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## **The Contributions of Louis Brandeis to the Law of Lawyering**

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## THE CONTRIBUTIONS OF LOUIS BRANDEIS TO THE LAW OF LAWYERING

*John S. Dzienkowski\**

### I. INTRODUCTION

Much scholarship has been written about the U.S. Senate debate pertaining to the conduct of Louis D. Brandeis as a lawyer and whether he represented conflicting interests in violation of the rules of ethics.<sup>1</sup> The overwhelming evidence points to the fact that the opponents of Louis Brandeis sought to find any possible reason to object to his candidacy because of their antisemitism and their objection to Brandeis' economic policies.<sup>2</sup> In this essay, I examine

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<sup>1</sup> See, e.g., GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 58 (1978) [hereinafter HAZARD, PRACTICE OF LAW]; MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE (1st ed. 2009); John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965); Geoffrey C. Hazard, Jr., *Lawyer for the Situation*, 39 VAL. U. L. REV. 377 (2004) [hereinafter Hazard, *Lawyer for the Situation*]; Katherine A. Helm, *What Justice Brandeis Taught Us About Conflicts of Interest*, 35 J. LEGAL PROF. 1 (2010); Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L. J. 1445 (1996).

<sup>2</sup> See THOMAS KARFUNKEL & THOMAS W. RYLEY, THE JEWISH SEAT: ANTI-SEMITISM AND THE APPOINTMENT OF JEWS TO THE SUPREME COURT (1st ed. 1978). As I described in an earlier article,

The climate surrounding the nomination was very turbulent. One Senator later described the debate as follows:

When his nomination for Justice of the Supreme Court came up for confirmation in the Senate, one of the bitterest fights that was ever waged in that body took place. In those days, action of the Senate on confirmation was held in executive session; but some of the leading statesmen of the day, some of the ablest men in that parliamentarian body, made a bitter, unreasonable, and unconscionable attack upon this man. Some of these men were moved into action because of Justice Brandeis' religion; but I have always thought the great bulk of this opposition, that which was the most powerful and made the greatest effort to defeat his confirmation, came from a combination of financial

the effect that the debate about the ethics of a distinguished lawyer and jurist had upon the law of lawyering.

My thesis is that the use of an ethical argument to oppose a Supreme Court nomination exposed the weaknesses in the ethics codes and highlighted the importance of anticipating future challenges of lawyering while conducting the practice of law. This debate took place on a national stage in which third parties sought to use ethics rules to demonstrate the unfitness of a lawyer to serve on the United States Supreme Court.<sup>3</sup> The debate attempted to legitimize opposition to a Supreme Court nominee and develop third-party standing to raise conflicts of interests to disqualify a nominee.<sup>4</sup> The conduct in question involved non-litigation representation.<sup>5</sup> This was one of the first examinations into ethics outside of the advocacy setting.<sup>6</sup> This controversy highlighted the difficulties of drafting ethics codes in the context of non-litigation lawyering.<sup>7</sup> In addition, the disagreement introduced to the legal profession and the nation as a whole, the notion of what role ethics should play in assessing a

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interests which wanted to punish an able man who had often thwarted them in their evil ways, and who feared, if he were given this great place of honor, he might still frustrate their efforts to acquire, by questionable means, greater financial power.

John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 749 n.43 (1992) [hereinafter Dzienkowski, *Lawyers as Intermediaries*], quoting George W. Norris, *Address in the Memory of Justice Brandeis*, 317 U.S. xxi, xxii (1943).

<sup>3</sup> See *Nomination of Louis D. Brandeis: Hearings Before the Subcomm. of the Comm. on the Judiciary U.S. S., on the Nomination of Louis D. Brandeis to be an Assoc. Justice of the Supreme Court of the U.S.*, 64th Cong. 277-79 (1916), reprinted in 1 THE SUPREME COURT OF THE UNITED STATES NOMINATIONS 1916-1975 (Roy M. Mersky & J. Myron Jacobstein comps., Buffalo, Wm. S. Hein & Co. 1977) [hereinafter 1 *Hearings*]; *Nomination of Louis D. Brandeis: Hearings Before the Subcomm. of the Comm. on the Judiciary U.S. S., on the Nomination of Louis D. Brandeis to be an Assoc. Justice of the Supreme Court of the U.S.*, 64th Cong. 277-79 (1916), reprinted in 2 THE SUPREME COURT OF THE UNITED STATES NOMINATIONS 1916-1975 (Roy M. Mersky & J. Myron Jacobstein comps., Buffalo, Wm. S. Hein & Co. 1977) [hereinafter 2 *Hearings*]; *Nomination of Louis D. Brandeis: Hearings Before the Subcomm. of the Comm. on the Judiciary U.S. S., on the Nomination of Louis D. Brandeis to be an Assoc. Justice of the Supreme Court of the U.S.*, 64th Cong. 277-79 (1916), reprinted in 3 THE SUPREME COURT OF THE UNITED STATES NOMINATIONS 1916-1975 (Roy M. Mersky & J. Myron Jacobstein comps., Buffalo, Wm. S. Hein & Co. 1977) [hereinafter 3 *Hearings*].

<sup>4</sup> Hazard, *Lawyer for the Situation*, *supra* note 1, at 377.

<sup>5</sup> 3 *Hearings*, *supra* note 3, at 298.

<sup>6</sup> HAZARD, PRACTICE OF LAW, *supra* note 1, at 58-60.

<sup>7</sup> Helm, *supra* note 1, at 10, 15.

lawyer's fitness when under consideration for a judicial position.<sup>8</sup> The opposing side countered by suggesting that Brandeis likely had a broader view of lawyering in mind when he represented multiple parties.<sup>9</sup> In my opinion, this debate over the ethics of Louis Brandeis contributed to the importance of developing the rules of ethics and in demonstrating the different views of lawyering in the legal profession.

## II. HISTORICAL SETTING OF THE ETHICS CONTROVERSY

A transformation occurred during the late 1800s and early 1900s in the practice of lawyering. The day-to-day work of lawyers shifted from advocacy work to transactional practice as the client base increasingly moved into the Industrial Revolution.<sup>10</sup> During this time, the legal profession was undergoing a transformation in terms of substantive law.<sup>11</sup> In addition, there was also a transformation in determining how the ethical standards would be applied in a non-advocacy setting when lawyers were called upon to provide advice to the nation's corporations.<sup>12</sup> Lawyers were called upon to apply ethics and conflicts rules developed primarily in the advocacy context to non-litigation practice—areas of lawyering which were largely undeveloped.<sup>13</sup> This is the setting in which Brandeis practiced law in a major business center in the country.<sup>14</sup>

The conduct of Louis Brandeis that was subject to the Senate hearings involved: (1) transactional work for a family; (2) debtor-creditor work for a company in financial distress; (3) labor law work to resolve a dispute between labor and management; and (4) lobbying before a legislature to support public law reform that affected the anticompetitive business practices of a former client.<sup>15</sup> Many of these representations occurred before the American Bar Association

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<sup>8</sup> HAZARD, PRACTICE OF LAW, *supra* note 1, at 57-59.

<sup>9</sup> Helm, *supra* note 1, at 9-10.

<sup>10</sup> Robert T. Swaine, *The Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar*, 35 AM. BAR ASS'N 89, 91 (1949). See also Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 6 (1999).

<sup>11</sup> Carle, *supra* note 10, at 7.

<sup>12</sup> Carle, *supra* note 10, at 20.

<sup>13</sup> Swaine, *supra* note 10, at 91.

<sup>14</sup> Helm, *supra* note 1, at 5.

<sup>15</sup> 3 *Hearings*, *supra* note 3, at 298.

(“ABA”) promulgated the 1908 Canons of Professional Ethics, and most of them before Massachusetts adopted its code of conduct for lawyers.<sup>16</sup>

Apart from the lack of established standards to judge the conduct of lawyers, two allegations, (1) unethical conduct because he represented conflicting interests, and (2) not adequately informing his clients that their interests were in conflict, during the time of the hearings were illustrative of the debate over the conduct of Brandeis.<sup>17</sup> In defending Brandeis, his supporters provided evidence that many other lawyers represented clients in similar contexts with verbal disclosures during that time.<sup>18</sup> The critics exaggerated when they accused Brandeis of clear, unethical behavior and many of the complaints relied upon the disclosures (or lack thereof) that Brandeis made to his clients before he undertook the conflicting representations.<sup>19</sup> Full disclosure was required, but at that time it was difficult to prove exactly what information and warnings Louis Brandeis gave the parties to the transactions.<sup>20</sup>

The opponents of Brandeis crafted their arguments in an attempt to demonstrate that Brandeis acted in an unethical manner in his practice of law.<sup>21</sup> The use of ethics to challenge a person’s competence to serve as a justice on the United States Supreme Court relied on a perception that unethical behavior accompanies dishonesty and incompetence.<sup>22</sup> Even today, a charge that a lawyer behaved unethically causes an individual to conclude that such lawyer is untrustworthy.<sup>23</sup> Countering unethical behavior charges was difficult outside of the context of the representation because the process to defend against such charges would require disclosure of confidential information.<sup>24</sup> The arguments that labeled Brandeis as

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<sup>16</sup> Canons of Professional Ethics, MASS. L.Q., Nov. 1915, at 1, 1 (adopting the ABA Canons in 1915); *Model Rules of Professional Conduct*, AM. BAR ASS’N, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html) (last visited Nov. 6, 2016).

<sup>17</sup> HAZARD, PRACTICE OF LAW, *supra* note 1, at 61.

<sup>18</sup> HAZARD, PRACTICE OF LAW, *supra* note 1, at 61 (comparing Brandeis’ conduct to “other reputable lawyers that . . . had often done exactly as Brandeis.”).

<sup>19</sup> HAZARD, PRACTICE OF LAW, *supra* note 1, at 61.

<sup>20</sup> HAZARD, PRACTICE OF LAW, *supra* note 1, at 61.

<sup>21</sup> Frank, *supra* note 1, at 707.

<sup>22</sup> Frank, *supra* note 1, at 685.

<sup>23</sup> *See generally* Frank, *supra* note 1.

<sup>24</sup> At the time, the Canons of Professional Ethics did not contain an exception to the confidentiality obligation authorizing a lawyer to disclose confidential information in order

unethical inevitably elevated the tenor of the debate, and thus attracted the attention of all the participants.<sup>25</sup> Understandably, the members of the Senate were hesitant to openly vocalize support for a candidate of the highest Federal court in the United States if the candidate's conduct was viewed to violate the norms of ethics.

### III. DEFENDING BRANDEIS' CONDUCT AGAINST CHARGES OF UNETHICAL BEHAVIOR

The defense of Louis Brandeis highlighted many important lessons for the law of lawyering. At this time, candidates for the Supreme Court did not personally testify before the Senate.<sup>26</sup> Instead, their supporters would present evidence in favor of the candidate and offer defenses to particular attacks.<sup>27</sup> The absence of direct testimony from Louis Brandeis adds to the mystery of what Brandeis sought to do in his lawyering, but it also highlighted to a broader audience the difficulty of applying rules of conduct to transactional lawyering.<sup>28</sup>

A defense of a lawyer's conduct in representing a client places the lawyer in a difficult position because it often requires the disclosure of confidential information, which is sometimes information adverse to the client, but is needed to establish the defense.<sup>29</sup> In most situations, the clients are former clients and in some cases no longer living.<sup>30</sup> The presentation of evidence by the accused lawyer is complicated and in situations in which the allegations are vague, the defense may be very difficult, if not impossible, to present. The nature of lawyering in an attorney-client setting involves a fluid relationship that depends upon significant

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to defend the lawyer's conduct. However, the Model Rules contain such an explicit exception now. MODEL CODE OF PROF'L RESPONSIBILITY R. 1.6(b)(5) (AM. BAR ASS'N 2015).

<sup>25</sup> UROFSKY, *supra* note 1, at 450-51.

<sup>26</sup> UROFSKY, *supra* note 1, at 443.

<sup>27</sup> UROFSKY, *supra* note 1, at 443-44. Brandeis' law partner, Edward McClennen, managed the responses in favor of Brandeis during the confirmation hearings. UROFSKY, *supra* note 1, at 445.

<sup>28</sup> UROFSKY, *supra* note 1, at 444.

<sup>29</sup> See John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 57-58 (2013) [hereinafter Dzienkowski, *Ethical Decisionmaking*].

<sup>30</sup> Legal Profession Prof, Client Interests Live on for Conflict Purposes, LEGAL PROF. BLOG (July 30, 2010), [http://lawprofessors.typepad.com/legal\\_profession/2010/07/client-interests-live-on-for-conflicts-purposes.html](http://lawprofessors.typepad.com/legal_profession/2010/07/client-interests-live-on-for-conflicts-purposes.html).

interaction between a lawyer and the client that is difficult to replicate to properly defend the lawyer's conduct.

When an individual contends that a judicial candidate is unethical because he or she was involved in a conflict of interest, the link between ethical lawyering and judicial fitness comes into focus.<sup>31</sup> Does a lawyer who represents conflicting interests and does not properly disclose the conflict and obtain client consent appear less competent to handle cases? Or is the person focused on the profit motive from the legal fees to the disregard of the clients' interests more competent to handle cases? The attacks grounded in conflict of interest allegations allowed the opponents of Brandeis to tarnish the legal career of a distinguished practitioner.<sup>32</sup>

The inclusion of a significant number of witnesses in the hearings sent a powerful message to lawyers throughout the country.<sup>33</sup> It elevated the subject of professional responsibility to a level of importance at a time when the profession was struggling with its newly enacted code of conduct.<sup>34</sup> As the ABA sought to adopt a modern view of the concept of a profession, individual lawyers representing corporations and business individuals saw the dangers inherent in their craft.<sup>35</sup>

These charges illustrated a tension between client demands and lawyer services, and thus highlighted that lawyers should be mindful of conflicts and other compromising situations when deciding whether to accept a representation.<sup>36</sup> The Senate hearings led some prominent lawyers, such as John Frank, to opine that lawyers should never represent multiple clients as a situation.<sup>37</sup> Such

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<sup>31</sup> Helm, *supra* note 1, at 4.

<sup>32</sup> Helm, *supra* note 1, at 4.

<sup>33</sup> Katherine Helm's description of the proceedings paints a powerful picture as to nature of the hearings. Helm, *supra* note 1, at 3-4 (describing the four month hearing as taking on a life of its own).

<sup>34</sup> Helm, *supra* note 1, at 19.

<sup>35</sup> *Model Rules of Professional Conduct: Preface*, AM. BAR ASS'N, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preface.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preface.html) (last visited Nov. 6, 2016). The ABA and the legal profession at the time of the Brandeis hearings sought to establish its control over regulating lawyers through control of entry, discipline, and conduct. Helm, *supra* note 1, at 19.

<sup>36</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. (AM. BAR ASS'N 1983).

<sup>37</sup> Frank, *supra* note 1, at 698. The term, "situation" was offered as a defense to the conflicts of interest charges. Brandeis supposedly undertook a representation of the situation whether it was a family transaction or dispute or a corporate debt crisis. By representing the

advice highlighted the dangers of examining a professional's work for the purpose of determining whether it complied with ethical norms.

The inquiry into the ethics of Louis Brandeis also demonstrated the need for documented evidence of disclosures and consents from clients and third parties. As lawyers began to represent the business interests that grew out of the Industrial Revolution, they needed to be mindful that their conduct could be scrutinized years later.<sup>38</sup> With the difficulty of establishing a defense to a lawyer's decisions, lawyers needed to document their decisions with internal notes in the file, along with express client consents.<sup>39</sup> Such documentary proof of contemporaneous consideration of the ethical issues would provide significant contemporaneous proof for a lawyer's actions.<sup>40</sup> The defense of Brandeis lacked such proof and the hearings demonstrated the wisdom of having such evidence in the future.<sup>41</sup>

The hearings also illustrated the notion that the success of the role of a lawyer as a problem-solver often determines whether the lawyer's decisions on conflicts of interests would be subject to scrutiny.<sup>42</sup> If the lawyer's conduct leads to a successful solution in a multiple client representation, few will argue that the lawyer erred in accepting the representation. However, if the representation fails in forming the transaction or resolving the dispute, the lawyer's conduct in accepting the representation takes a center stage. The allegations made against Brandeis involved representations that did not lead to a successful resolution of the business and legal problem. The analysis under the codes of ethics should be identical in both of these

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situation, Brandeis sought to address the problem for the interests of all involved rather than represent any one of the individual clients.

<sup>38</sup> Harrison Barnes, *The Industrialization of the Law Firm*, BCG ATTORNEY SEARCH, <http://www.bcgsearch.com/article/60634/The-industrialization-of-law-firm/> (last visited Nov. 6, 2016).

<sup>39</sup> Theresa M. Gronkiewicz, *Twelve Tips to Help You Avoid Disciplinary Proceedings*, AM. BAR ASS'N (2013), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/12\\_tips\\_avoid\\_disciplinary\\_proceedings\\_scpd\\_2013.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/12_tips_avoid_disciplinary_proceedings_scpd_2013.authcheckdam.pdf).

<sup>40</sup> *Id.*

<sup>41</sup> David G. Dalin, *The Appointment of Louis D. Brandeis, First Jewish Justice on the Supreme Court*, LOUIS D. BRANDEIS 100: THEN & NOW 1-2, 4, <http://bir.brandeis.edu/bitstream/handle/10192/31435/LDB100Dalini.pdf?sequence=1> (last visited Nov. 6, 2016).

<sup>42</sup> Frank, *supra* note 1, at 698.



situations; however, the reality of failed legal representation places the lawyer at an enhanced risk.

#### IV. THE INADEQUACY OF THE 1908 CANONS TO JUDGE CONDUCT OF LAWYERS

On a mission to become a national organization that is prominent in self-regulation of the legal profession,<sup>43</sup> the ABA adopted the Canons of Professional Ethics (Canons) in 1908.<sup>44</sup> One would think that a confirmation hearing taking place in 1916 would allow the participants in the hearing to examine the 1908 Canons in order to determine if the concepts contained in the code should have guided the conduct of Louis Brandeis. However, the hearing did not go as one would have hoped.

In 1908, the ABA adopted thirty-two of the Canons.<sup>45</sup> Canons 33 through 45 were adopted in 1928.<sup>46</sup> Of the original Canons, eighteen were intended to guide lawyers in litigation.<sup>47</sup> Arguably, only one rule addressed the situations that Louis Brandeis encountered: Canon 6, which focused on the topic of “Adverse Influences and Conflicting Interests.”<sup>48</sup> Under Canon 6, lawyers are obligated to inform every prospective client of any relation, interest, or connection to the parties or the facts of the representation.<sup>49</sup> Additionally, lawyers may not represent conflicting interests, “except by express consent of all concerned given after a full disclosure of the facts.”<sup>50</sup>

If one were to follow the requirements of Canon 6, the sole question of Brandeis’ representations would be whether he properly disclosed the conflicts to all of the clients, and whether he properly obtained their consent. But, the opponents argued that Brandeis

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<sup>43</sup> See generally Richard L. Abel, *AMERICAN LAWYERS* (1989).

<sup>44</sup> See James M. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2395 (2003).

<sup>45</sup> CANONS OF PROF’L ETHICS n.1 (AM. BAR ASS’N 1908), [http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons\\_Ethics.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf)

<sup>46</sup> *Id.* at n.8.

<sup>47</sup> *Id.* at Canons 1, 3, 8, 10, 13 n.4, 17-25, 28 n.6, 31 n.7 (explaining Canon 13 was amended in 1933, Canon 28 was amended in 1928, and Canon 31 was amended in 1937).

<sup>48</sup> *Id.* at Canon 6.

<sup>49</sup> *Id.*

<sup>50</sup> CANONS OF PROF’L ETHICS, *supra* note 45, at Canon 6.

never should have accepted the representations in the first place.<sup>51</sup> Thus, they were imposing a higher standard upon Brandeis in transactional matters than was contemplated through the guidance of Canon 6.

Scholars have argued that the drafters of the 1908 Canons were not as concerned with conflicts of interest because they sought to promote client autonomy. This rationale could explain the inclusion of only one canon to guide lawyer conduct.<sup>52</sup> However, this would support the view that Brandeis' conduct was consistent with the existing norms at the time. And, if the profession sought to impose a higher standard for conflicts of interest, it was the obligation of the drafters to detail how a lawyer should act in particular situations.

Subsequent amendments to the Canons included several provisions that arguably have bearing upon the type of conduct that was under examination in the confirmation hearings.<sup>53</sup> Canon 35 (Intermediaries), Canon 37 (Confidences of a Client) and Canon 44 (Withdrawal from Employment as Attorney or Counsel) could have been used by lawyers in similar situations.<sup>54</sup> However, one might suspect that the Brandeis confirmation hearings accentuated the divide in the profession as to how lawyers should draft the ethical codes.<sup>55</sup>

In the decades following the Brandeis confirmation hearings, the ruling members of the ABA realized that the Canons of Professional Ethics were insufficient to regulate the conduct of lawyers in the American legal profession.<sup>56</sup> One group sought to draft the codes in terms of broad aspirational guidelines and another group sought more concrete guidance and clarity in the specific provisions.<sup>57</sup> Less than a decade after the confirmation of Louis Brandeis, the ABA leadership appointed a committee to revise the

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<sup>51</sup> Helm, *supra* note 1, at 7.

<sup>52</sup> Altman, *supra* note 44, at 2472-74 (2003) (noting that the autonomy contained in the canons was consistent with Brandeis' views of independence and autonomy towards lawyering described by Clyde Spillenger in his Yale article).

<sup>53</sup> MODEL CODE OF PROF'L RESPONSIBILITY Canon Preface (AM. BAR ASS'N 1980).

<sup>54</sup> *Id.* at Canon 35, 37, 44.

<sup>55</sup> Helm, *supra* note 1, at 9.

<sup>56</sup> Dzienkowski, *Ethical Decisionmaking*, *supra* note 29, at 63.

<sup>57</sup> Dzienkowski, *Ethical Decisionmaking*, *supra* note 29, at 61-63.

Canons of Professional Ethics.<sup>58</sup> Four efforts to revise the Canons failed because of this schism in the ABA leadership.<sup>59</sup> I suggest that the Brandeis confirmation hearings had a significant influence on the debate and the arguments illustrated how reasonable minds differed as to the proper approach to drafting codes to regulate lawyer conduct. In 1964, Reporter John F. Sutton, Jr. proposed a compromise that included Canons, Ethical Considerations, and Disciplinary Rules.<sup>60</sup> This approach gave each group something in the new Model Code of Professional Responsibility.<sup>61</sup>

## V. THE OPEN ENDED NATURE OF CONFLICTS ALLEGATIONS IN LAWYERING

The opponents to the confirmation of Louis Brandeis brought twelve allegations against his conduct in the practice of law.<sup>62</sup> The core of most of these allegations involved a conflict of interest.<sup>63</sup> Until the Industrial Revolution, conflicts of interest had been examined primarily in the context of litigation representations.<sup>64</sup> Canon 6 of the Canons of Professional Ethics adopted a rather basic view of conflicts of interest.<sup>65</sup> First, at the outset when a prospective client is deciding whether to retain a particular lawyer, the lawyer is required “at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy . . . .”<sup>66</sup> The absolute duty to disclose *all* information to the parties placed a significant burden

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<sup>58</sup> Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1, 2 (1970).

<sup>59</sup> *Id.* at 3-5 (describing the four efforts to revise the Canons).

<sup>60</sup> See John F. Sutton, *Re-Evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint*, 33 TENN. L. REV. 132, 134 (1966) (viewing that the Code needed aspirational standards that set forth core principles); See *id.* at 137-39 (believing that a code for regulating lawyers needed more than just bright-line rules).

<sup>61</sup> MODEL CODE OF PROF'L RESPONSIBILITY (AM. BAR ASS'N 1969); see generally, John F. Sutton, Jr., *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255 (1970) (discussing the history of the 1969 Model Code of Professional Responsibility).

<sup>62</sup> See Frank, *supra* note 1, at 685 (examining all of the charges brought against Brandeis).

<sup>63</sup> See Frank, *supra* note 1, at 692, 694.

<sup>64</sup> See Swaine, *supra* note 10, at 89, 171 (explaining the evolution of lawyering during the industrialization period in America).

<sup>65</sup> MODEL CODE OF PROF'L RESPONSIBILITY Canon 6 (AM. BAR ASS'N 1983).

<sup>66</sup> *Id.*

upon the lawyer.<sup>67</sup> Second, Canon 6 prohibits lawyers from representing conflicting interests “except by express consent of all concerned given after a full disclosure of all the facts.”<sup>68</sup> Finally, Canon 6 attempts to define the prohibition against conflicts of interest as a duty to represent clients with “undivided loyalty and not to divulge his secrets or confidences” because of loyalties undertaken to represent a new client.<sup>69</sup> An examination of two allegations made against Brandeis presented open-ended conflict of interest questions for the lawyer.<sup>70</sup>

In the Lennox bankruptcy representation, the creditors of Lennox sought to hire Brandeis to help resolve a crisis in the financial situation of the company.<sup>71</sup> Brandeis accepted the matter because he was convinced by his clients that the creditor and debtor had a common interest to work out the crisis.<sup>72</sup> Apparently, Brandeis did not clarify whether he represented the Lennox Company or Mr. Lennox, and, if he did represent them, whether there was a limitation on the scope of the representation.<sup>73</sup> After examining the situation, Brandeis concluded that a work out of the financial crisis was not possible, and, therefore, he urged the company to transfer assets to a trust for the benefit of the creditors.<sup>74</sup> Eventually, the company

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See, e.g.*, Frank, *supra* note 1, at 694-98, 697 n.44, 700-02; Helm, *supra* note 1, at 5-6, 9, 11.

<sup>71</sup> Frank, *supra* note 1, at 699-700; Spillenger, *supra* note 1, at 1505.

<sup>72</sup> Morris Weisman, *Brandeis and the Lennox Case*, 47 *COM. L.J.* 36, 38 (1942). The allegations, however sought to ascribe a financial motive for accepting the representations:

That he took employment from a client, advised him to make an assignment for the benefit of his creditors, had his own partner appointed the assignee and afterwards denied that he had ever been employed by the client. That at the time he took the employment and gave the advice he was the attorney of one of the largest creditors of the client and for whose benefit the assignment was made, and in connection with the question whether the assignment should be made or not, was advising another of the large creditors. That he later repudiated his employment by his client and prosecuted a petition in bankruptcy against him alleging, as an act of bankruptcy, the making of the assignment that he himself had advised him to make. Out of this course of conduct he made for himself and his firm fees amounting to \$43,852.

<sup>3</sup> *Hearings*, *supra* note 3, at 298.

<sup>73</sup> Frank, *supra* note 1, at 700 (explaining the case by pointing out that Lennox could not have reasonably viewed Brandeis as representing his interests while also indicating that Lennox sought to conceal assets and Brandeis would not let him do so).

<sup>74</sup> Frank, *supra* note 1, at 699-700.

entered bankruptcy.<sup>75</sup> The core of the complaint against Brandeis was that he represented conflicting interests in seeking to work out the financial crisis.<sup>76</sup> In defense of Brandeis, the law of representing unintended clients when a lawyer commenced a multiple client representation was not well developed.<sup>77</sup> And, one could argue that his exploratory work on the financial situation did not rise to the level of representing the Lennox interests.<sup>78</sup>

In another matter involving an ethics allegation against Brandeis, the Warren trust representation, he represented the Warren Company, a paper mill that was owned by the family of a law partner.<sup>79</sup> Brandeis helped place the assets of the family into a trust and then proceeded to lease out some of the property to several family members.<sup>80</sup> When a lawsuit arose to invalidate the lease, Brandeis defended the lease in the lawsuit on behalf of the lessees.<sup>81</sup> Eventually, the case was dropped and other members of the family bought out the beneficiary.<sup>82</sup> The core of the complaint against Brandeis was that he should have declined to prepare a lease of the property from the family trust to family members, and also should have declined to represent the beneficiary in seeking to uphold the lease.<sup>83</sup> At that time, Brandeis viewed his representation broadly as including the family, and also including the trust and the members of the trust.<sup>84</sup> The ethical rules of lawyering at the time did not provide guidance for lawyers who were confronted with the situation that Brandeis faced.<sup>85</sup>

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<sup>75</sup> Frank, *supra* note 1, at 700.

<sup>76</sup> Frank, *supra* note 1, at 700. Such a claim would only be valid if Brandeis had undertaken a representation of both creditor and debtor. *Id.* at 701.

<sup>77</sup> Frank, *supra* note 1, at 701-02; Spillenger, *supra* note 1, at 1488-89.

<sup>78</sup> Although this is a plausible explanation, today a lawyer in a similar situation or case would be sure to warn the non-client in a writing that the lawyer did not represent the non-client's interests. This would have prevented Lennox from later claiming that Brandeis was representing his interests. Frank, *supra* note 1, at 702.

<sup>79</sup> Frank, *supra* note 1, at 694.

<sup>80</sup> Frank, *supra* note 1, at 694.

<sup>81</sup> Frank, *supra* note 1, at 694-95.

<sup>82</sup> Frank, *supra* note 1, at 695.

<sup>83</sup> Frank, *supra* note 1, at 695; 3 *Hearings*, *supra* note 3, at 298-99 (quoting “[t]hat he for a long time represented and collected fees from two clients whose interests were diametrically opposed to each other and when they, later, went to law over those same conflicting interests he took employment for one of them against the other”).

<sup>84</sup> Frank, *supra* note 1, at 694-96.

<sup>85</sup> Frank, *supra* note 1, at 697-98.

The Senate hearings on the various transactions illustrated how difficult it is to guide lawyers on specific conflicts of interest.<sup>86</sup> The language of Canon 6 is too absolute and without much subtle nuance.<sup>87</sup> No lawyer in practice can avoid all conflicts of interest. The rules must identify conflicts that rise to the level of requiring client consent and should identify the manner in which lawyers must analyze those conflicts. Subsequent developments in the Model Code and the Model Rules improved upon this guidance in the rules of professional responsibility.<sup>88</sup> Correspondingly, the drafters of these codes of conduct were clearly aware of the questions that were raised in the Brandeis hearings and they sought to address lawyering in the transaction context.<sup>89</sup>

## VI. DIFFERENT VIEWS OF BRANDEIS' CONCEPTION OF LAWYERING FOR MULTIPLE CLIENTS

The impact Louis Brandeis had upon the modern day ethical rules requires an examination of his multiple client representations. A number of scholars have examined the different representations that raised ethical concerns and the justifications offered by the supporters during the Louis Brandeis hearings for Justice of the Supreme Court.<sup>90</sup> It is important to remember Brandeis himself never

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<sup>86</sup> 1 *Hearings*, *supra* note 3, at 277-79.

<sup>87</sup> CANONS OF PROF'L ETHICS, *supra* note 45, at Canon 6.

<sup>88</sup> MODEL RULES OF PROF'L CONDUCT R. 2.2 (AM. BAR ASS'N 1982).

<sup>89</sup> Alysa C. Rollock, *Professional Responsibility and Organization of the Family Business: The Lawyer as Intermediary*, 73 IND. L.J. 567, 578 (1998) (quoting "In 1983, in large part due to the efforts of Geoffrey Hazard, Reporter to the Kutak Commission, which was responsible for drafting the Model Rules, the American Bar Association incorporated Brandeis's concept of 'lawyer for the situation' into Model Rule 2.2.>").

<sup>90</sup> See, e.g., Dzienkowski, *Lawyers as Intermediaries*, *supra* note 2, at 755-57. As Professor Hazard described,

The transactions complained of included the following: First, Brandeis had at one time represented one party in a transaction, [then] later represented someone else in a way that impinged on that transaction. Second, he had acted in situations where those he served had conflicting interests, for example by putting together the bargain between parties to a business deal. Third, he had acted for a family business and continued so to act after a falling out among the family required reorganization of the business arrangement. Fourth, over a course of several years he had mediated and adjusted interests of the owners and creditors of a business in such a way as to keep the business from foundering.

HAZARD, PRACTICE OF LAW, *supra* note 1, at 60.

confirmed or rejected these defenses.<sup>91</sup> However, these defenses continue to occupy a prominent role in the jurisprudence of Brandeis' concept of lawyering for multiple clients.

John Frank, a leading lawyer, viewed the Brandeis conduct regarding the representation of multiple clients to reflect a lawyer who sought to solve client problems and yield to client pressures.<sup>92</sup> In no uncertain terms, Frank viewed this approach of representing multiple clients too dangerous and would allow for individuals to second guess the lawyer's role in the matter.<sup>93</sup> No matter how tempting, lawyers should never act as "counsel for a situation" because the risks are too high.<sup>94</sup>

Professors Geoffrey Hazard and Thomas Shaffer adopted a romanticized view of Brandeis' lawyering for multiple clients.<sup>95</sup> Hazard was attracted by the notion that clients often want to have one lawyer represent all of their interests.<sup>96</sup> In many cases this perspective on lawyering produces the best result for all of the clients. Hazard first wrote about this in his book, *Ethics in the Practice of Law*, but later implemented this type of lawyering in Model Rule 2.2, the Lawyer as Intermediary.<sup>97</sup> The basic notion was that lawyers can represent the best interests of all of the parties in seeking to create a transaction or resolve a dispute.<sup>98</sup> If the effort fails, each of the parties can hire independent lawyers to represent their interests.<sup>99</sup> Professor Thomas Shaffer relied upon his religious teachings to view lawyering in the family context as perfect for

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<sup>91</sup> Morris Weisman, *supra* note 72, at 37.

During the investigation of his record and character, and throughout the attack, Brandeis made no effort to defend himself. Not a single word of complaint came from him. Certain that he was free of legal or moral wrong, he waited in silence, with sorrow in his heart for his traducers. In him were deep wells of courage, the product of highest morality and intellectual loftiness, of a rigid self-imposed discipline, and restraint. For such a man to be charged with the breach of the most sacred canon of professional ethics, disloyalty to a client, for a few pieces of silver, was irony indeed.

Morris Weisman, *supra* note 72, at 37.

<sup>92</sup> Frank, *supra* note 1, at 701-02.

<sup>93</sup> Frank, *supra* note 1, at 708.

<sup>94</sup> Frank, *supra* note 1, at 708.

<sup>95</sup> HAZARD, PRACTICE OF LAW, *supra* note 1, at 64-65.

<sup>96</sup> HAZARD, PRACTICE OF LAW, *supra* note 1, at 63-64.

<sup>97</sup> See generally HAZARD, PRACTICE OF LAW, *supra* note 1. See also MODEL RULES OF PROF'L CONDUCT R. 2.2 (AM. BAR ASS'N 1982); Rollock, *supra* note 89, at 578.

<sup>98</sup> HAZARD, PRACTICE OF LAW, *supra* note 1, at 64-67.

<sup>99</sup> HAZARD, PRACTICE OF LAW, *supra* note 1, at 33.

lawyering for the situation.<sup>100</sup> He embraced the view that the collective family interest was often in the best interests of the individuals and that lawyers should have the freedom to offer legal services to the family unit.<sup>101</sup> The idea that each member of a family may need to hire a separate lawyer was completely antithetical to the interests of a family unit.<sup>102</sup>

Professor Clyde Spillenger had a slightly less charitable view of Brandeis' conception of lawyering.<sup>103</sup> Spillenger's historical work led him to conclude that Brandeis believed in imposing his views upon clients for their benefit.<sup>104</sup> Brandeis' independence and fidelity to other interests caused him to limit client voice.<sup>105</sup> This more ambivalent view of Brandeis' lawyering explains his representation of multiple clients through this prism of a controlling lawyer who imposed his views upon clients.

The romanticized perspective of lawyering for the situation does offer an attractive explanation for what Brandeis did in his law practice.<sup>106</sup> However, it is unlikely that he meant to create a different form of lawyering when he represented multiple clients. Instead, he took his highly skilled legal mind and sought to address problems in a methodical way. In my view, Brandeis believed that clients benefited when lawyers could offer their skills obtained as an attorney. In my opinion, Brandeis' actions on behalf of multiple clients was in response to client choice, and included a client decision to trust his judgment, as their attorney, in addressing a legal problem.

Unfortunately, in today's litigious climate, Model Rule 2.2 had many interpretive issues<sup>107</sup> and was ultimately removed by the ABA House of Delegates in 2002.<sup>108</sup> The drafters placed many of the concepts from Rule 2.2 in the comments of the general conflicts of

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<sup>100</sup> Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 980 (1987). Professor Shaffer has argued that the Warren family representation is a perfect illustration of Brandeis' "pattern of thought (and of practice)" for implementing the counsel for the situation role. *Id.* (according to Shaffer, Brandeis rejected the notion of only representing individuals for the notion that lawyers can represent and value human harmony).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 981.

<sup>103</sup> Spillenger, *supra* note 3, at 1449-51.

<sup>104</sup> Spillenger, *supra* note 3, at 1509.

<sup>105</sup> Spillenger, *supra* note 3, at 1449.

<sup>106</sup> Spillenger, *supra* note 3, at 1502-04.

<sup>107</sup> See Dzienkowski, *Lawyers as Intermediaries*, *supra* note 2, at 771-85.

<sup>108</sup> See MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2002).



interest rule, which is Model Rule 1.7.<sup>109</sup> By referring to multiple client representation in the comments to the general conflicts of interest rules, the drafters left open in the text of the rule for lawyers to continue to represent multiple clients in forming transactions and resolving disputes. Clients continue to request one lawyer to represent multiple parties in forming a transaction or resolving a dispute.<sup>110</sup> And, lawyers continue to offer services similar to the work that Brandeis offered his multiple clients.<sup>111</sup> Brandeis brought collaborative representation of multiple clients into the forefront of the legal profession, and the profession continues to grapple with the proper manner to deliver such services.

## VII. CONCLUSION: CONTRIBUTIONS OF BRANDEIS TO THE MODERN LAW OF LAWYERING

Without doubt, the charges leveled against Louis Brandeis in the confirmation hearings were motivated by political hatred, antisemitism, and economic protectionism.<sup>112</sup> But this unsuccessful, yet illegitimate, attack may have had an unintended but significant influence upon the development of the law of lawyering.

The Senate debate placed a focus upon the importance of ethical conduct for a leading lawyer under consideration for a seat on the bench of the United States Supreme Court at a time when the ABA and multiple states were adopting codes of conduct for attorneys.<sup>113</sup> The ABA realized that the promulgation of codes of conduct was an important component of its quest for self-regulation of the legal profession.<sup>114</sup> However, the debate over the conduct of a prominent lawyer in the public eye raised the stakes for those who were drafting ethics codes. Ethics codes needed to provide lawyers with guidance on how to address conflicts of interest in transactional practice to avoid the types of allegations that were made against Louis Brandeis.

The allegations were set in the context of conflicts of interest in non-litigation, which illustrated the difficulty of drafting codes to

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<sup>109</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. (AM. BAR ASS'N 2002).

<sup>110</sup> Dzienkowski, *Lawyers as Intermediaries*, *supra* note 2, at 761.

<sup>111</sup> Dzienkowski, *Lawyers as Intermediaries*, *supra* note 2, at 776, 778.

<sup>112</sup> Frank, *supra* note 1, at 683-84.

<sup>113</sup> Frank, *supra* note 1, at 685.

<sup>114</sup> See Abel, *supra* note 43, at 142 (examining the role of promulgating ethics codes in the quest for self-regulation).

address this area of legal ethics. This obstacle may have contributed to the development of two different approaches to drafting ethics codes – those who sought to focus on aspirational guidelines and those who wanted more detailed guidance.<sup>115</sup>

The confirmation hearings also illustrated the prevalence and importance of multiple client representation in business practice. The inadequacy of the 1908 Canons of Professional Ethics to address Brandeis' conduct further demonstrated the need for the bar regulators to pay closer attention to non-litigation practice.<sup>116</sup>

Louis Brandeis introduced the concept of intermediation into the representation of multiple clients in transactions or dispute resolution.<sup>117</sup> This type of law practice framed a century long debate involving client desire and independent lawyer judgment in resolving the legal issues in a group setting. The debate over the proper role of a lawyer continues today and we still recount the ethical dilemmas faced by Louis Brandeis in his law practice. The debate over the propriety of the conduct of Louis Brandeis has contributed significantly to shaping the modern law of lawyering.

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<sup>115</sup> William T. Ellis & Billie J. Ellis, *Beyond the Model Rules: Aristotle, Lincoln, and the Lawyer's Aspirational Drive to an Ethical Practice*, 26 T.M. COOLEY L. REV. 591, 597-98 (2009).

<sup>116</sup> Dzienkowski, *Lawyers as Intermediaries*, *supra* note 2, at 757-58.

<sup>117</sup> Dzienkowski, *Lawyers as Intermediaries*, *supra* note 2, at 748-49.