

## The Fallacy of the Monolithic Client-Lawyer Relationship: Leaving 1908 and Procrustean Regulation Behind

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“Not many people got a code to live by anymore.”

*Repo Man* (1984)

In a small town in southern Illinois, an elderly gentleman walks through the side door of a house on Elm Street that serves as the entrance for a law office. Once inside, he describes for the lawyer, a sole practitioner, his financial and medical condition, his family relationships, and his plans for whatever time he and his wife may have remaining together. His wife, it seems, has a degenerative disease that may require years of health care. The lawyer asks questions, some highly personal, and helps the client structure his future.

Later that day, somewhere in central Florida, the principal of a limited liability company that owns a local restaurant discusses the status of a state liquor license application with a lawyer at a 15-member boutique law firm that specializes in representing small businesses in regulatory and administrative matters. The restaurant is also seeking to expand and, through the law firm, is in negotiations with the owner of an adjacent storefront to acquire that space and has approached the local buildings department for the necessary approvals.

At that very moment, a 21 year-old accused of participating in an armed robbery meets with his court-appointed criminal defense lawyer in a prison conference room in Baltimore. His alleged accomplices wait in their cells for counsel to arrive, while he discusses with his counsel whether to testify against them in exchange for a negotiated plea that will mean only three years behind bars.

Meanwhile, in downtown Houston, a 60-lawyer law firm prepares to take depositions on behalf of the plaintiffs in a securities fraud class action. The lawyers in the firm have little contact with their principal clients, the class representatives, and virtually no contact with the individual class members, most of whom are not yet identified. They are prosecuting this action under the close supervision of a federal district court judge and expect to be compensated out of the class recovery.

On the other side of that class action is a publicly traded Fortune 100 corporation with hundreds of subsidiaries and offices throughout the world. The corporation is represented in this particular case by a 1,500-lawyer firm that also has offices throughout the world. The corporation employs two dozen other law firms

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on various types of matters. The corporation itself has an in-house staff of 350 lawyers who perform a broad range of functions in connection with its business and legal affairs. Lawyers from the firm sit with in-house lawyers and corporate executives to prepare them for the upcoming depositions.

In suburban Los Angeles, a middle-aged couple walks into an office building to meet with a small group of collaborative professionals who they hope will help them sever their marital ties without acrimony. They enter into an agreement that helps ensure their cooperation in negotiating an amicable separation and divorce without the need for protracted and otherwise unpleasant judicial proceedings. The lawyers and the clients then work together toward that goal.

What do these situations have in common? Nothing other than, in the most general sense, they all depict client-lawyer relationships. In each of these vignettes, which are merely representative of the myriad client-lawyer relationships that a system of professional regulation must address, there are certain basic, core principles that are generally applicable. The confidentiality of information exchanged between client and lawyer, the avoidance of lawyer conflicts of interest that may work a material limitation on the representation of the client, the obligation to refrain from assisting clients in criminal or fraudulent activities, the reasonableness of fees and any agreements relating thereto, the requirement that advertising and other communications relating to the lawyer's services be truthful, and the general prohibition against the making of false or misleading statements, are just some of the essential precepts that apply to all client-lawyer relationships.

These precepts should not, however, be mechanically applied. In each instance, the clients have widely divergent expectations of the lawyers they have retained with respect to the central attributes of their relationship. Correspondingly, the lawyers have very different levels of duty and responsibility to their clients. However, beginning with the adoption of the Canons of Professional Ethics in 1908, the centennial of which we commemorate this year, the American Bar Association has promulgated a series of model codifications, generally embraced by state regulators, that have been predicated on what I have previously described as the fallacy of the monolithic client-lawyer relationship.<sup>1</sup> The codifications have all been constructed in a manner that assumes that every interaction between every client and every lawyer is capable of being addressed by a unitary statement of principle. That assumption is no longer valid, if it ever was. The premise of this paper is that the legal profession should give serious consideration to abandoning the "one size fits all" approach to legal regulation, through which we force every client-lawyer relationship onto a Procrustean bed of rules. Instead, we should explore a more flexible approach that will more closely comport with the reasonable expectations of clients and lawyers in the broad range of relationships they have today.

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1. See Steven C. Krane, *Ethics 2000: What Might Have Been*, 19 N. ILL. U. L. REV. 323, 329 (1999).

The promulgators of the Model Rules of Professional Conduct have implicitly, though perhaps unintentionally, conceded that the monolithic client-lawyer relationship is a fallacy. They have developed specific rules that are applicable only to lawyers who play specialized roles. For example, particularized rules guide the lawyer when serving as an advisor,<sup>2</sup> as an evaluator,<sup>3</sup> as a third-party neutral<sup>4</sup> and as a prosecutor.<sup>5</sup> The categories of “counselor,” to which Model Rules 2.1 through 2.4 belong, and “advocate,” which includes the broad range of rules in the “3” series of the Model Rules, are not sufficiently narrow to warrant being considered deviations from the monolithic approach.

There are also Rules focusing on the lawyer’s responsibilities in dealing with certain types of clients, such as organizations,<sup>6</sup> clients under a disability<sup>7</sup> and—very recently—prospective clients.<sup>8</sup> Certain types of business issues are addressed specifically in the Rules, such as client-lawyer transactions<sup>9</sup> and ventures through which lawyers provide non-legal services to their clients.<sup>10</sup> Likewise, law practice structure is addressed specifically, with respect to supervision of lawyers and non-lawyers<sup>11</sup> and, relatedly, the responsibilities of subordinate lawyers.<sup>12</sup>

In other respects, however, perhaps because the prospect might be considered a daunting one, the guardians of the Model Rules have declined to provide more specific guidance to lawyers notwithstanding the broad and diverse range of client-lawyer relationships. The practical examples that the drafters have occasionally placed in the Comments to particular Rules provide an interpretative gloss in certain circumstances, but these are authoritative only in those states in which the regulators adopt the Comments as legally binding, along with the Rules. The conclusion for any lawyer seeking guidance under the Model Rules is still chiefly dependent upon a construction or interpretation of the elemental principles stated in each of the “black-letter” Rules.

Over the past few years, many commentators have observed that our system of single-sized ethics rules breaks down when it is applied to certain specialized areas of law, such as in bankruptcy practice, mediation and collaborative law<sup>13</sup> or to

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2. Model Rule 2.1.
  3. Model Rule 2.3.
  4. Model Rules 1.12 and 2.4.
  5. Model Rule 3.8.
  6. Model Rule 1.13.
  7. Model Rule 1.14.
  8. Model Rule 1.18.
  9. Model Rule 1.8(a).
  10. Model Rule 5.7.
  11. Model Rules 5.1 and 5.3.
  12. Model Rule 5.2.

13. See Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation can be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141 (2004); Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399 (2003); Mona L. Hymel, *Controlling Lawyer Behavior: The Sources and Uses of Protocols in Governing Law Practice*,

certain activities of lawyers such as Internet advertising.<sup>14</sup> Some of these authors have urged the adoption of separate codes of ethics to govern lawyers who practice in particular specialties.<sup>15</sup> Targeted codifications such as those suggested by some of these authors have a number of potential shortcomings, however. At the most fundamental level, having an overlay of rules that supplements, supersedes or perhaps even conflicts with the foundational Rules of Professional Conduct could be more confusing than beneficial to those lawyers whom the specialized codification seeks to guide.

Further, the creation of federal codes of lawyer conduct—as would probably be the case in the bankruptcy context, for example—would not only impose an additional layer of regulation, it would subject a category of lawyers to unwanted scrutiny at the hands of an additional enforcement agency.<sup>16</sup> Federalization of the practice of law (or at least national licensure, such as the so-called “driver’s license” approach to lawyer licensing) may appear beneficial to many lawyers, particularly to those who engage in multijurisdictional or cross-border practice or who have exclusively federal practices, such as immigration specialists or the aforesaid bankruptcy lawyers. The fact remains, however, that state-by-state regulation of lawyers is entrenched in the United States and shows no signs of loosening its grip in the foreseeable future. This is largely because the rank-and-file lawyer is still essentially a local practitioner, and because much of the substantive and procedural law that most lawyers confront in their day-to-day practices is state law, with sometimes significant state-to-state variations. Also, because the American Bar Association continues to reaffirm its commitment to state judicial branch regulation of lawyers.

This paper proposes a middle ground between perpetuation of the monolithic approach to lawyer regulation, with which the legal profession has lived since codifications began (a phenomenon predating the century-old Canons themselves by nearly another century<sup>17</sup>), and a proliferation of sets of ethics rules interlaced with or, worse, overlaid upon one another. The proposal calls for a reassessment of our entire regulatory scheme. While that may sound like

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44 ARIZ. L. REV. 873 (2002); Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45 (1998); John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355 (1986).

14. See Daniel Backer, *Choice of Law in Online Legal Ethics: Changing a Vague Standard for Attorney Advertising on the Internet*, 70 FORDHAM L. REV. 2409 (2002); William E. Hornsby, Jr., *Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing*, 36 U. RICH. L. REV. 49 (2002).

15. See Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665 (2001); Fred C. Zacharias, *Specificity In Professional Responsibility Codes: Theory, Practice, And The Paradigm Of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993).

16. Cf. Association of the Bar of the City of New York, *The Proposed Federal Rules of Attorney Conduct: The Wrong Solution for the Wrong Problem*, 54 THE RECORD 219 (1999).

17. See James M. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2421-22 (2003).

a radical approach, it is to a great extent a structural change intended to increase clarity and to refine the distinctions that already exist with respect to the application of the Model Rules of Professional Conduct to different categories of client-lawyer relationships. In other respects, it is a challenge to reevaluate the extent to which certain rules are applied mechanically, sometimes seemingly without regard for the sensibility of that approach.

We would begin by identifying the core principles to which all lawyers must adhere regardless of their role or the nature of their client. The rudiments for this exercise already exist in the Model Rules of Professional Conduct. Location and extraction is all that is required. Once those core principles are classified, subsidiary rules would be developed, as appropriate, both for particular lawyer roles and for different client relationships. This type of regulatory structure, which has been employed in the past and was explored in connection with the revision of Article 2 of the Uniform Commercial Code in the 1990s, has often been termed a “hub-and-spokes” approach.

In some cases, it may be that “one size” does, in fact, “fit all.” Take, for example, the catch-all provisions of the Model Rules. No variations are needed on the theme of prohibiting lawyers from “commit[ting] a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”<sup>18</sup> or “engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation.”<sup>19</sup> Of course, these uncompromising proscriptions, while anything but nuanced, are subject to interpretation depending upon the particular facts involved, but no lawyer in any setting, with respect to any client—or even with respect to no client whatsoever—should ever commit criminal acts reflecting on the lawyer’s fitness as a lawyer. Nor should a lawyer ever, regardless of the circumstances, commit a fraud. Consequently, the rules can reasonably be imposed uniformly upon all lawyers.

But in most other respects, variations are required to ensure that the application of the core principle comports with the reasonable expectations of clients and their lawyers. This is perhaps most apparent in the realm of conflicts of interest, where courts and ethics committees, with limited exceptions, insist on treating the relationship between the large corporation being represented in a multi-billion dollar transaction as if it were the representation of a young couple purchasing their first home. Similarly, those charged with interpreting our rules are generally reluctant to permit even sophisticated clients to enter into agreements that modify the duties and responsibilities that ethical codifications impose on their lawyers with respect to matters such as fees, scope of representation, use of confidential information, waivers of conflicts of interest and conditions for termination of the relationship. Issues such as these cry out for a more enlightened and varied approach to lawyer regulation.<sup>20</sup>

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18. Model Rule 8.4(b).

19. Model Rule 8.4(c).

20. See generally Steven C. Krane, *Re-evaluating Expectations in the Attorney-Client Relationship*, 1994 PROF. LAW. (SYMPOSIUM ISSUE) 7.

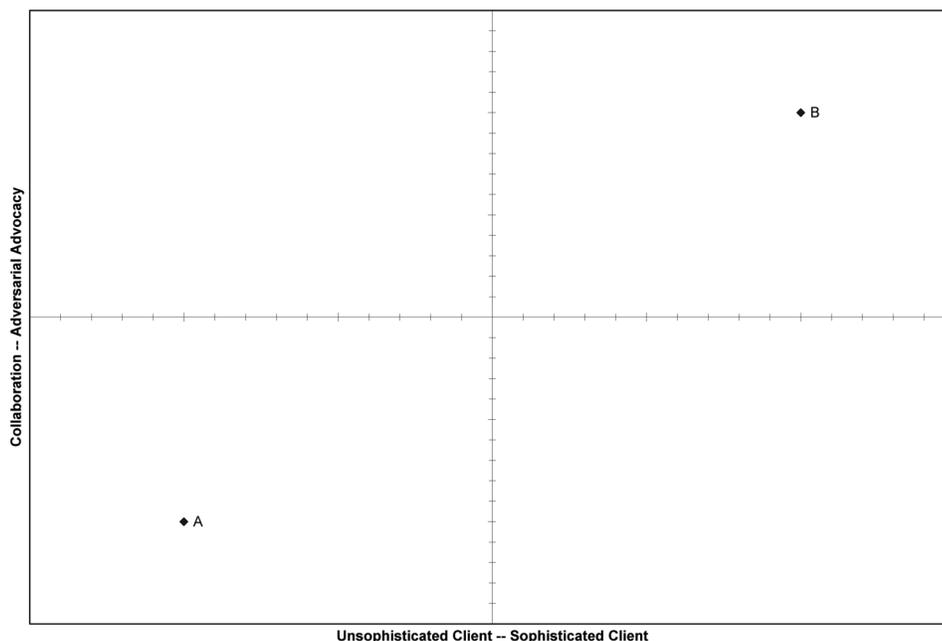
Let us explore a potential framework for such an approach: a hub-and-spokes structure. Consider first the broad spectrum of client characteristics, including those identified in the vignettes that introduced this paper. Despite their divergences, as a general matter clients can be divided into three (or arguably four) categories. At one end of the spectrum, are clients with a heightened need for protection through more rigorous Rules of Professional Conduct. These include indigent clients in civil and criminal matters, clients under a disability, and individual clients with little or no prior experience with lawyers.

At the other extreme is a category consisting of sophisticated clients, such as entities or individuals who have other lawyers or in-house counsel to advise them independently of the client-lawyer relationship in question, or who otherwise have significant prior experience with lawyers. These clients have far less need for the protection of strict rules governing their relationship with counsel. They are ordinarily perfectly capable of effectively negotiating the terms and conditions of the client-lawyer relationship and, in many cases, actually have the upper hand in terms of their bargaining power in such discussions. Indeed, many major organizational clients impose restrictions and obligations on their lawyers that go far beyond the responsibilities described in the Model Rules, such as limits on project staffing or work that can be performed, or undertakings not to represent the client's business competitors regardless of whether conflicts of interest actually exist. To the extent there is a perceived need to divide clients further, on the theory that a simple dichotomy between "sophisticated clients" and "unsophisticated clients" is insufficient, a middle, normative group could be added.

The third (or fourth) category would contain special groups of clients that do not fit neatly into the other categories for various reasons. In particular, aggregate clients, such as participants in a class action or other large groups of clients who are represented by a lawyer in essentially identical matters (such as non-class mass tort plaintiffs or individual homeowners in environmental litigation), have very different needs from those in more dyadic relationships with their lawyers. Moreover, often those relationships are subject to close supervision by a court during the course of the representation, even outside of the class-action context.

Next, consider the wide variety of lawyer roles, which can be divided into five general categories: (1) adversarial advocacy (including litigation and arbitration, with a potential sub-distinction for criminal practice in view of the constitutional principles involved); (2) negotiation; (3) counseling and evaluation; (4) mediation (including other non-adversarial dispute resolution); and (5) collaborative processes. The categories are presented here in descending order of aggressiveness, that is, in decreasing degrees of what used to be termed "zealous advocacy" under the Model Code of Professional Responsibility. As one progresses through the categories, the lawyer owes an increasing duty to the process itself in which the lawyer is involved, which must temper the "zeal" with which the lawyer must otherwise single-mindedly pursue the client's interests.

The effect of dividing clients and lawyers into categories may be expressed graphically through a chart such as that set forth below. The horizontal (X) axis



represents the nature of the client. The unsophisticated clients are located toward the left side of the grid, while the sophisticated clients are located toward the right side of the grid. Similarly, the role of the lawyer can be plotted on the vertical (Y) axis, with adversarial advocacy at the upper end and collaborative processes at the lower end. Point A might represent a lawyer representing an individual of modest means with limited prior experience with the legal profession in a non-adversarial, perhaps even collaborative matter. Point B, in contrast, might represent a medium-sized public corporation being represented in a hotly contested litigation.

Conceivably, a three-dimensional model could be constructed adding another axis perpendicular to the X-Y plane (the Z axis) to represent the practice setting of the lawyer in question. As a general matter, however, the nature of the client and the role of the lawyer will ordinarily be far more determinative of the “spoke” to be followed than the size of the law firm involved or other structural or physical attributes of a particular lawyer’s practice. The addition of yet another axis, expanding the theoretical grid from four quadrants into eight cubic subdivisions, would add complications that are not warranted by the substantive benefits that might theoretically be gained from its inclusion. In other words, it is not the position of this paper that special rules be adopted for large firms, small firms, or solo practitioners, but that the focus in creating a hub-and-spokes set of rules be upon the role of the lawyer and the nature of the client.

Imagine now the grid peppered with points representing the broad range of client-lawyer relationships. Organizing them into groups as to which different spokes would apply is perhaps the greatest challenge, exceeding that of determining

	Advocacy	Negotiation	Counseling	Mediation/ADR	Collaboration
Unsophisticated Client	A	A	B	B	C
Sophisticated Client	B	B	C	C	D
Aggregate Client	E	E	E	F	F

precisely what each spoke should say. One possibility would be to have four sets of rules, one for each of the four quadrants on the grid. That approach, however, could easily lead to arbitrary determinations as to where, on the client or lawyer spectrum, the particular client-lawyer relationship fits. One of the keys to a successful hub-and-spokes structure is being able to determine which, if any, spoke is applicable to a particular situation. A different technique is needed.

If we proceed on the assumption that there are three categories of clients and five categories of lawyer roles, that yields 15 possible combinations. A basic allocation chart would provide lawyers with a roadmap to determining which of several spokes apply. The following chart assumes that there are six spokes (A through F) emanating from a hypothetical core-principle hub. A lawyer counseling an unsophisticated client would follow spoke B, as would a lawyer negotiating on behalf of a sophisticated client. A lawyer representing a special client, such as a plaintiff class, would follow spoke E in litigation, but spoke F in mediation or other non-adversarial alternative dispute resolution procedures.

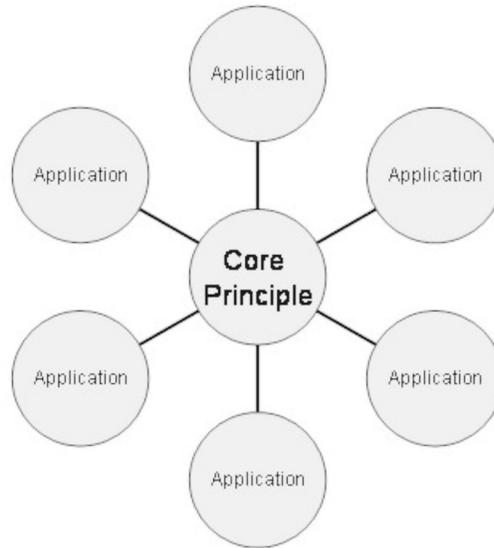
Depending on the nature of the hub principle involved, there may not be a need for six separate spokes. Perhaps many rules can remain as they are. Perhaps with respect to some hub principles, more spokes, and even some sub-hubs (themselves spokes from which additional spokes emanate), may be needed to express the various applications of the general rule. The structure of the six-spoke rule hypothesized above is depicted graphically below.

Although the hub-and-spokes approach was not ultimately adopted for Article 2 of the Uniform Commercial Code despite the excellent work of its developers,<sup>21</sup> it has been proposed for use in statutory schemes generally<sup>22</sup> and actually employed in a number of legal contexts, including most notably business organization statutes.<sup>23</sup> It is certainly easier to take a least common denominator approach to legal ethics regulation, but it is not in the best interests of either clients or lawyers.

21. See Raymond T. Nimmer, *Intangibles Contracts: Thoughts of Hubs, Spokes, and Reinvigorating Article 2*, 35 WM. & MARY L. REV. 1337 (1994); Raymond Nimmer & Richard Speidel, "Hub and Spoke Concepts in Article 2 Revision: Discussion Memorandum" (Sept. 1994) (unpublished memorandum on file with author).

22. See Thomas F. Blackwell, *Finally Adding Method to Madness: Applying Principles of Object-Oriented Analysis and Design to Legislative Drafting*, 3 N.Y.U. J. LEGIS. & PUB. POL'Y 227 (1999-2000).

23. See "Report of the Codification Committee of the Section of Business Law of the State Bar of Texas on the Proposed Business Organizations Code" (2000).



The foregoing discussion is intended chiefly to provoke a discussion among the members of the bar as to the most effective way in which we can continue to regulate ourselves. The hub-and-spokes approach is but one example of the concepts that might be employed in bringing our rules of professional conduct into the 21st Century. Of critical importance in the development of any set of rules of professional conduct is that they be transparent and accessible. Voluntary compliance is the key to ensuring, to the maximum extent possible, that lawyers comport themselves ethically. Reliance on the disciplinary process alone is inadequate. The enforcement community has limited resources even to respond to the number of complaints it receives, and cannot be expected to ferret out wrongdoing in the profession that is not brought to its attention. We must be effective in our self-policing, so that the 99.9% of lawyers who wish to comport themselves in full compliance with the rules can do so.

At bottom, however, if we continue to insist that lawyers have a code to live by—and this paper does not suggest otherwise—that code must make sense. The challenge is to develop a codification of ethics rules that provides guidance to all lawyers in all of their client relationships by attempting at least to a reasonable extent to address the multitude of permutations. It is time for us to take the first step: rejection of the fallacy of the monolithic client-lawyer relationship. Once our minds are free of this self-imposed restraint, there is no limit to what we can achieve.

