Reflections on a Thirty-Five Year Collaboration

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In the months since the legal community and the American polity lost Geoffrey Hazard in January 2018, it has often been said that the loss was felt in several areas of the law, as well as in several legal institutions.

Consider these resume entries: the American Bar Foundation, the American Bar Association, the American Law Institute, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, law schools at the University of California Berkeley, the University of Chicago, the University of Pennsylvania, Yale University (with an acting deanship at the then fledgling Yale School of Management thrown in on the side), and the University of California Hastings. And consider this array of potential teaching assignments for a harried chair of a law school Curriculum Committee: Civil Procedure, Professional Responsibility, Judicial Administration, Class Actions, Advanced Federal Procedure, and International Contracting.

But Geoff's influence was not limited to the thousands of law students he engaged in the classroom over the years, or the dozens of trenchant articles he published. Hazard was a master of the "big project" also, and in every instance he leveraged his influence by mentoring junior colleagues and developing new talent along the way.

One of those big projects was publication of the first edition of *The Law of Lawyering* in 1985, followed by supplementation at least annually that continues into the current Fourth Edition.[1] I was the fortunate junior colleague whom Geoff selected to accompany him on that particular journey, but our collaboration was the result of much happenstance. No step in the progression was particularly remarkable, but a lot of chips had to fall in a lot of right places; it was not even inevitable that *this* big project would appear on anyone's drawing board.

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1. GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING (4th ed. 2016).

I. A SERIES OF HAPPENSTANCES GIVES RISE TO A THIRTY-FIVE YEAR COLLABORATION

First, Hazard himself has said in interviews that neither his prominence in Civil Procedure nor in Legal Ethics were written in stone as his career took shape. But for a scheduling crisis at Boalt Hall in 1958, he would have become the next Prosser of the world of Torts rather than the Hazard on Civil Procedure that we all know. And his emergence as the leading architect of modern legal ethics began as he watched from a perch at the American Bar Foundation—not strictly as an observer, it is true—as the American Bar Association struggled with formulation of the Model Code of Professional Responsibility in the late 1960s.

It was, of course, dissatisfaction with that 1969 Code, written as if for "downstate Illinois in the 1860s,"[2] that led to Geoff's best known and most momentous big project: Reporter for the Commission on Evaluation of Professional Standards—the Kutak Commission—which generated the Model Rules of Professional Conduct that were adopted by the ABA House of Delegates in 1983. The "old" Model Code of Professional Responsibility—it was not even 15 years old—was simply inadequate for the post-Watergate world, and the new Model Rules were pure Hazard in their insistence that this was to be "real" law.[3] No more platitudes; these would instead be binding legal commands enforceable by the State.[4]

My engagement with legal ethics and with the Model Rules (and thence with Geoffrey Hazard) included considerable happenstance as well. I graduated from Rutgers Law School in Newark in 1969, but did not embark on an academic career, at the Indiana University School of Law in Indianapolis, until the fall of 1979.

Civil Procedure was to be my main teaching assignment, but, after the fashion of the time, I was assigned to teach Professional Responsibility as well, in large part because most of my new colleagues didn't yet know much about it, and the field was only just beginning to achieve real academic rigor. Of course, like most lawyers of my generation, I didn't know much about it either, not having taken a course in the subject during law school, having barely skimmed

2. GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 7 (1978) (internal quotation marks omitted).

3. Technically, only the Kutak Commission itself was in a position to determine what the Model Rules would say and how they would "sound;" Geoff Hazard was the Commission's Reporter, not one of its members. On a major drafting project, a Reporter serves the deliberative body as its guide, draftsman, and research arm, but has no vote; the impact that a Reporter's own substantive views will have depends on the individual. A Reporter can serve as a mere scrivener (or potted plant), or a Reporter can participate fully in the substantive discussions, explain forcefully why one formulation is superior to another, and thus influence the end product to a significant degree. Hazard did not serve the Kutak Commission as a potted plant. Full stop.

4. *See* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991) [hereinafter Hazard, *Future of Legal Ethics*]; Geoffrey C. Hazard, Jr., *Legal Ethics: Legal Rules and Professional Aspiration*, 30 CLEV. ST. L. REV. 571 (1981).

the then-new Code of Professional Responsibility as I prepared to take the bar exam and begin my legal career,[5] and having had no occasion to consult it during the ten years I practiced before returning to the academy.

The early 1980s was a heady time to be teaching Legal Ethics (while also learning it). Bits and pieces of various tentative and discussion drafts for the Model Rules were being circulated and examined not only in national circles, but in every state and local bar group in the country. When the Indianapolis Bar Association looked for a speaker to defend the new-fangled and supposedly "radical" Kutak Rules, it was inevitable that it turned to the law school. And realistically, that meant that it turned to me.

Now it was time for me to jump more deeply into the weeds, and I took the same approach to the Model Rules that I insisted my students take with the Federal Rules of Civil Procedure: treat it as a well-drafted *statute* and always ask, "What does the text *say*, what does it *mean*, and how does it *fit* with the rest of the text?" (Wait until later to worry about whether the result represents good or bad policy.)

This deep-dive assessment led me to the conclusion that although there were important differences between the nascent Model Rules and the existing Code of Professional Responsibility, the basic core was being retained. Ignoring the slogans and quick takes, and focusing on what the old and new rules *actually* said, as opposed to the mythology surrounding them, I quickly found that a different picture appeared. Preparation for the panel discussion in Indianapolis led to my first published article as a law professor,[6] and, through more happenstance, to my collaboration and mentorship with Geoff Hazard.

When my textual exegesis of the Model Rules was in final draft, happenstance put me on the same plane back from a meeting of the Association of American Law Schools with the chief draftsman of those same Model Rules—Hazard, of course. A colleague had earlier browbeaten me into overcoming my reticence (and awe) to present Geoff with a copy of my manuscript. Thus, I spent much of the flight watching out of the corner of my eye as Hazard looked at my work—apparently not just skimming but actually taking notes!

Two years later, after my article had been published and the Model Rules had officially been promulgated (and Hazard therefore had no further official role in that big project), I received a phone call from a small publishing house in New Jersey. Geoffrey Hazard was going to do a rule-by-rule desk book on the development of the Model Rules, and wanted to know if I would agree to co-author it with him.

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5. Preparation for the bar exam did not itself require *any* engagement with the Code in 1969. There were no questions on the exam dealing with legal ethics or professional responsibility, and, *a fortiori*, there was no such thing as today's separate Multi-State Professional Responsibility Exam.

6. W. William Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739 (1981).

A lawyer with over ten years of experience but a near-rookie law professor, I nonetheless knew enough about academic sensitivities to know that non-tenured faculty cannot lightly agree to co-author any work, so I temporized long enough—considerably less than an hour, as I recall—to receive the enthusiastic support of Dean Frank T. "Tom" Read. Yes; non-tenured faculty members can co-author anything they want if their co-author is Geoffrey Hazard!

II. THE HAZARD APPROACH TO LAW, THE HAZARD WORK ETHIC, AND THE HAZARD WORK STYLE

Over the years, *The Law of Lawyering* gained more traction, its page count grew, and its internal cross-references became ever more complex. Our sleepy little publisher was absorbed, reabsorbed, then spun off, and finally acquired by international publishing giant Wolters Kluwer. During this period, I was asked from time-to-time some variation of the questions "What was your connection to Geoff Hazard that led him to choose you as his co-author," and "What is it *like* to work with a legend in the field," and "What happened if you disagreed on something?"

As to the first, I was convinced from the outset and never had reason to doubt that Geoff was always both a committed textualist and therefore a committed positivist. (Or perhaps it was the other way around.) As a draftsman and as a scholar and an advocate, he knew that words *mattered*, and that once words were set in type they were to be honored unless modified or replaced.

Sure; interpretive moves are available where more than one reading is possible. That is the common law way, to which Geoff was equally committed. But appeals to pure policy didn't cut it with Geoffrey Hazard if the text couldn't get you there. If the text as written was bad policy, gear up, marshal your arguments, and get the text changed.

Presumably Geoff saw that same dedication to the written word in my earlier work that he had read on the plane, given that it was a line-by-line comparison of competing texts.[7] And although he could not have known of my approach to the Federal Rules of Civil Procedure at first, we had many (and early) opportunities to tap into our shared interest and expertise in that beautifully integrated bundle of text.[8]

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7. Perhaps it did not hurt either that my basic conclusions about the substance of the new Model Rules—"Three Peas in a Pod"—were compatible with those of their chief draftsman. As Hazard later wrote,

> I have tried to show that the content of the legal profession's narrative and core ethical rules, as pronounced in the 1908 Canons, has been preserved largely unchanged in today's Rules of Professional Conduct. However, the form in which those rules are expressed has changed dramatically. What were fraternal norms issuing from an autonomous professional society have now been transformed into a body of judicially enforced regulations.

Hazard, *Future of Legal Ethics*, *supra* note 4, at 1249.

8. See, for example, THE LAW OF LAWYERING, *supra* note 1, Chap. 30, especially sections 30.02 to 30.04 and 30.11, comparing in great detail the substantive and procedural approaches to frivolousness found in Model Rule 3.1 and FED. R. CIV. P. 11, including their overlapping legislative histories.

Making the right connections between critical pieces of a large integrated text, especially a text of black letter rules, is not only a noticeable feature of every edition of the Hazard & Hodes book, but it also dictated Geoff's plan for getting the First Edition organized and down on paper. We did *not* start with Rule 1.1—there was no Rule 1.0 then—and press on to the end. Instead, he started us with Rule 1.6 on confidentiality, which is not only at the very core of the client-lawyer relationship, but had been, by far, the most controversial provision during the drafting and adoption process. That chapter—originally Chapter 9 and now Chapter 10 in the Fourth Edition—has always been the longest, in part because it deals with the related subjects of privilege and work product, and in part because it also includes by far the largest number of cross-references to other rules and other bodies of law.

We then built the book "from the inside out," taking up in order the cluster of rules that are chiefly concerned with the limits on what lawyers may ethically do in the service of clients[9]—but always with either an explicit or implicit tie-in to the consequences for the confidentiality principle.

A lawyer may not counsel or assist a client in crime or fraud (Model Rule 1.2(d)), but suppose the client engages in crime or fraud on his own and then claims that the lawyer told him how to get away with it? A lawyer may not knowingly present perjured testimony (Model Rule 3.3(a)(3)), but suppose the client insists on testifying falsely anyway? Or suppose the lawyer only learns about the perjury after the fact? A lawyer may not sit idly by while a client defrauds a third party by telling lies or omitting crucial facts (Model Rule 4.1(b)), but how should the lawyer respond if it happens?

All of these and more demand an answer to a critical question: is the lawyer on the scene *still* required to maintain client confidentiality? Or is the lawyer permitted—or sometimes even required—to disclose just enough to right the wrong?

As to how the work actually progressed—"what it was like"—the answer is that Geoff Hazard and I almost never met in person, and never—well, hardly ever—talked on the phone. Instead, an unending stream of drafts (all in hard copy) passed between us, with FedEx and the Xerox Corporation the major beneficiaries. This was early days for word processing programs and Geoff was stuck on the typewriter (essentially for the duration).

Sections that I initiated would come back to me covered with hand-written edits and suggestions, with longer inserts typed out. I would incorporate what Hazard had done onto the electronic version, while making further tweaks of my own. That version would be copied again and sent back to Geoff for final approval and transmittal to our editors. For material that Geoff initiated, the first round of editing took place as I re-keyboarded his typed manuscript into a word

9. *See* Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669 (1981).

processor, adding material or rephrasing as I proceeded. That version would go back to Hazard as if it was the first draft, and he would then edit further—possibly restoring some of his original language.

Technologically, this was highly inefficient, but it created a working relationship that grew smoother as we progressed through the First Edition and then into each successive supplement and later edition of the book. It is probably fair to say that while Hazard's writing style was more elegant, mine was slightly edgier. The give and take of multiple edits soon produced a satisfactory blend.

In addition, the constant interaction should have produced a clear sense that this was a true collaboration, with each co-author equally responsible for every word. Certainly, that was the reality. Despite what Hazard himself referred to as his "severe" public persona, he was easy to work with in private—generous with his time, always ready to praise others, never pulling rank.[10]

And what about disagreements between the co-authors? Most were matters of emphasis, style, or phraseology, handled the way good lawyers always handle these things—compromise reached through respectful dialog. Rare cases of substantive disagreement were resolved through a different form of compromise: instead of diktat that "X is correct" or "Y is correct," the reader would eventually see on the page the outlines of a lawyerly argument for and against both X *and* Y.

III. THIS IS WHAT WE GOT WITH HAZARD

Not long after Geoff Hazard's death, I had a prescheduled dinner with Peter Jarvis, the third co-author of *The Law of Lawyering* (who has also contributed to this Symposium).[11] At one point Peter mused, "In legal ethics, what is it that we got when we got Hazard," which I took to be a question about Geoff's signal contributions, his signature issues. I gave an on-the-spot approximation, but I now see that Peter's query is a perfect way to organize the balance of my thoughts.

Before getting down to specifics, I should start with the Hazard worldview—at least as regards lawyers and lawyering. Geoff was unabashedly bullish on the American legal system and the role of lawyers in it, but the appreciation was clear-eyed and free from both romanticism and cant. He knew where the warts were, and he didn't shrink from acknowledging them.[12] Instead,

10. Someone who didn't know Geoff Hazard at all—perhaps someone who wasn't even a lawyer—once wondered aloud if *The Law of Lawyering* was a case in which the senior sloughed off all of the work to the junior and then took the lion's share of the credit. That was unequivocally *not* the case, as anyone who has ever worked with Geoff on a major project will attest—including, no doubt, several of the contributors to this Symposium.

11. Peter R. Jarvis, *Geoff Hazard: My Views as a Law Student, Mentee and Coauthor*, 70 HASTINGS L.J. 1085 (2019).

12. *See* Geoffrey C. Hazard, Jr. & Dana A. Remus, *Advocacy Revalued*, 159 U. PA. L. REV. 751, 781 (2011) ("We acknowledge that, as implemented, our adversarial system has numerous flaws, and, as practiced, advocacy can be abused. But we argue that these evils lie in the practice, and not the core function, of adversarial advocacy.").

he used the necessarily unlovely aspects of lawyering as the ballast in his overall judgment that being an American lawyer is excruciatingly difficult, fraught with moral ambiguity and hard judgments, but ultimately supremely worthwhile and uplifting.[13]

In particular, Geoff Hazard defended the American adversary system against its many modern critics, while again recognizing the political and moral tradeoffs involved (and also ridiculing the extreme defenses of the system that had sometimes been advanced in earlier times). *Of course* role differentiation requires an advocate to adhere to Thomas Macaulay's sardonic definition, in an 1837 essay, of a lawyer as someone who would "with a wig on his head, and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire."[14]

But lawyers ultimately serve justice and morality even in these situations, by upholding the autonomy and human dignity of even the least of us. Hazard demolished critics whose answer to role differentiation was to urge lawyers instead to withhold from their clients assistance and advice that was *within* the bounds of law, but unsupportable under what *the lawyer* took to be "common morality."[15]

For specific features that we "got" by having Geoffrey Hazard as our chief architect I will list four, while recognizing that the edifice of modern legal ethics was not designed and built by one person alone.

First, Geoff insisted that despite the legal profession's long-standing (and wholly appropriate) focus on the near-sacred duties that lawyers owe to clients, that cannot be the *only* focus. Taking seriously the meme "zealous representation *within* the bounds of law" means recognizing that these boundaries were established to protect the interests of people who are *not* clients or former clients or would-be clients, which in turn means that lawyers often have duties that run to rival parties in transactions and even to opponents in litigation.

Certainly, client interests remain primary, but situations in which the interests of others must be factored in to a lawyer's overall judgment are not rare. Indeed, the Model Rules of Professional Conduct are crowded with provisions explicitly protecting the rights of non-clients,[16] and part of Hazard's

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13. *See* Geoffrey C. Hazard, Jr., *My Station as a Lawyer*, 6 GA. ST. U. L. REV. 1 (1989); Geoffrey C. Hazard, Jr., *Remarks upon Acceptance of Michael Franck Award May 29, 2008*, J. PROF. LAW. 389, 389 (2008) ("I believe the practice of law is demanding intellectually, ethically and, if I may say so, spiritually.").

14. 3 LORD MACAULAY CRITICAL, HISTORICAL, AND MISCELLANEOUS ESSAYS 376 (New York, Albert Mason 1874).

15. *See* Geoffrey C. Hazard, Jr., *The Morality of Law Practice*, 66 HASTINGS L.J. 359 (2015).

16. Examples include Rule 1.2(d) (duty not to counsel or assist a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent); Rule 1.16(a) (duty to withdraw from representation if necessary to avoiding violation of Rule 1.2(d)); Rule 3.3(a) (duty not to knowingly make a false statement of fact or law to a tribunal, duty not to offer evidence that the lawyer knows to be false); Rule 3.4(a) (duty not to unlawfully obstruct another party's access to evidence or to unlawfully alter, destroy or conceal evidence); Rule 3.4(b) (duty not to falsify evidence or suborn perjury); Rule 4.1(a) (duty not to knowingly make a false statement of material fact or law to a third person); Rule 4.1(b) (duty not to knowingly fail to disclose a material fact where

mission as Reporter to the Kutak Commission was to make them clearer and, therefore, more clearly enforceable than the predecessor provisions in the Model Code of Professional Conduct.[17]

For example, Geoff never stopped being surprised—amused too, perhaps, and possibly irked—when serious lawyers professed to think it "radical" that a long-standing rule requiring advocates to disclose legal authority that is directly adverse to the position of a client *really means what it says*.[18] This is an instance in which a lawyer is *required by law* to *subordinate* client interests to the interests of opponents in litigation—the "law" here being the very same rule of professional conduct.

Thus, despite endless incantation in professional circles of the "core value" of untrammeled client loyalty, the reality is that the interests of non-clients—including the interests of the courts and the administration of justice itself—trumping in with some regularity and require limited "betrayal" of a client, even in a litigation setting.

Perhaps the most important thing we "got" from Hazard in the world of legal ethics grew out of the regrettable fact of life that people who are not clients can sometimes be the victims or intended victims of a client's crime or fraud. What duties do lawyers owe to *these* non-clients? Everyone has an interest in not being victimized, after all, but what is the wrongdoing client's *lawyer* supposed to do about it? What is that lawyer even *permitted* to do about it? How can a lawyer say or do *anything* without acting disloyally or disclosing client confidences (a.k.a. "blowing the whistle")?

Geoff's contribution was to provide a full understanding of the ramifications of the well-known difference between zealously defending a client who has *already* (irretrievably) victimized someone else, and various forms of knowingly aiding or encouraging or even failing to interdict or rectify *planned or ongoing* client wrongdoing.[19]

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disclosure is necessary to avoid violation of Rule 1.2(d)); Rule 4.4 (duty to respect the rights of third persons during representation of a client); and Rule 8.4(d) (duty not to engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation). *See* MODEL RULES OF PROF'L CONDUCT r. 1.2(d); 1.16(a); 3.3(a); 3.4(a); 4.1(a), (b); 4.4; 8.4(d) (AM. BAR ASS'N 2018).

17. *See* Geoffrey C. Hazard, Jr., *Dimensions of Ethical Responsibility: Relevant Others*, 54 U. PITT. L. REV. 965, 969 (1993) ("Although a lawyer is generally required to give preference to the interests of the client, there are circumstances when legal rules and norms of common decency require otherwise."). That most of the provisions protecting the interests of non-clients had clear antecedents in earlier professional codes was the chief point of my *Three Peas in a Pod* article. *See* Hodes, *supra* note 6.

18. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(2). The identical language had been present in the Model Code of Professional Responsibility, and the Kutak Commission proposed minor adjustments that would have minimally increased the occasions for making disclosure. This proposal caused such an outcry over a supposedly "radical" new departure that the Commission decided to leave the language as it had existed for years. *See* Geoffrey C. Hazard, Jr., *Arguing the Law: The Advocate's Duty and Opportunity*, 16 GA. L. REV. 821, 825–28 (1982).

19. *See* Geoffrey C. Hazard, Jr., *The Client Fraud Problem as a Justinian Quartet: An Extended Analysis*, 25 HOFSTRA L. REV. 1041, 1046 (1997) ("The legal problem in these circumstances is to differentiate between assistance by the professionals that is legitimate and assistance that is not.").

The chief ramification is that *in practice* there must be some mechanism to decouple innocent lawyers from clients bent on crime or fraud, at least as a matter of self-preservation and good citizenship. Simply withdrawing from the representation—which is rarely simple—will not always be sufficient, Hazard maintained. Often, the only way to counter the effects of lawyer assistance already unwittingly given will be to make limited disclosure about the true situation. But it took most of the profession almost exactly 20 years to "get" it.[20]

Along the way, Geoff had to remind us repeatedly—in every edition and supplement of *The Law of Lawyering*, for example—that despite Model Rules language that seemed to be absolutist in forbidding this kind of disclosure, *in practice* the combined effect of other ethics rules and the requirements of "other" law was not only to permit this kind of limited whistle-blowing in many situations, but sometimes to require it.[21] In our book, we called these "forced exceptions to confidentiality," meaning that they were effectively forced upon the lawyer by the operation of law.[22]

Third, once Hazard had demolished the reductionist view that lawyers inhabit a world in which there are only clients on the one hand and everyone else on the other—all of whom must be held at least at arm's length—he was able to move on to consider ever more subtle variations on a lawyer's allocation of his

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20. *See* Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 302 (1984) (recounting how the Kutak Commission's proposal to permit lawyers to reveal client confidences on a limited basis in order to interdict and rectify client frauds was flatly rejected by the American Bar Association House of Delegates in 1983).

He then offered a subtle improvement on the Commission's proposal, advancing what is essentially the language of today's Model Rules 1.6(b)(2) (limited disclosure permitted to *prevent* client crimes or frauds involving substantial financial injury) and 1.6(b)(3) (limited disclosure permitted to *prevent, mitigate or rectify* financial injury *resulting from* client crimes or frauds). *See* MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2), (b)(3). In both situations, the exception to confidentiality applies *only if* the client has "used the lawyer's services" in connection with the wrongdoing.

When the Commission on the Evaluation of the Rules of Professional Conduct (commonly referred to as the Ethics 2000 Commission) undertook a full review of the Model Rules, Geoffrey Hazard was appointed as a member of the Commission, and the duties of Chief Reporter were turned over to the exceptionally capable hands of Professor Nancy Moore. The Commission's final (2001) report included Rules 1.6(b)(2) and 1.6(b)(3), but these provisions were, again, either rejected or withdrawn for lack of support in the House of Delegates.

It was not until the Task Force on Corporate Responsibility (the Cheek Task Force) re-introduced those two rules verbatim, in 2003, that the House of Delegates abruptly reversed course. That was almost exactly twenty years from the publication of Hazard's Emory Law Journal article.

21. The most significant ethical rule in this regard is Model Rule 1.6(b)(5), which permits disclosure of otherwise protected information "to establish a claim or defense on behalf of the lawyer" or to "respond" to various allegations made against a lawyer. MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(5). This so-called "self-defense" exception is long-standing and has never been controversial. But Hazard showed that the exception can be employed preemptively, and that there are times when *in practice* it *must* be so employed. Applicable "other" law includes the law of agency and the law of fraud and accessorial liability for torts and crimes.

22. The concept came primarily from Hazard, but the terminology came from Hodes. Having been admitted first to the Louisiana Bar, I was familiar with the Louisiana Code provisions establishing "forced heirs" who could not be disinherited, and adapted the term.

loyalties and his talents. This led to a theory of "primary and derivative clients," the latter sometimes referred to as "almost clients."[23]

Employing this mode of analysis pushes beyond the common understanding that, subject to the rules regulating conflicts of interest, a lawyer can have two or more co-clients in the same matter, each equally entitled to the same measure of the lawyer's loyalty and diligent efforts with respect to that matter. And it is entirely different from situations in which, also subject to monitoring to prevent interference with the lawyer's independent professional judgment, a non-client engages a lawyer to serve some *other* person or entity as *the* client (or simply pays for a lawyer's representation of another).

Hazard's analysis applies when a lawyer's client owes special duties—usually duties of a fiduciary nature—to someone who is *not* the lawyer's client in the traditional sense. However, because the client has a keen interest in carrying out those fiduciary duties lawfully and properly, the primary client is best served when the lawyer is *particularly* attentive to the interests of the derivative client—more so than in the case of an ordinary non-client, as described above.

The results reached by applying primary and derivative client analysis can almost always be replicated by applying other precepts of the law of lawyering, which includes melding in the law of contracts, agency, fiduciary breach, and more. But Hazard's approach makes it easier to keep track of the players.

For example, when a lawyer represents a corporate entity, it is almost universally understood that the lawyer formally represents the organization *only*, not the officers, directors, employees, or any other "constituent."[24] Yet the entity client owes duties to all of *these* non-clients that it does not owe to ordinary third parties. Rule 1.13 and the rules regulating conflicts of interest shed considerable light on how an entity lawyer should manage internal discord, but the task becomes easier if the lawyer recognizes that the constituents nicely fit the definition of derivative clients.

Finally, Geoff Hazard contributed to a revival of the concept of "lawyering for the situation," which had roiled the confirmation hearings for Justice Louis Brandeis in 1916. Unlike in the primary and derivative client situation described above, a lawyer here has two or more full-fledged clients to whom he owes equal loyalty and effort. Indeed, inasmuch as a "situation" cannot literally need a lawyer or engage one, it is technically more accurate to think of the lawyer as representing several individuals who are together involved in or bound up in a "situation" of some kind.

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23. *See* Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 31 (1987). For the latter usage, see GEOFFREY HAZARD ET AL., THE LAW AND ETHICS OF LAWYERING 648–74 (5th ed. 2010).

24. *See* MODEL RULES OF PROF'L CONDUCT r. 1.13; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 (AM. LAW INST. 2018).

Typically, the situation is one in which the clients have interests that are mostly harmonious, but with some differing interests that the lawyer will try to help them accommodate. The most common "situations" arise when several associates are forming a business in which they will have different roles and different financial interests, or when members of an extended family differ over business or financial or other arrangements going forward—as was true of some of the situations that Justice Brandeis made famous.

Although recognizing that lawyering for the situation is essentially a specialized application of conflicts of interest and client communication rules, Hazard prevailed upon the Kutak Commission to highlight the subtleties of this kind of representation by creating a separate rule for "intermediation," which is quite different from "mediation," in which a lawyer serving as a third-party neutral represents *nobody*.

Model Rule 2.2 on intermediation and its Comments closely tracked the language of the other relevant rules, and repeatedly stressed the importance of continuing client consent, constant communications with all of the clients, and alertness to the possibility that the "situation" was getting worse rather than better, so that withdrawal from the venture would be necessary.[25] Moreover, this kind of representation is pervasive in modern practice, outside of contested litigation.[26]

Nonetheless, the profession generally failed to "get" the connection, and resisted the concept of lawyering for the situation as if it represented a further erosion of client loyalty. Accordingly, the House of Delegates adopted the Ethics 2000 Commission's recommendation to eliminate Rule 2.2 and to move all of its substance to detailed comments in the conflicts of interest rules.[27]

IV. CODA: IN HIS OWN WORDS

In this Article, I have described how I became involved in a long-term collaborative relationship with Geoffrey Hazard in legal ethics, and how that collaboration proceeded over the years. I also provided some thoughts about Hazard's views on lawyers and lawyering generally, and gave examples of some of his most telling contributions to the field.

In closing, I cannot do better than to repeat a quote from Hazard himself that I insisted be used in the First Edition of *The Law of Lawyering*, and have made sure ever since has never seen the cutting room, let alone hit the cutting room floor. This passage is from the small 1978 book *Ethics in the Practice of Law* that was the precursor to the early drafts of the Model Rules of Professional Conduct.

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25. *See* MODEL RULES OF PROF'L CONDUCT r. 2.2 (deleted 2011).

26. *See* Geoffrey C. Hazard, Jr., *Lawyer for the Situation*, 39 VAL. U. L. REV. 377 (2004).

27. *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmts. 26–28 (nonlitigation conflicts), 29–33 (Special Considerations in Common Representation).

It is nominally about what later became Model Rule 2.2 on "intermediation," but it is really about American law and American lawyers generally. Hazard at his best, it is also about experience and judgment, as well as elegance in writing and in thought.

> [An intermediary, or lawyer for the situation,] is no one's partisan and, at least up to a point, everyone's confidant. He can be the only person who knows the whole situation. He is an analyst of the relationship between the clients, in that he undertakes to discern the needs, fears, and expectations of each and to discover the concordances among them. He is an interpreter, translating inarticulate or exaggerated claims and forewarnings into temperate and mutually intelligible terms of communication. He can contribute historical perspective, objectivity, and foresight into the parties' assessment of the situation. He can discourage escalation of conflict and recruitment of outside allies. He can articulate general principles and common custom as standards by which the parties can examine their respective claims. He is advocate, mediator, entrepreneur, and judge, all in one. He could be said to be playing God.
>
> Playing God is a tricky business. It requires skill, nerve, detachment, compassion, ingenuity, and the capacity to sustain confidence. When mishandled, it generates the bitterness and recrimination that results when a deep trust has been betrayed. Perhaps above all, it requires good judgment as to when such intercession can be carried off without unfairly subordinating the interests of one of the parties or having later to abort the mission.
>
> When a relationship between the clients is amenable to "situation" treatment, giving it that treatment is perhaps the best service a lawyer can render to anyone. It approximates the ideal forms of intercession suggested by the models of wise parent or village elder. It provides adjustment of difference upon a wholistic [sic] view of the situation rather than bilaterally opposing ones. It rests on implicit principles of decision that express commonly shared ideals in behavior rather than strict legal right. The basis of decision is mutual assent and not external compulsion. The orientation in time tends to be a hopeful view of the future rather than an angry view of the past. It avoids the loss of personal autonomy that results when each side commits his cause to his own advocate. It is the opposite of "going to law."[28]

Geoffrey Hazard was a man of many talents and many careers, no doubt, but also a man of many major projects. I was fortunate to be deeply involved in one of them, and that involvement largely shaped my own entire career. A thirty-five year collaboration, and quite a ride.

28. HAZARD, *supra* note 2, at 64–65.