Where Little Cable Cars Climb Halfway to the Stars

By Mark H. Aultman*

We've hands that fashion and heads that know
But our hearts we lost—how long ago!
—G. K. Chesterton

Whatever you say is a lie.
—Groucho Marx, in *Horsefeathers*, 1932

Are you a corrupt politician? Or am I being redundant?
—Groucho Marx, on *What's My Line*

"Say, did you hear the one about the anarchist who was washed ashore on an isolated island?"

"No", said the lawyer.

"He came upon some natives and asked, 'Is there a government here?' "

"And the natives answered, 'Yes'."

" 'Well, then,' said the anarchist, 'I'm opposed to it!' "

"Ha, that's a good one!" said the lawyer.

"Say, did you hear the one about the ABA cruise ship that crashed on an isolated island?"

"No," said the lawyer.

"Well, the lawyers came upon some natives and asked, 'Is there a government here?' "

"And the natives answered, 'Yes'. And the lawyers asked, 'Well, then, when do we start running it?' And the natives said, 'You have to be subject to its laws like everyone else!' "

" 'Well, then,' said the lawyers, 'we're opposed to it!' "

"That's not funny," said the lawyer.

It is August of 1982, a good time to be in San Francisco. But the fog is heavy, and there are not many hours in the day when one can see clearly. The cable cars are still running, though they are soon to be taken out of service for major renovation of the cable system. This is still, though, and probably always will be, a city of cables—cables run under the streets to pull the cars and

---

* Attorney at Law, Yellow Springs, Ohio.

cables hold up the suspension bridges.

But these are cables whose utility is in their structural strength—mechanical anachronisms in an age where cables carry information electronically. The cables of the new electronic age will be different. They will need structural strength, but their utility will be in their ability to carry information in their interiors. The purely mechanical is giving way to the electronic. Whatever is being created will be both mechanical and electronic, exterior and interior. Structure and purpose, exterior and interior, are coming together. San Francisco in the summer of 1982 is a strange and troubling place.

There is a park in the middle of San Francisco. It is well landscaped, and the palm trees growing there all year round, in a climate where it is not uncomfortable in the hottest part of the summer, give the park an idyllic air. It is an escape, a refuge, a place where people are sitting and resting and talking. The park seems safe—it is a place that seems to protect the people who come there and make them want to protect it.

But the park at Union Square is not what it seems. It is not the last vestige of untouched nature in the middle of a growing city. It is, in fact, the roof of a parking garage. It is not preserved and protected nature, but recreated nature. The human race preserves only in remote regions, and even then the battle for preservation is difficult. Most places where people spend much time is not preserved nature but the memory of nature—nature ordered, tended, cared for, to fit in with an idea of remembered beauty. The actual environment in most places is becoming ugly, though in places like San Francisco something of a natural beauty still remains, and is more difficult to hide.

The American Bar Association is meeting in San Francisco in the summer of 1982. Locals comment that lawyers seem to have taken over the place. They are spread out in downtown hotels, over twelve thousand having registered for this convention. They have not, most of them, come here for weighty debate. They came here to play, learn a little, and deduct the cost. The media are giving some attention to the new ethics code that the ABA's Kutak Commission is preparing, and there is substantial interest in it among some lawyers. Still most of them can do nothing but watch.

There are three hundred and some odd delegates who can actually vote on the code—or any of the other matters that will come up. The rest can watch. They cannot even debate—too unwieldy

and too cumbersome. But why should a few hundred attorneys who have shown enough interest in the ABA over the years to be chosen as delegates, decide the kind of questions that are being decided in this code?

For centuries it has been a basic tenant of Anglo-American law that the duty of a lawyer was to protect the client's interests. Clients back then were mostly personal clients, and there were always exceptions, but the duty was central to a lawyer's self-understanding. Now changes were being made. Some said all lawyers should be encouraged to disclose client confidences to prevent wrongdoing; others said they should be forbidden from ever doing so. It was evident that changes were necessary, because the word "client" no longer meant what it used to, but why should a few hundred lawyers out to have a good time in San Francisco be called upon to make these decisions? Some of the distinctions being drawn threatened to redefine the American legal profession at its very heart. Perhaps its heart was sick, and it was certainly weary, but was this any group to be performing the surgery?

For the newspapers it was a circus. They reported the "debate", or more accurately, the attempt at debate. The time set aside to debate actually became a debate on the first issue for debate—whether there should be a requirment of written attorney-client fee contracts. The issue was resolved reasonably, as only lawyers can be reasonable—it should not be required, but should be done if reasonable. Not law, but reason, was becoming the only standard for lawyers. But the problem with that is that what seems reasonable depends upon who is doing the deciding.

The newspapers were reporting not a slam-bang debate on important issues (which is the way lawyers like to think of themselves) but a ludicrous battle of words about nothing. This was not the image the ABA wanted to convey, and after some debate on the irresponsibility of such a decision, it was determined to defer the matter until the ABA's winter meeting in New Orleans. Deep south soulful New Orleans in the winter all of a sudden seemed safer than trendy San Francisco, which has the same temperature all year round. It is colder in San Francisco in the summer than most lawyers realize, but one can have strange dreams there. One can even be tempted to believe, at times, that there is hope. This is a dangerous place to talk about legal ethics.

New Orleans is safer. The past lies heavier there, and there is a history of souls that have been crushed, and kept down. People

there will understand what is happening. After all, this was the birthplace of the music that expressed the soul of the downtrodden survivor. That sad mournful music alternating with the stepped-up rhythms of Dixieland. Life goes on—it crushes you but you go on—singing. But you don't rebel there—you know your place. You can sing sad, and you can sing happy—just don't think too much. People who think too much tend to get uppity, and that only causes trouble. New Orleans is a better place for an American Bar Association meeting than San Francisco.

The press in New Orleans is going to take this one more seriously than the one in San Francisco. The press reporting on the New Orleans meeting, in fact, calls it a tough, free-swinging debate. These people, the press reports, came to do battle. Now this, thinks the ABA lawyers, is what the legal profession is all about. Slam-bang debate where important issues are hammered out. Sure, you may lose (one side has to) but that doesn't matter. That is the image the legal profession wants to convey—good hardfought debate, and a tough but fair decision on the issues. Praise the Lord and pass the ammunition.

But what really happened? What really happened is that the American Bar Association got tired of the Kutak Commission and all the trouble it was causing and decided to put an end to it. A Committee on Evaluation of Professional Standards? Who needs it? Watergate is past, and people have forgotten the role lawyers played in it. Social memory is short, and, the American Bar Association concluded, there is no reason to keep reminding it of lawyers and Watergate. Pass a code and get it over with. Act like Watergate and everything else happened *despite* ethics codes, not because of them.

It was almost inevitable, given the structure and procedures within which the Kutak Commission members had operated. The Commission proposed, over a number of years, many rules, some significant and some cosmetic. Every significant rule was rejected. The Commission proposed others, and kept insisting on a code that was not simply another justification of lawyers' assistance in crime and fraud, especially for wealthy clients.

Finally at the New Orleans meeting, the ABA's corporate constituency got what it wanted. Every cosmetic rule, the ones that made no difference (or could apply only to the lawyers representing the poor and those who could only occasionally afford lawyers) remained. Almost every other significant reform was not only re-

jected, but in most instances was actually twisted to strengthen the opposing position even more.

It was not simply a defeat for the Kutak Commission. Nor was it simply an annihilation of its position, the ignoring of its significant recommendations. It was the prostitution and corruption of the Commission, retaining its more naive and cosmetic provisions but re-enacting in even stronger form all the old evils the Commission was ostensibly established to combat.

In a room somewhere high atop a tower in Chicago, lawyers are talking.

> "Listen to this crap", says one of them. He is waving a pamphlet. " 'Lawyers of America Unite! Throw off your chains! There is a specter haunting America.' I thought this kind of stuff went out with Marx. Or at least with the 60's."
>
> The lawyers look around, very cautiously, over their shoulders, and speak in hushed terms. These are dangerous times.
>
> "I don't know", says one of them, "the threat of Marx is much more serious than people realize."
>
> "Oh come on. Even the communists don't take Karl Marx seriously any more."
>
> "Who said anything about Karl?"
>
> "Well, who then?"
>
> "Groucho."

February, 1983

Dear American Bar Association:

Dan Rather informed me on the news the other night that the House of Delegates of the American Bar Association rejected the proposition of the Kutak Commission that lawyers be permitted to disclose client confidences to the extent necessary to prevent the client from commiting criminal or fraudulent acts likely to result in death, bodily harm, or substantial injury to the financial interests or property of another. I had the distinct impression that Dan did not approved of the ABA action.

Dan could not tell me, however, as *Time* magazine reported, that the House the next day adopted a rule requiring that attorneys disclose a client's perjury, and that this vote was an atonement for its vote of the previous day. The next thing I noticed was that editorials were appearing in the newspapers complaining about the ABA action. It appears that the public is angry, and unappeased by the efforts at atonement.

It is evident that there must be some mistake and that the public simply has not had explained to it the wisdom of the ABA decision-making process. Accordingly, I would appreciate it if you could send me a copy of the precise wording of the rules so that my faith can be restored.

Yours in trust and confidence,
A Lawyer

Several weeks after the above letter, worded differently (quite differently, actually), was sent, a copy of the new rules arrived in the lawyer's office. The cover page said: "The Office of Policy Administration, without the concurrence of the House Committee on Drafting, believes this to be the result of the actions taken by the House of Delegates at the 1983 mid-year meeting on amendments to the proposed Model Rules of Professional Conduct, final action upon which will be taken at a later meeting of the House."

What was attached was more clear, direct, and to the point, than any statement of the Model Rules that the American Bar Association had yet sent out. All the excess verbiage was gone. There were no comments, no introductions or explanations as to scope, nor any other long drawn out paragraphs explaining how wonderful lawyers are. There was just the text of the rules. Most of the rules were referred to in one of two ways: 1) Model Rules Text, or 2) Model Rules Text as Amended by the House, February, 1983. It appeared that for at least some of the rules the conventioneers in New Orleans had not actually adopted the exact language. This was, however, believed to be "the result of the actions taken by the House of Delegates."

The Office of Policy Administration, in other words, was not going to be responsible for this mess. It was the creation of the House of Delegates—the ultimate authority. It had been just another example of democracy in action. Does it matter that the delegates to the American Bar Association are not, like the representatives to the U.S. Congress, full-time paid public employees who might reasonably be expected to take time trying to learn about issues and protect the public interest? Of course not. This was the latest innovation in democratic theory—rule by conventioneers out for a tax deductible vacation. But, after all, why not? It was not like it was something that was to be taken seriously. It was only ethics. Ethics to be enforced by the nation's court system and disciplinary enforcement agencies. It's law, you see, but it's not *seri-*

ous law.

"Hey, why does a lawyer wear a three-piece suit and carry a briefcase?"
"I don't know, why?"
"So people won't see his briefs!"
Ya-da, da-da, da-da, ya-da, da-da, da-da.
"But why doesn't he want people to see his briefs?"
"Because the emperor has no clothes."
"This doesn't make any sense."
"Of course not, it's an ethics code."
Ya-da, da-da, da-da, ya-da, da-da, da-da.

All the new rules in the new draft for which no one wants to accept responsibility—because there is no one *to* accept responsibility (how do you hold a bunch of conventioneers responsible for anything?) show a very consistent pattern. They are the rules that make a difference. The other rules, all those nice little rules that sound so reasonable and poetic, but are absolutely unenforceable except by arbitrary agencies with power to do whatever they feel like—these are the ones that were not changed.

What rules were not changed? "The lawyer shall provide competent representation." What's competent? What is "reasonably necessary?" (1.1). "The lawyer shall act with reasonable diligence and promptness." ("Please, can't I act with unreasonable diligence and promptness? It'll drive my opponent nuts.") (1.3). "The lawyer shall keep the client reasonably informed", and "shall explain the matter to the extent reasonably necessary to permit informed decisions." ("Won't this nice Bar Association *ever* let us be unreasonable?")

When a client is under mental disability "the lawyer shall, so far as reasonably possible, maintain a normal client-lawyer relationship with the client." (1.14). Attorney: "Now tell me, what seems to be your problem?" Client: "It's crackers to slip a rozzer the dropsy in snide." Attorney: "Hm, that could be serious. I'm afraid this is going to be expensive."

There is even a rule, Rule 2.1, that does not use the word "reason", or its derivatives, even once. "In representing a client, the lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, the lawyer may refer not only to law, but to other considerations such as moral, economic, social, and political factors. . . ." ("Dear American Bar Association: My client proposes to drop a nuclear bomb on the city of New

York to punish it for its sins, because God commands it. May I refer to religious and theological factors in rendering my candid advice?" "Dear Lawyer: Our Committee on Factors to be Considered in Rendering Advice has determined that dropping a bomb on New York City raises economic and social questions and that it is not necessary to consider whether you may consider theological and religious factors. We are, in fact, of the opinion that if it were Chicago rather than New York, there might even be a moral question involved. Fortunately, that issue is not before us." "Dear American Bar Association: Fortunate for whom?")

And the Rules prohibiting frivolous claims and contentions (3.1) and requiring reasonable efforts to expedite litigation (but only if consistent with the interests of the client) (3.2) are still there, stirring monuments to the legal profession's willingness to take a tough stand on the issues. (As they used to say in the Oval Office before the "nice guy" era: "When the going gets tough, the tough get going.")

Rule 3.5, concerning impartiality and decorum of the tribunal; rule 4.2, concerning communications with persons represented by counsel; rule 4.3, concerning dealing with unrepresented persons; and rule 4.4, concerning respect for the rights of third persons, all remained unchanged. These are really nice rules, all of them. There is, however, a rather nasty undercurrent to some of them. "A lawyer should not use means that have no substantial purpose other than to embarrass, delay, or burden a third person." But what if the purpose is to represent one's client? "Well, hey look, we are lawyers. Our clients may be a bunch of sleazers, but we're only doing this because they tell us to. Why we couldn't do it on our own even if we wanted to. It says so right there in Rule 4.4. A good ol' rule, that 4.4."

Rule 6.3 is still there, giving permission for lawyers to serve as officers or members of legal service organizations (so long as the lawyer does nothing that would adversely affect a private client) and the lawyer may still, under rule 6.4, participate in activity designed to reform the law, even if this might affect the interests of clients! The American Bar Association sometimes outdoes even itself in its own benevolence.

And a lawyer may still advertise so long as it is not false or misleading (7.1) and does not imply that the lawyer is a specialist (7.4). And the niceties concerning firm names and letterheads (7.5), bar admission and disciplinary matters (8.1), reporting professional

misconduct (8.3) and jurisdiction (8.5) are maintained. The American Bar Association is still coming out foursquare in favor of things that sound nice. No shirking here.

But then, those are not the provisions that the American Bar Association is really interested in. An analysis of the important provisions indicates that the ABA has removed the very heart of the legal profession—all notions of fidelity to law are gone—and now it doesn't know what to do with the bloody mess.

"Doctor, doctor, how's the patient?"

"The situation is critical, but not serious."

"Will you have to operate?"

"I don't know, I can't decide."

"But Doctor, you've dedicated yourself to saving lawyers' lives."

"That's right, and I've saved many lawyers' lives already this year."

"By operating?"

"No, by not operating."

Ya-da, da-da, da-da. Ya-da, da-da, da-da.

There is not much left, after reading through the innocuous provisions, except for the provisions on which the House of Delegates went to work. There are, to be sure, a few rules, that could make some difference, which the delegates missed. These are only minor hazards, however, and are not significant enough to outweigh the damage—a small price to pay in order to get a code that can be used to justify the organizational lawyer's participation in crime and fraud and make it sound like something else.

As George Orwell pointed out, those in power would prefer to have us forget history, and to the extent that's not possible, would prefer to make it up themselves after they have decided what we should believe it to have been. The Kutak Commission has had the bad taste to ignore this rule, leaving behind a record of its proposals as it has proceeded. This record is a chronicle of the corruption that is inevitable when rules of legal ethics are developed by organizations controlled by attorneys representing powerful clients. Various rules, reflected in the series of drafts, have been under consideration for over five years. Every significant recommendation of the Commission has been eliminated or modified with each successive draft, until now it is impossible to recognize the Commission's earlier proposals at all. The June 30, 1982, draft did show some vestige of integrity (though some principles were compromised,

more important ones were reasserted), and it was possible to believe that gradual corruption of the Model Rules that was evident in previous drafts had been reversed.

The integrity that remained was not much, to be sure. All it said was that lawyers, even lawyers representing organizational clients, could, if they chose, disclose client confidences if necessary to prevent the client from engaging in criminal or fraudulent activity likely to result in death, serious bodily harm or injury to financial interests or property. A lawyer could still, of course, choose not to, so corporate America could expect to have some pretty pliant lawyers. Still, there was always the possibility that a lawyer could, just might, have an unfortunate attack of conscience and that the corporation would not be able to call on the American Bar Association or the disciplinary apparatus to exert psychological pressure and make noises about disbarment. And just who did the American Bar Association think it was supposed to be representing? Lawyers or the corporations who hire them?

> The top of a tower again:
> Ya-da, da-da, da-da; ya-da, da-da, da-da.
> "Turn that thing up. Someone may be listening."
> YA-DA, DA-DA, DA-DA; YA-DA, DA-DA, DA-DA.
> "What the hell's going wrong here? What's wrong with that Commission? They should have caved in by now."
> "Maybe we underestimated some of them."
> "I just don't understand it. It's turning into a fiasco."
> YA-DA, DA-DA, DA-DA; YA-DA, DA-DA, DA-DA.
> "Maybe the problem is that there are still some lawyers that like to believe in what they are doing."
> "Well, we can't have lawyers like that anymore. Let's end it."
> YA-DA, DA-DA, DA-DA; YA-DA, DA-DA, DA-DA.
> "Ya-da, da-da, da-da; ya-da, da-da, da-da."
> Ya-da. . .da. . .da. . . . . .da . . . . . .da . . . .

At the winter 1983 meeting of the ABA House of Delegates, many of the rules of Professional Conduct previously proposed by the Kutak Commission were amended. According to the draft of the Office of Policy Administration of the American Bar Association, some of the more significant amendments were as follows:

1) Rule 1.2 was amended to remove a provision that the lawyer could not prepare a written instrument containing terms that the lawyer knows are expressly prohibited by law. And a provision was

added to make clear that a lawyer could discuss with a client the legal consequences of illegal or fraudulent conduct, as well as assist in efforts (good faith) to test the validity, scope, meaning or application of the law concerning that illegal and fraudulent conduct (the latter part of the rule already being present in earlier drafts).

2) Rule 1.5 was amended to ensure that there could be no objective standard as to what constitutes a reasonable fee, and a provision was added to regulate contingent fees in domestic relations cases.

3) Rule 1.6 was amended to specifically prohibit lawyers from revealing information concerning criminal or fraudulent conduct when necessary to prevent substantial injury to property or financial interests, and to make it clear that a lawyer could reveal information to prevent death only if death is imminent, and only if the conduct is criminal.

4) Rule 1.13 was changed to make clear that an attorney representing an organization has no special duty to the organization as an entity, and instead represents the organization and its members and officers "as a group". The delegates also removed any references to permitting disclosure to outside authority, even if the organization's highest authority persists in clear violations of law likely to result in substantial injury to the organization, and instead inserted a provision that the lawyer may resign in accordance with Rule 1.16.

5) Rule 1.16 was amended to add a provision that a lawyer *may* withdraw if the client has utilized the representation to perpetuate crime or fraud, and if the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.

6) Rule 4.1 was amended to remove a provision which prohibited a lawyer from lying to third parties, and from failing to disclose material facts when necessary to avoid assisting in crime or fraud, and a provision was added that prohibited disclosure if it involved disclosure of client confidences under 1.6.

7) Rule 5.4, named (oddly enough) "Professional Independence of a Lawyer," was changed from a rule which specifically permitted a lawyer to be employed by a legal organization owned by non-lawyers to one specifically prohibiting it. The rule now prohibits, with trivial exceptions, a lawyer from ever sharing legal fees with a non-lawyer, or forming a partnership with a non-lawyer, or from practicing in a professional corporation or association for profit in which a non-lawyer has ownership interest, or is a director

or officer.

Some of the other changes made by the delegates were less serious. Some were even sensible. All that was clear was that the ones that really mattered—that might have interfered with, rather than justified, a lawyer's participation in corporate crime and fraud in America, had been changed. Some of the more significant of the other changes were: 1) Rule 1.8. A disclosure and consent provision, and one requiring opportunity for independent consultation with legal counsel, were added to a provision concerning business transactions between lawyers and clients. (The prohibition applies in situations where the lawyer acquires a financial interest adverse to the client, but not where the financial interest is consistent with the client's. This is a prohibition which, almost by definition, will have an effect only in the dominant lawyer/subservient client situation, but not the dominant client/subservient lawyer situation. This is the typical American Bar Association approach.)

2) Rule 1.12 changed a prohibition against a judge's or arbitrator's negotiating for employment with persons involved in a proceeding so that the prohibition was not limited to private employment, and added a provision permitting a law clerk to negotiate so long as the judge is notified.

3) Rule 1.15 added a provision that a lawyer safekeeping property or funds of a client or a third person shall, upon request, render a full accounting.

4) Rule 2.2 changed the rule to make clear that a lawyer acting as an intermediary, upon withdrawing, is prohibited only from representing the clients in the matter that was the subject of the intermediation, and not other matters.

5) Rule 2.3 removed a provision requiring a written statement to a client in a situation in which a lawyer is undertaking an evaluation for use by third persons.

6) Rule 3.6, concerning trial publicity, changed it to limit its prohibition to statements which "a reasonable person could expect to be disseminated by means of public communication," and to require that all public statements that a defendant has been charged with a crime include a statement that the defendant is presumed innocent until or unless proven guilty. (This latter addition helped significantly to fortify the impression of disregard for reality in Rule 3.6. A related rule, 3.8, concerning the special responsibilities of a prosecutor, added further to the merriment by requiring that the prosecutor exercise reasonable care to ensure that the state-

ments prohibited to a lawyer under 3.6 are not made by investigators, police, secretaries, or anyone "assisting or associated with" the prosecutor: A scene from this brave new world of legal ethics: "This is Action Central News, reporting from police headquarters. Tell us, Officer, what happened?" "We responded to a call concerning a mass murder. When we arrived at the scene, the alleged murderer was killing people, and we apprehended him. I hasten to add, however, that this is merely an accusation, and the defendant is presumed innocent until and unless proven guilty." "Uh, OK, thanks, Officer.")

7) Added a new rule, 5.5, that prohibits lawyers from practicing in a jurisdiction where unauthorized or from assisting others in activity that constitutes unauthorized practice.

8) Rule 6.1 added a provision permitting lawyers to give financial support to organizations that provide legal service to persons of limited means. (Thank God for the American Bar Association. Or is it the other way around?)

9) Rule 6.2 added a provision (which was in the May 30th, 1981, draft but not the June 30th, 1982, draft), as an example of good cause to seek to avoid court appointment to represent a person, that the client or cause is so repugnant to the lawyer as to impair the lawyer-client relationship.

10) Rule 7.2, concerning advertising, added a provision that any ad must include the name of at least one lawyer responsible for its content.

11) Rule 7.3 changed a rule which permitted solicitation in certain circumstances (close friend, former or current client, under auspicies of legal service organizations) to *prohibit all* solicitation, in person or otherwise, "when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." (This rule, I must confess, is one of my personal favorites. It is an almost perfect parody of the typical rule of legal ethics. Somewhere, maybe even in the Office of Policy Administration of the American Bar Association, Groucho Marx lives.)

12) Rule 8.4 added to the definition of "professional conduct" the following catchall garbage phrases from the Code of Professional Responsibility: "Engage in activity involving dishonesty, fraud, deceit or misrepresentation", and "Engage in activity that is prejudicial to the administration of justice". These rules are the ABA's way of saying: "And if you do anything we don't like, particularly since most of the other rules are going to let you get away

with anything, this is the rule we are going to use to get you. Have a nice day."

In the ABA's usual parody of democratic theory the ultimate authority of the American Bar Association is its House of Delegates. This process of decisionmaking is somewhat akin to standing up in the middle of a crowded bar on a Saturday night and shouting: "Hey, people out there are starting to get angry about all these kids getting killed by drunk drivers."

"Hey, yeah, that's bad." "Let's do something!" "Yeah, let's."

"OK, I've got some proposed rules here."

"OK, read them."

The proponent reads for a few minutes until people in the bar start shouting and throwing their food at him. "What the hell are you talking about? Jail for having a few drinks? A mandatory test that could send us to jail for having only three martinis? Are you crazy?"

"Now wait a minute, hear me out. Unless you people come up with some sensible rules, the people out there will, and they are mad!"

"OK, OK, but let's change some of these."

"Yeah, right on. Get rid of that mandatory jail stuff. How about a mandatory confinement to our house for three days? It'll save the taxpayers money."

"How about a mandatory confinement to Harrigan's Bar? That'll *make* the taxpayers money."

"Go with it, baby!"

"But. . .but. . . . . .wait. . . . . ."

"Can it, buddy. What do you know?"

"How about changing that test so that we don't have to take it if we have conscientious objections?"

"Yeah, I've got religious scruples about letting cops know I'm drunk."

"But we've got to look tough!"

"Hey, I've got it! How about: 'An alleged drunk may not refuse to take the test if the police can prove beyond a reasonable doubt that a significant motive for the alleged drunk's refusal is to avoid providing evidence as to his state of intoxication.' "

"Hey, that's good. Go with it! Another round for the house!"

"Wait, we've only been talking about the procedures and penalties! How about the offense itself?"

"Yeah. We've got to tighten that up too!"

"I've got it! How about this: 'No person shall operate a motor vehicle while under the influence of alcohol if a significant motive for doing so is to kill or maim innocent women and children.' "

Someone throws a sandwich at the speaker. "Too tough", he shouts, standing up on the table. "How about making it 'kill *and* maim?' That way. . ." He falls off the table.

"Sounds good! Moved, seconded, and passed."

"Hooray!"

"How about another round?"

"We'll drink to that!"

Several months later someone asks about the rules. Everyone shrugs. "Hey, don't look at me. It was the House of Delegates of Harrigan's Bar."

The draft of rules prepared by the American Bar Association's Office of Policy Administration indicates that the entire process is being set up so that there is no way to establish who, if anyone, is responsible for what has happened. Except for Rule 1.5, concerning fees and written contracts (which says at the end that "proposed amendments were previously considered by the House of Delegates"), all the rules are preceded by either "Model rule text" or "Model Rule text as amended by the House, February, 1983." But there is some confusion as to what model rules are being referred to—the proposed final draft dated May 30, 1981, or the proposed final draft dated June 30, 1982. Some of the rules (3.3 and 5.1, for example) are the same as the rules proposed in the June 30th, 1982, draft, though preceded by the notation, "Model Rules text as amended by the House, February, 1983". Rules 5.2 and 5.3, which were also changed significantly in the June 30, 1982, draft to conform to the changes in 5.1, are referred to, though, as "Model Rules Text."

Rule 3.3 is not an insignificant rule. *Time* magazine reported that the House of Delegates voted, on the second day of the debate, after prohibiting practically all disclosure of a client's crime and fraud, to require disclosure of perjury. But the rule, 3.3, requiring the disclosure of a material fact necessary to prevent participating in a criminal or fraudulent act by the client, was already in the draft dated June 30, 1982. The Kutak Commission has, in one form or another, proposed this rule all along, and the wording in the Office of Policy Administration draft is the same as that in the draft of June 30, 1982, despite being referred to as having been amended by the House.

Nor is 5.1 an insignificant rule. In the proposed final draft dated May 30, 1981, the Kutak Commission proposed that a partner in a law firm "shall make reasonable efforts to ensure that all the lawyers in the firm, including other partners, conform to the rules of professional conduct," and that "a lawyer having supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct." This provision has the effect of subjecting top law firm partners to potential disciplinary, and perhaps civil, liability for violations of subordinate members. Though normal agency law would require that those who profit from the wrongdoing of their subordinates be held responsible, this was something that the most powerful constituency of the American Bar Association wanted very much to avoid.

The proposed final draft of June 30, 1982, changed the rule significantly. It stated: "A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rule of Professional Conduct." To "make reasonable efforts to ensure that the firm has in effect measures" means almost nothing. Probably a strongly worded memorandum urging support will suffice. And once the measures are taken, the partners are insulated from responsibility. To reinforce the first part of the rule, the next paragraph was further amended to say that a lawyer having direct supervisory authority over another lawyer "shall make reasonable efforts to ensure that the lawyer conforms. . . ." This was a provision, in other words, designed to ensure that top partners could escape blame, and pass responsibility to associates, and then to direct supervisors if necessary. It was the Watergate mentality all over again, and lawyers at the top of the firm hierarchy would know better than to make tapes.

Rule 5.1 in the draft of June 30, 1982, may have been a tradeoff for other provisions (perhaps the change in Rule 1.13 making it clear that corporate attorneys could disclose certain confidences just like any others). That makes little difference now. All the significant provisions concerning the possibility of disclosure of corporate wrongdoing have been removed, and both corporate clients, and most lawyers in a firm's hierarchy who might profit by wrongdoing, have succeeded in removing themselves from any possibility of being held responsible. The Model Rules of Professional Conduct appear to be a significant triumph for both the corporate and

legal establishment not only against public interest but against the interests of most lawyers. They appear that way, that is, except for one thing. They also appear, a little too obviously, to be a farce. At some point the line between tragedy and comedy is unnecessary to draw, because everyone can see it.

It is after midnight in the lobby of a large hotel in New Orleans. "What's going on in the bar? I've never heard such a racket."

"Oh, it's been taken over by lawyers. The delegates amended most of their code today. They've been celebrating ever since."

One of them walks over and looks in. Most of the attorneys, both the men and women, are dancing and singing. The sound is drowning out just about everything, even in the lobby, but since the hotel is filled with lawyers, it makes little difference:

> Oh, what do you do with a drunken lawyer
> What do you do with a drunken lawyer
> What do you do with a drunken lawyer
> Ear-lie in the morning?

After a while two of the lawyers walk out.

"My place or yours?" he asks.

"Mine," she says. "I've got a nice little room in the French Quarter. Let's go there."

As they stand outside on the sidewalk they can still hear the singing:

> Oh, what do you do with a drunken lawyer
> What do you do with a drunken lawyer
> What do you do with a drunken lawyer
> Ear-lie in the morning?

The next morning the lawyer wakes up and feels terrible, for a number of reasons. He gets out as quickly as he can, which she in no way discourages. "My God," he thinks as he walks through the lobby, "this just wasn't what it was supposed to be like." He has a headache.

As he steps out on the sidewalk, in the middle of the French Quarter, he hears the sound of the music of New Orleans. It is sad, ineffably sad, and he looks up the street. Then he sees it. A black funeral procession. The street has been cleared and they are walking down the center. Their steps are slow, keeping in time with the music. Though some of them, particularly the older ones, seem slightly bowed, the procession is straight and steady, almost majes-

tic. The lawyer stares. He has never seen anything like it before. The perfect cadence, so in time with the music. Some of the members play, while others walk—that slow mournful pace. Then others play, while the others walk. No one seems to be telling them what to do, but it all happens as if on cue. That mournful gait and that mournful music, as if somehow the rhythms of life and death have come together and could go on on their own, no longer needing direction and control. In the middle of the procession there is a casket.

The lawyer turns to a woman beside him. "Who died?" he asks.

She stares at him incredulously, "You don't know?" she asks.

"No", says the lawyer.

"My God", she says, and shakes her head.

The procession comes nearer and the casket is directly in front of the lawyer. He stares at it. As he does he begins to be overcome by a suffocating feeling, as if walls are all around him, slowly closing in. It seems like it is getting darker and that he might never be able to leave.

Then the casket passes and the procession moves on down the street. The feeling of dread passes as the lawyer watches the mourners move on. The music fades a bit, but seems even sadder as it goes farther away. The procession goes around a corner, but the lawyer can still hear the music. It has picked up its beat. It is almost a happy song now, but it still seems very gentle and sad, like a lingering memory.

The lawyer cannot figure out what they are playing, or if he is right, why they are playing that. It sounds out of place, even in the Dixieland beat:

Ya-da, da-da, da-da; Ya-da, da-da, da-da,

Ya-da, da-da, da da da!

He can no longer see the procession at all, and he can barely hear it. Around the corner, though, the members of the procession are dancing. They are not happy and laughing, exactly, but they are dancing and playing music. It would be a happy song at other times, but now it is different.

A death has come, and life will go on.

March, 1983