TEACHING LEGAL PROFESSION: ETHICS UNDER THE MODEL RULES

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INTRODUCTION

How and why does one deal with questions of ethics[1] in a course on the law governing lawyers? Most of the discussion in the course focuses on the applicable rules governing the conduct of lawyers. Those rules can be criticized in terms of the harm they allow to flow from the representation of a client, in the light of the social benefits purportedly furthered by those rules. The student might even be asked to discuss the possibility of civil disobedience in the interests of justice. But some of the applicable rules address the student's ethics directly. This is because in application the rules might be ambiguous as to what they require or allow the lawyer to do, and because some of the rules even give the lawyer discretion to act to the client's disadvantage. When ethics is discussed, it is not discussed as instruction in ethics, but rather in terms of a student's own sense—one already developed through enculturation and socialization—of what a person should do under the circumstances and how the decision about what to do is tied up with the social circumstances in which the agent acts. This essay focuses on how to approach the ethical questions that arise under these permissive rules. One such question might be whether those permissive rules are actually permissive or whether conduct to the client's disadvantage allowed by such a rule is not in fact, under

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1. Or "morals," if you wish. The two terms are often used interchangeably. Among lawyers and other regulated professionals, "ethics" is often taken to mean the positive rules governing conduct by those professionals by virtue of their profession being state-regulated. "Morals," on the other hand, cover what a lawyer should do, all things considered, or how the lawyer should live, including norms of conduct that relate to the relationship between a person and a deity. I use the term "ethics" to refer to norms governing conduct in society. The term might also be used to describe what a virtuous person would do under the circumstances. What a person should do can refer to conduct relative to animals, if one includes them as proper objects of social concern, and to conduct relative to future generations (e.g., conduct relating to the environment and the consumption of non-renewable natural resources), depending on how one understands what "society" includes.

the circumstances, mandatory. Another such question might be whether the lawyer can waive the opportunity to take advantage of the rule by agreement with the client or otherwise simply ignore that rule's permission.

Ethics is presented as role differentiated, rather than the ethics of the "ordinary person." This position is set out in Part II.A. of the essay. The importance to the lawyer's ethics of the duty of loyalty is set out in Part II.B. The largest part of this essay deals with the relatively little-discussed problem of what the lawyer does once this duty of loyalty is set aside by the applicable rules. This part begins at Part II.C. and is developed in Part II.D.

I. THE DIFFERENCE OF LEGAL PROFESSION

The course in the profession of law is importantly different from other law school courses taught three hours a week to second-year and third-year law students.[2] For the most part, however, that difference is not apparent. In terms of training in legal skills, a course in the legal profession is not different from other upper-division courses when it comes to the intellectual and rhetorical skills that are developed.[3] Legal profession can be taught profitably as a classroom course, in a seminar, in a clinic, or in a pseudo-clinic (e.g., negotiation, trial practice, or client counseling in which there is no actual client).[4] As is the case in some upper-division courses, this course may require some knowledge of material taught in courses, many of which most of the students have not yet taken.[5] It also refers to areas of knowledge to which most of the students have not been exposed to any substantial degree.[6]

2. At St. Louis University, the course, called "Legal Profession," is taken by second-year students with only a sprinkling of third-year students.

3. It is a useful vehicle to teach the drafting and interpretation of written law, analysis and solution of legal problems, and client counseling. The usual arguments as to the best way to get the material to the students—Socratic dialogue, lecture, question-and-answer, the assignment of a paper or papers, etc.—apply here as they do to any other course.

4. Or, it might be taught as part of several courses, in which the legal and ethical problems of lawyers are raised in the context of advising clients. *See* DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 4–5 (2d ed. 1998).

5. Depending on the semester, many of the students have had or are currently taking Business Associations, so they are somewhat conversant with the law of agency and the law of partnerships and corporations. This is similar for a course in the law of evidence. All of the students have had the Constitutional Law course that deals with federalism and separation of powers, but most have not yet had much exposure to the law of the First, Fourth, Fifth, Sixth, and Fourteenth Amendments. Nor have most of them had a course in securities regulation, criminal procedure, or jurisprudence. If the course is to include discussion of problems relating to representation of estates, corporations, or partnerships, the instructor will have to provide the missing information by lecture or additional reading assignments.

6. These areas include: ethics, moral philosophy, or the social sciences, other than perhaps economics. Many instructors are also not well trained in any such fields before coming to this course.

A course about the legal profession differs from other courses in two important ways. First, this is a course in the rules that will be applicable to the students themselves when (if) they begin to practice. They are encouraged to take this course personally. Second, the course includes a substantial reference to ethics, in part because some of the law governing the practice of law makes room for discretion which can be exercised, at times, to the detriment of the client! The course is about the students themselves if they go on to practice law.

The first difference, the course's relevance to the student's own future life as a lawyer, should make the course of more than ordinary importance to the future practicing lawyer. Because it is about the student's own future life as a lawyer, it should be the most important course to the student who expects to practice law. Yet, this does not appear always to be the case. To be sure, there is the risk of bar sanctions and loss of license for misconduct and perhaps court-imposed sanctions, and that should get the student's attention. But that threat does not seem to fix the student's mind and is softened even more by some of the students' experiences over the preceding summer in law offices.

As to the second difference, why ethics? The positivistic bias of most law schools makes ethics seem to be a strange kind of thing for a lawyer to study. There's law and there's morals, and while the first can be discussed and dealt with in law school, the second is too difficult for the law student or the lawyer to deal with. But in a course in the practice of law, students should constantly face the question, "What should I do in this case?" That question might be dealt with by reference to rules of law, except when the rule is unclear and choices must be made between alternatives, or when the rule itself gives the lawyer a chance to exercise discretion, even to the disadvantage of the client. This referral of the student to her own present and future ethics seems to weaken the intellectual attraction of the course for students, even if the ethics of lawyers is an acceptable subject for study. Most of the students seem to have already decided that "ethics" is a matter of ordinary sense. In a way, the students' view is justified. What students (and the rest of us) know about proper conduct comes from a long period of socialization during which they became acquainted with those cultural norms that have been worked out to regulate social life. Figuring out what to do is not a matter of proceeding from general value statements to rules of conduct to applications; it is a matter of taking what one knows about how to act in particular cases and reasoning from that knowledge of ordinary rules to determine what to do in this case. When I engage students (and others) in ethical discourse, that is exactly how they think about what one should do in particular circumstances.[7] Rarely do I hear any

7. One of these circumstances is the position of the agent (e.g., lawyer) in the social system and another is the relationship that a person in that position has with the person or persons affected by the lawyer's conduct. One of the things that the student should take away from this

mention of categorical imperatives, utility or cultural values, or religious teaching about the propriety of goals or the resolution of dispute. Rarely do I hear a student refer to what a virtuous person would do, although there are often vacuous references to "professionalism," which could simply be a matter of etiquette.[8]

The student's thinking about what to do as a lawyer is made to appear to be relatively simple by the student's initial understanding of the lawyer's roles in the adversary system—defined in part by the lawyer's duty of loyal and enthusiastic aid to clients' pursuit of their own ends.[9] That takes care of a great deal for the student, so long as the student's personal interests as a future lawyer are not involved in the discussion. The context of the adversary system seems to simplify the lawyer's professional life because, to the student, the client's interests seem always to trump. There are rules that limit the duty of loyalty, of course, but those rules can be read in terms of the primary importance of a lawyer's pursuit of success for the client. For example, the student may not help a client violate law,[10] but the student already knows how to interpret the law in a way most likely to overcome limitations on the achievement of the client's goals.[11] Much of this verbal positioning is reinforced by a strong desire for personal success. Hence any reading of a rule that enhances the adversarial nature of the lawyer's job by reducing its complications, the more attractive that reading seems to be. The student's acceptance of a strong duty of loyalty to the client (as opposed to simple goal orientation) can be tested in cases in which serving the client involves a possible detriment to the lawyer's own interests,[12] including the concern the

course is the danger that the role-required conduct may affect the person when in another position (e.g., parent, director, legislator) and other relationships.

8. I don't do a great deal with "professionalism." That is, in part, because of my doubts as to the practical utility of the concept as it is developed. On the other hand, the instructor might want to develop the theme of the virtuous lawyer and pose the question "How should I live?" rather than "What should I do?" The former question is addressed to the virtuous lawyer; the latter to the lawyer concerned with rules and principles. The usual focus of the course is on rules and principles of right conduct, which fits into the student's own thinking about ethics. Can one teach virtue? One can certainly teach about it in the sense that one can ask the student what kind of a person would do X in these circumstances, whether or not X is conduct required by the applicable rules. For some informative material on virtue ethics in bite-sized form, see generally HOW SHOULD ONE LIVE? ESSAYS ON THE VIRTUES (Roger Crisp ed., Oxford Univ. Press 2003).

9. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2007).

10. *See id.* at R. 1.2(d).

11. *See* Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995).

12. I rarely find students who (even with prompting) are taken aback by the "self defense" rule of Model Rule 1.6(b)(2):

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between

student may have with the avoidance of (unnecessary or unreasonable) harm to others.

II. ETHICS UNDER THE RULES

How should the instructor approach questions of ethics? Can the instructor speak coherently about ethics in general or about the ethics of the ordinary person? In general, all will likely agree that ethics includes at least a prohibition on doing harm to others. Also, most will agree that, ordinarily, one ought to treat all as equally entitled to concern and aid.[13] Any departure from such general norms should be justified or (at least) excused, if it is to be accepted as the act of an ethical person. But, what of the claim by lawyers that they must be allowed (indeed, are often required) to do things to others that "ordinary persons" would find unethical? Doesn't that claim mark lawyers as unethical persons when they prefer the goals of their clients to the welfare of others and harm others for their clients' sakes?

A. Ethics is Role-Differentiated

Near the beginning of the course, the lawyer's normative universe should be considered in the light of Professor Wasserstrom's famous article on role differentiation and the ethics of lawyers.[14] The usual opposition suggested by

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> the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client . . . .

MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2007). Additionally, very few are bothered by the very broad reading given "reasonably necessary" under the guidance of *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190 (2d Cir. 1974). For an analysis of the self-defense exception, see Jennifer Cunningham, *Eliminating "Backdoor" Access to Client Confidences: Restricting the Self-Defense Exception to the Attorney-Client Privilege*, 65 N.Y.U. L. REV. 992 (1990).

13. The principles of "do no harm" and "treat all equally" are limited, of course, by the problem of whether one can require heroic altruism of a person. My position in class and in general is that one is not expected to be heroic. The second proposition—that one should treat all persons equally—is controversial in its plain statement, e.g., in a culture that is strictly stratified on the basis of birth or tribe, and is usually qualified by reference to "similar cases." For an interesting and short discussion of "equality," see BERNARD WILLIAMS, IN THE BEGINNING WAS THE DEED chs. 8–9 (2005).

14. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975) (arguing that all persons are subject to the ordinary requirements of ethics unless some differentiation is justified by the role of the agent, and that the agent claiming that differentiation has the burden of proof with respect to the desirability of the conduct in question). Therefore, role differentiation is really an exception to the general norms applicable to all persons. However, it is not clear from the article what kinds of arguments would carry the burden in favor of role differentiation. *See also* ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 2–8 (1980). Goldman distinguishes between strong and weak role differentiation, associates the former with professional role differentiation (physicians and

Professor Wasserstrom and other commentators is between what the lawyer does and what the ordinary person should do under similar circumstances.[15] I think this approach is misleading because it is too simple; it does not take account of the problems of persons acting in various relationships in the work-a-day world.[16] That is, there is no "ordinary person" acting as such in a social system sufficiently complex to include lawyers.[17] To be sure, we learn what to do in general in generally-stated propositions; we learn about what to do in the various occasions in which we interact with others. As we learn how to live in society, we ingest broad concepts like "play fair," "don't harm," and "treat people equally," but we understand them in terms of what we are doing at the time as we are encumbered by the expectations attached to particular positions and relationships in the social system.

A person who is a lawyer also holds other positions in the social system. She may be a parent, a scout leader, a member of a religious organization's governing board, a holder of political office, a business partner, a teacher, etc. In each such position, she has many different relationships with others in the social system, to each of which is attached certain expectations on both sides of that relationship. So, a parent has a particular relationship with each child, with a spouse, with the children's teachers, and with others who somehow are related to the child. A law professor has a role with respect to each student, with respect to colleagues, administrators, perhaps donors, and faculty from

lawyers), and asserts and argues that strong role differentiation must be justified by showing that it is: (a) "necessary to the fulfillment of [the relevant professional] function" and (b) "justified in terms of the deeper moral teleology of [the] profession. It must be shown that some central institutional value will fail to be realized without the limitation or augmentation of [the professional's] authority or [moral] responsibility, and that the realization of this value is worth the moral price paid for strong role differentiation." *Id.* at 7; *see id.* at 31–33.

15. *See* Wasserstrom, *supra* note 14, at 5.

16. The following discussion of the lawyer's roles follows generally ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 422–34 (1968 Enlarged Edition). Merton takes the position of "Lawyer" or "Parent" to be a "status," one of a cluster of statuses. *Id.* at 422–24. Each status has a "role set," which is a "complement of role relationships which persons have by virtue of occupying a particular social status. *Id.* at 423. The utility of "role" to sociology is attacked in Margaret A. Coulson, *Role: A Redundant Concept in Sociology? Some Educational Considerations*, *in* ROLE 107 (J.A. Jackson ed., 1972). I agree that my reference to the role relationship between the lawyer and third persons affected by the representation, but not in direct interaction with the lawyer, is a stretch.

17. Role differentiation as a justification for particular conduct is controversial. Strong opposition to role differentiation is found, for example, in the writings of David Luban. *See, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 104–27 (1988) (arguing that there is something left of the individual human being after accounting for role, and that both the individual and the ethics of role are subject to universally valid norms of conduct). For instance, compare Merton's analysis on the interaction between cultural norms (Luban's universally valid norms of conduct?) with social norms that guide conduct of persons occupying roles. *See infra* note 21.

other schools. Each of these roles carries its own expectations on both sides of the relationship. None of these relationships can function in the social system without some "reasonableness"-type modifications of general ethical principles attached to conduct. So, the general principle of equality among people in right and desert has to be modified in order to accommodate the preference that one friend gives the other friend over all others.[18] There can be no effective duty of loyalty without some modification of this general principle of equality. Similarly, the principle of "do no harm" has to be modified to accommodate the actions of surgeons, policemen, soldiers, lawyers, and others who, in order to carry out their functions, must do harm and must treat people unequally.

Role differentiation in ethics then, is not really simply an exception from the general behavioral norms that regulate social life in the social system. Rather it is a feature of the web of norms that allow the socially useful provision of services to persons. So, with respect to his role as agent of a client, a lawyer's attention to the general norm of equality of all[19] is not the same as that of the parent with respect to child or spouse, or the policeman with respect to the enforcement of the criminal law, nor (again in the role of client's agent) is the lawyer's compliance with the norm of not harming others similar to that of the baker with respect to customers or creditors, or the judge with respect to fellow judges, parties, or clerks. At the level of application, the norms that guide conduct allow the provider of socially useful services to provide them. But to the extent that the costs[20] of allowing the lawyer these

18. A famous and controversial article by Professor Charles Fried tries to assimilate the status of lawyer to that of friend. *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976). See the caustic response in the form of a letter to the editors of the Yale Law Journal from Edward A. Dauer and Arthur Allen Leff, suggesting other moral analogs to the lawyer. *See* Edward A. Dauer & Arthur Allen Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573 (1977).

19. Consider the general ethical principle that all are equally entitled to equal treatment, and the lawyer's relationship to the general community with respect to the availability of legal assistance. The lawyer need not treat all applicants for the lawyer's services equally to the extent that time and resources allow at the time(s) the question of whether and how to provide services to a particular person comes up. If the question is whether to discontinue services, the answer is limited by Model Rule 1.16. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16 (2007). But if the question is taking on a new case, the lawyer may refuse to take any case and limit the degree to which the lawyer takes it for any reason. *See id.* at R. 1.2(c). The lawyer is not a public utility, required to provide service to all comers. Should that be the case? If it is the case, why is it? Part of the reason might be that a rule requiring the lawyer to serve all comers, subject to available resources, is not hard to evade by colorable claims concerning the lawyer's competence and available resources, and perhaps moral compunctions. Another part has to do with the strong value placed on individual autonomy in our culture.

20. For one way to calculate the costs and benefits see GOLDMAN *supra* note 14. It is also worth asking whether the most important voice in determining the costs and benefits of role-differentiated ethics is the practicing bar or whether a stronger voice should be given to the lay

variations exceed the social value of the service, they will be held "unreasonable" and the lawyer's conduct will be condemned as unethical. This should lead to modification of the lawyer's role-ethics in question.[21] Indeed, many social roles are unacceptable and the role-expectations unreasonable. Consider the role of a criminal with respect to the victims of a crime.

The many roles played by the lawyer as such and in other positions in society are not hermetically sealed as against each other, and the lawyer. The demands of roles and of role-partners can conflict. The lawyer's roles with respect to different clients, for example, can conflict in terms of attention given to each client's needs. Behavior and attitudes learned in a particular role may bleed over into the lawyer's conduct as parent or legislator or friend. Some roles' demands may be sufficiently at odds with the lawyer's view of herself that she will attempt to avoid as much apparent personal involvement in the act and its consequences as possible.[22] A lawyer representing a party bears a particular relationship as a disinterested and trusted participant to governmental and private agencies that hear claims and attempt to settle disputes. There are expectations of candor and conformity to relevant rules and norms governing conduct that may compete with the expectations of the client for zealous pursuit of the client's ends and the preservation of confidences. The lawyer also has relationships to persons, other than the client, affected by the representation and relationships with other lawyers who

public, for example, by doing away with the claim by some state supreme courts that the regulation of the bar is their exclusive province.

21. Merton insists on keeping cultural norms separate from social norms, the former including morals. MERTON, *supra* note 16, at 216. He warns that "[w]hen the cultural and the social structure are malintegrated, the first calling for behavior and attitudes which the second precludes, there is a strain toward the breakdown of the norms, toward normlessness" (anomie). *Id.* at 217. Such malintegration could also serve as a reason for changing the balance among the various roles of a lawyer in particular cases, as an exception to the duty of loyalty or confidentiality, perhaps in favor of third persons. Consider, for example, the adjustment to the duty of confidentiality in order to take into account the special value of human life and physical safety. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2007). Additionally, compare this with the less protective treatment of third persons' property interests. *Id.* at R. 1.6(b)(2), (3) & 4.1. That is, the person occupying a role is also conscious of limits imposed on that role's ethics by the more general requirements of the culture in which that role is executed. That awareness can produce tensions in the agent when the apparent requirements of the role seem to conflict with these general ethical limitations. This tension could lead to anomie but it also could lead to reformist tendencies or a decision, in particular cases, simply to ignore the rule applicable to the role insofar as it is in conflict with the relevant cultural norms.

22. *See* Chad Gordon, *Role and Value Development Across the Life-Cycle*, *in* ROLE 65, 69 (J.A. Jackson ed., 1972). The concept of Role Distance is used by Prof. Luban to argue that there is an authentic, extra-role person functioning as a moral agent in each person acting in the social system. *See* LUBAN, *supra* note 17, at 106–07 (referring to the work of the sociologist Erving Goffman).

practice in the lawyer's community, whether territorially or professionally defined. Like any other person in a community, a lawyer has a special relationship to that community which the execution of that person's roles affects. The Model Rules can be presented as a way in which the American Bar Association proposes that the bar regulate this competition among role partners for the lawyer's attention and concern, placing the greatest importance in the lawyer's loyalty-infused relationship with the individual client.

B. The Centrality of the Duty of Loyalty (How Does Ethics Come Up?)

If the student sees that a lawyer must choose between serving a client's purposes and doing what the lawyer thinks, under other circumstances (in other social contexts), would be the right thing to do, the student dealing with this choice can see two potential ways out of the dilemma. First, the student might take the radical relativist position and state that different people in different places see things differently, and all their views are equally valid. The student may therefore insist on a reading of the norm most likely to help the lawyer succeed for the client and resist any suggestions for changes in the applicable rule that may make it more difficult to succeed for the client. Second, the student might appeal to strong role differentiation and insist that things are different for lawyers, because of the lawyer's function as guarantor of the client's liberty and access to the legal system. The problem of radical relativism has already received good treatment, and I refer the reader to Bradley Wendel's lesson on how to respond to this position.[23] The problem of role differentiation is dealt with above.[24]

Most of the legal questions raised in the course can be discussed without asking the law student to refer to the student's ethics. Most questions about the exercise of discretion will be answered with reference to the lawyer's legal duty of loyalty to the client and the exceptions to that duty in particular cases. The remaining questions concerning determining the right thing to do come up in two ways:

(1) The Model Rules, and state variations of those rules, deserve classroom consideration not only as a source of lawyer-regulatory law, but also with respect to their consistency with the limits on tolerable variation of cultural norms of adequate respect for persons, fairness, and justice. Questions should be raised about the balance set by the Model Rules among the role-

23. *See* W. Bradley Wendel, *Ethics for Skeptics*, 26 J. LEGAL PROF. 165 (2002); W. Bradley Wendel, *Teaching Ethics in an Atmosphere of Skepticism and Relativism*, 36 U.S.F. L. Rev. 711 (2002). As to the philosophical and practical problems raised when one denies a universally true ethics, but nevertheless takes ethics seriously, and must therefore deal with relativism, see BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 120–31 (1985).

24. *See supra* Part II.A.

partners[25] competing for the lawyer's attention and concern.[26] Do the Rules strike the optimum balance given the harm done as a result? The student discovers that the third person, likely to be affected adversely by the representation, is provided thin protection against the lawyer's zeal.[27] Agencies of government are given protection against the overzealous representation of a client, with respect to assuring the legitimacy and efficiency of their operations.[28] Respect for law is enjoined, albeit gingerly.[29] There is even a general prohibition on conduct that is inconsistent with that of a person of proper character (a nod to virtue ethics?),[30] and a mysterious reference to a lawyer's option not to take extreme measures for the client's sake in the first comment to Rule 1.3.[31] Here, the student is asked to look at the relevant rules from the point of view of a lawyer and from the point of view of another person (whose place in the social system might match one of the positions that might be occupied by the student).[32] Can a lawyer adequately critique the

25. The Model Rules recognize different functional relationships between the lawyer and others. *See* MODEL RULES OF PROF'L CONDUCT pmbl. (2007).

26. It is useful to compare the variations in various adopted versions of the Model Rules, for different judgments as to whether different third party claims on the lawyer's concern are tolerable in terms of the efficient performance of the lawyer's job for the client.

27. The lawyer's responsibilities as an evaluator for third persons is dealt with in Rule 2.3, including the hesitantly-developed law of third-party liability for failure to exercise proper care in the writing of opinions and similar activity directed at third persons. MODEL RULES OF PROF'L CONDUCT R. 2.3 (2007); *see id.* at R. 3.4 (pertaining to fairness in adversarial proceedings); *id.* at R. 4.1 (pertaining to making false statements, and, subject to the duty of confidentiality, preventing the effective commission of a crime or fraud by the client); *id.* at R. 4.2 (pertaining to protecting the attorney-client relationship of opponents); *id.* at R. 4.3 (pertaining to the treatment of unrepresented persons); *id.* at R. 4.4 (prohibiting harassment of third parties and violation of third parties' legal rights in the course of obtaining evidence); *see also id.* at R. 1.6(b)(1)–(3), 1.13(c) (providing exceptions to the duty of confidentiality).

28. *Id.* at R. 3.1–3.8. Also consider Model Rule 3.9 with respect to appearances in nonadjudicative proceedings. *Id.* at R. 3.9.

29. The lawyer may not "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." *Id.* at R. 8.4(b). Nor may a lawyer council or assist a client in "conduct that the lawyer knows is criminal or fraudulent," nor "knowingly assist a judge or judicial officer in conduct that is in violation of applicable rules of judicial conduct or other law." *Id.* at R. 1.2(d), 8.4(f).

30. *Id.* at R. 8.4.

31. *Id.* at R. 1.3 cmt. 1.

> A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

Id. For speculation as to what this means, see *infra* Appendix.

32. As noted earlier, once role-differentiated ethics bump up against the limits set by generally applicable cultural norms of conduct, the resulting dissonance will result in (a) a

rules that direct the lawyer's conduct and purport to justify or excuse the lawyer's activity's social costs?[33]

Subject only to the cryptic comment to Rule 1.3, noted above, the duty of loyalty seems to be peremptory, except as it is clearly made inapplicable by the rules themselves. The lawyer is bound to serve the client with loyalty to seek the best and most efficient path to the client's goals. This means that the lawyer has no options, no way to other-favoring conduct (which would come at the expense of the client), but must choose between loyalty and disloyalty. For example, if a lawyer receives an inadvertently sent fax or document and that fax or document reveals information that was confidential and thereby protected from disclosure to the lawyer or her client, then to the extent that the rules allow it, the lawyer must read and use the information in the document to the client's advantage.[34] This, even though the lawyer thinks it is somehow unfair, perhaps wrong, to peek and tell.[35]

rejection of cultural norms by the person faced with the conflict or (b) a revision of the rules to keep them within the limits set by the cultural norms, either informally, by the lawyer's conduct contrary to the rule, or formally, by official interpretation or actual revision of the relevant rule. *See supra* notes 20–21.

33. *See supra* note 14 (discussing justifications for role differentiated ethics in particular cases in which the lawyer's role-directed conduct threatens or injures others).

34. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 2 (2007).

35. However, consider the grant of discretion in Comment 3 to Model Rule 4.4, which states that whether to return a mis-sent document unread is a decision that is "a matter of professional judgment ordinarily reserved to the lawyer." *Id.* at R. 4.4 cmt. 3. The reference to Model Rules 1.2 and 1.4 is odd, as they seem to deny, rather than grant, the lawyer discretion that is not subject to the client's veto. *See also supra* note 30. Moreover, ordinary agency law should give the principal a veto with respect to this question. One function of the duty of loyalty, after all, is to reduce the client's agency costs of checking on the lawyer's diligence and faithfulness to the principal. To the extent that that duty (and the concomitant duty of confidentiality) is weakened, so is the value of the lawyer's service to the client. It is unlikely that the possibility of inadvertent disclosure seriously reduces the value to the client of the duty of confidentiality. As to inadvertent disclosures, see Andrew M. Perlman, *Untangling Ethics Theory From Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767 (2005). The ABA Standing Committee on Ethics and Professional Responsibility recently reversed its earlier strong position against reading and using the protected information. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-440 (2006). This attitude in favor of loyalty over what might be termed "fair play" is reinforced by Formal Opinion 06-442, with respect to an attorney's inspection of metadata in electronic documents, and by implication, metadata in other documents received from opponents. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006). According to Formal Op. 06-442:

> The Model Rules of Professional Conduct do not contain any specific prohibition against a lawyer's reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party. A lawyer who is concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata, or who wishes to take some action to reduce or remove the potentially harmful consequences of its dissemination, may be able to limit the likelihood of its transmission by "scrubbing"

(2) When does a lawyer have discretion to act in a way that conflicts with the client's interests and the relevant rules? It is not always clear what sort of discretion the lawyer has beyond that to choose the best route to success for the client. Generally, a lawyer can "go easy" on the opposition (e.g., by consenting to continuances or agreeing to a discovery regime that gives the opposing counsel greater ease in requesting and getting possibly damaging material) if the purpose of that move is to make the adversary process more smooth and less costly to the client, without reducing the client's chance for success in the matter.[36] But what of the lawyer's sense that something is very wrong with the lawyer's powerful pursuit of the client's ends in the face of inadequate opposition or in those cases in which the opposition is (unfairly) hobbled by lack of information? This suggests three questions for discussion:

(i) Questions should be raised about the appropriateness of simply ignoring the applicable rules in particular cases, especially those involving the divulgence of clients' secrets to avoid or mitigate danger to third persons' interests and those in which pursuit of the client's interest with full zeal may result in an injustice.[37]

(ii) A related question regards the proper approach to interpreting rules, such as the exceptions to the duty of confidentiality or loyalty, in order to achieve a just or fair result despite the client's wishes,[38] as well as the rules against deceit,[39] in order to help enforce legal duties of others or otherwise achieve a good end[40] and to further the interests of the client.[41]

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metadata from documents or by sending a different version of the document without the embedded information.

Id.

36. That may be all that the first comment to Model Rule 1.3 is about in its permission to counsel not to use the most aggressive measures in the client's behalf. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2007); *see infra* Appendix.

37. E.g., softening the lawyer's adversarial zeal in order to make up for a failure in the adversary system of legal representation to assure a fair outcome. The usual problem is that of the unrepresented or inadequately represented opponent. How does a lawyer adjust to cases of that sort without losing the habit of zealous representation and reducing the value to clients of the duty of loyalty?

38. *See infra* Part II.D.

39. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2007). For the rules that govern advising or assisting the client to engage in such acts, see *id.* at R. 8.4(a), 1.2(d). The Oregon Supreme Court took a hard-nosed position with respect to reading the relevant rule. *In re* Conduct of Gatti, 8 P.3d 966 (Or. 2000). As a result, Oregon changed its rule in order to accommodate approved lying:

> Notwithstanding DR 1-102(A)(1), (A)(3) and (A)(4) and DR 7-102(A)(5), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these disciplinary rules. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other

(iii) Finally, questions should be raised about the interpretation and implementation of rules that allow the lawyer to take action against the interests of the client. How should the lawyer decide whether to exercise the option provided by such rules? How should the lawyer decide how to exercise these options? This is the subject of the next section of this essay.

C. Permission to be Neither Loyal Nor Discreet

Some of the Model Rules allow the lawyer to work against the client's interests. This might involve disclosure or use of information protected by the rule of confidentiality[42] or it might involve the lawyer's refusal of assistance.[43] The reason for allowing the lawyer to take such action may be the preservation of the lawyer's own welfare, it might be the preservation of third parties from harm, or it might be to serve the interests of the community or an agency of that community (e.g., a court or legislature). In any case, it must be clear that once the permission kicks in, the duty of loyalty to the client falls away. This has to be the case because, were the duty of loyalty to remain in force, none of the permissions to act contrary to the client's interests could be taken. Without that duty, the constellation of claims on the lawyer's attention and concern changes. The lawyer's role with respect to the client is devalued, as against the lawyer's role with respect to third persons, tribunals, or those who depend on the lawyer for their own economic welfare.[44]

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subterfuge. "Covert activity," may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

OR. CODE OF PROF'L RESPONSIBILITY DR 1-102 (2006).

40. *See, e.g.*, *In re* Pautler, 47 P.3d 1175 (Colo. 2002) (finding a prosecuting attorney who posed as a public defender in order to obtain a suspect's surrender guilty of "conduct involving dishonesty, fraud, deceit, or misrepresentation"); *see also* W. William Hodes, *Seeking the Truth Versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and "Lying with an Explanation"*, 44 S. TEX. L. REV. 53 (2002) (discussing the *Pautler* case and other cases in which misleading statements were made by an attorney).

41. Here, one can talk about the difference between lying and "puffing," or other deceitful practices in the service of the client. The latest material on this subject published by the ABA is Formal Opinion 06-439, Lawyer's Obligation of Truthfulness when Representing a Client in Negotiation: Application to Caucused Mediation. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 (2006). Most lawyers would agree that there is a difference between lying and "puffery" and argue that the latter is not deceitful. Of course the "puffer" is likely "puffing" in order to persuade the other party to the negotiation to accept and act in accordance with the "puffing." It is also worth getting into the difference between misleading and lying statements in litigation. *See* Hodes, *supra* note 40, at 67 (discussing defense tactics in the trial of David Westerfield for the abduction and murder of a child).

42. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007).

43. *Id.* at R. 1.16.

44. E.g., partners or family members.

An interesting question[45] is whether the permission granted under these rules is waivable? It is interesting because it invites a discussion of the purpose of the permissions and their effect on the lawyer's ethical duties to third persons. I can think of three ways of looking at these permissions. (a) They provide a safety valve for lawyers who need such a way out for their own mental health. They are a kind of burn-out preventative. The lawyer may serve her own interests at the expense of the client's interests in tough circumstances.[46] By this view, the exercise of the opportunity given by the exception is suboptimal with respect to the provision of legal services, but the harm is minimal given the small number of times the exception is likely to be relevant to the lawyer's decision as to what to do. (b) They provide a reason for doing the right thing under special circumstances. That is, the lawyer may choose to help others at the client's expense.[47] (c) They are a judgment that the protection given the client by the rules with these exceptions is optimal for the provision of legal services. The cost of these narrow exceptions to the client-attorney relationship is unimportant, which gives weight to the social interests that the lawyer serves in making use of them. The balance struck between the claim of the client and all other claims on the lawyer's concern is just right. If this third reading is given the exceptions to the lawyer's duties of confidentiality and loyalty, then the waiver of the permissions granted by the rules would give the client more protection than is deemed by the bar to be necessary to the proper and faithful delivery of legal services. It is anomalous to allow the lawyer to give such extra protection and at the same time claim that what the lawyer does to the detriment of others in the client's service is justified by role-differentiated ethics! The choice is then between (a) the exceptions' being a necessary evil, given the mental health of the lawyer, and (c) the exceptions' being a recognition that the optimal availability of legal services includes taking these other interests (set out in the exceptions) into account. To me, the third approach is the best understanding of the exceptions.

The authors of the Restatement (Third) of the Law Governing Lawyers[48] and those who drafted the preamble and comments to the Model Rules of

45. For this question, I thank the participants on the listserv for the Association of Professional Responsibility Lawyers (APRL). *See* Association of Professional Responsibility Lawyers, http://www.aprl.net/ (last visited May 25, 2007).

46. For instance, see the "self defense" rule, Model Rule 1.6(b)(5), for an example of a plainly self-serving exception to the duty of confidentiality. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2007). Additionally, see Model Rule 1.16(b) for the reasons for exit despite harm to the client under. *See id* at R. 1.16(b).

47. This plainly does not fit the "self defense" rule. *See id.* at R. 1.6(b)(5). Nor does it fit the rules allowing the lawyer to withdraw to the client's detriment in order to preserve the lawyer's own pride, comfort, or financial health. *See id.* at R. 1.16(b).

48. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

Professional Conduct[49] seem to have lined up on the side of the safety-valve approach; they take a very permissive view of the lawyer's decision to act, or the lawyer's actions under these rules.[50] The Restatement precludes discipline for acting or refusing to act according to the permission granted by the rules. It does not, however, appear to preclude discipline for improper interpretation of the predicate conditions[51] to the permission to act against the client's interests. There seems, then, to be no prohibition on contracting away all these permissions by agreement. The opposing view—that the permissions must be considered case-by-case and may not be waived—would require the lawyer to react at each circumstance in which the permission becomes possibly available.

But even if this commentary makes arbitrary the lawyer's decision whether and how to exercise the discretion granted by the Rules, it does not abate the ethical pressures behind these permissions. Recall that there is no Rules-recognized conflict between acting as permitted by the Rules and the Rules-imposed duty of loyalty or confidentiality.[52] It is also fair game for discussion as to whether the ALI and the ABA were mistaken in their implicit characterization of these rules' permissions.[53]

49. MODEL RULES OF PROF'L CONDUCT pmbl. (2007). Paragraph 14 of the Model Rules' Preamble and Scope refers to the permissions discussed in this section and states: "No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion." *Id.* at ¶ 14.

50. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 66 cmt. g (2000); *id.* at § 67 cmt. k; *id.* at § 120 cmt. j, cmt. k (precluding contracting away the discretion to exclude testimony "reasonably believed to be false" with a reference to Rule 23(1)). There is no other prohibition on contracting out of the exercise of discretion. *See also* MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 14 (2007) (refering to the permissions discussed in this section, and stating: "No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.").

51. The problem of interpretation as an ethics problem is discussed *infra* beginning at note 56.

52. The rejection of any discipline-enforced duty to exercise discretion also does not preclude possible common law liability to third persons for conduct not required by the Model Rules. Why not make contracts to waive exercise of these permissions unenforceable as a matter of "public policy"? There is surely no problem of infecting lawyers' decisions with conflicts of interest in such a move, any more than the permissions granted by the Rules to act in a way that is inconsistent with the client's interest raises a problem of conflict of interests under the Rules.

53. It might also be worthwhile to ask whether, absent the threat of discipline protecting the third party, the common law should impose a duty of care on the lawyer with respect to the person who is harmed by the lawyer's conduct and with whom the lawyer has a relationship in the course of his representation, where such conduct is not required by the lawyer's ethics of role. *See* Hawkins v. King County, 602 P.2d 361, 365 (Wash. Ct. App. 1979) (denying such a duty). What should stand in the way of such a duty if the lawyer is perfectly capable of understanding the danger and avoiding it, and there is no countervailing duty of loyalty or confidentiality?

D. Deciding to Exercise the Option Not to be Loyal: Ethics of Interpretation

There are two steps to be taken before the lawyer is in a position to act on the grant of discretion. The first step is the interpretation of the predicate conditions for taking advantage of the permission. The second step is the determination of what steps are permissible and which steps are mandatory.[54] How should the lawyer approach these steps? As to the first step, how should the lawyer approach the problem of interpretation and application?

As to the second step, to what extent should the lawyer take into account the possible harm from his actions to the client? When considering what to do, the lawyer no longer has the strong duty of loyalty imposed by the lawyer's role morality, but the client, as a person or as a representative of persons[55] is still entitled to some consideration under general cultural norms requiring a good reason for harming someone. Although that claim on the lawyer's concern is that of a person with no special relationship to the lawyer, the person still has a claim on the lawyer's concern with respect to the decision to act, just because the lawyer's conduct may cause harm.

As to the first step, interpretation of the predicate conditions, consider the problems raised by Model Rule 3.3(a)(3), which allows the lawyer to exclude evidence he "reasonably believes" is false:

> A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.[56]

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54. This includes only exceptions that become mandatory by virtue of the nature of the disclosure or harm to be voided by the disclosure. This does not include exceptions to the duty of confidentiality that are mandatory by virtue of the Rules, themselves, as in some states' variations on Model Rule 1.6. *See, e.g.*, ILL. RULES OF PROF'L CONDUCT R. 1.6(b) (2006) ("A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm."); N.J. RULES OF PROF'L CONDUCT, RPC 1.6 (b) (2006). New Jersey's variation on Rule 1.6(b) states:

> A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:
>
> (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;
>
> (2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

N.J. RULES OF PROF'L CONDUCT, RPC 1.6 (b) (2006).

55. I doubt that artificial persons are owed any ethical consideration except insofar as they represent the interests of humans.

56. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2007).

Does the interpretation of the predicate pose an ethical as well as a legal problem?[57] It seems odd to think of interpretation as an ethical matter having to do with what one should do or how one should live. But where there is more than one defensible reading of a rule, should one alternative be preferred given general norms against doing harm and according all persons equal concern, subject to duties to others? That is, is there a preferred reading, given role morality and its limits? The agent is asked in this case to determine whether a reading in favor of loyalty would trench too much on more general norms.[58] But he is also asked to see to his role-moral duties to his client. One particularly concerned with the possible cavalier treatment of the duty of loyalty in tough cases might be inclined rather easily to the position that the lawyer, still under that duty, must read the exception with a bias against the loyalty-denying act. Such an approach limits the denial of loyalty to the narrowest range of cases. However, this is permission that the Restatement prohibits the lawyer from waiving,[59] which emphasizes the lawyer's role relationship with the tribunal. This suggests both that the lawyer's permission to exclude evidence he "reasonably believes" is false amounts to a duty to exercise judgment and that the judgment should be exercised in a way that values strongly the role of the lawyer with respect to the tribunal in its search for the truth.[60] This approach to reading the rule weakens the claim of the client to the lawyer's loyalty when the lawyer is faced with a question of falsity of potential evidence.

Rule 3.3(a)(3) limits the lawyer's occasion for this exercise of discretion in the introduction of suspected false evidence to its *introduction*.[61] If a lawyer comes to know that the lawyer, her client, or a witness called by her has presented evidence that the lawyer later "reasonably believes is false" remedial measures should be taken.[62] What is the difference between offering "evidence that the lawyer knows to be false" and evidence that the lawyer

57. The task of interpretation is supposed to be one of finding out the "true" meaning of a written statement with respect to the problem at hand. A reference to reasonable belief and necessity, however, does not point to a purely objective quantity. It calls upon the lawyer to exercise judgment as to where there is sufficient information to justify a change in role-attitude.

58. *See supra* notes 20 & 21 and accompanying text (suggesting that general ethical principles impose outer limits on the extension of role morality's potential to allow harm to others).

59. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. j (2000).

60. One might call this role "officer of the court" or, as the Model Rules call it in the first paragraph of the preamble, "officer of the legal system." *See* MODEL RULES OF PROF'L CONDUCT pmbl. (2007). Neither title has much content beyond a reference to the lawyer's important participation in the processing of cases before a tribunal. A lay-person representing herself in court would play the same role, to the extent she knows how to do it, and should have the same kind of duties to the tribunal.

61. *See id.* at R. 3.3(a)(3).

62. *See id.*

"reasonably believes is false"? The definitions at the beginning of the Model Rules don't help. By these definitions, "'knows' denotes actual knowledge" [63] and "'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer."[64] So, a lawyer who "reasonably believes" that evidence is false must, as a reasonably competent lawyer, actually believe that it is false. How does one distinguish between actually knowing (and therefore believing) something is false and just actually believing it? The verbal distinction between "reasonably believes" and "knows" already has been subjected to scholarly examination[65] and much confusing and opaque judicial discussion. One way to look at it, and preserve the distinction's usefulness, is to make it into a distinction between moral certainty (knowledge) and belief based on less than information sufficient to base a moral certainty (reasonable belief).

What must the ethical lawyer do at the stage of deciding whether to exercise discretion? If it is impossible to distinguish reasonable belief from knowledge, then all the questionable evidence goes in. If, on the other hand, the ethical lawyer can distinguish between the two, then he must ask: Is there any reason in ethics, given the constellation of roles that exists once the predicate condition of "reasonable belief" is met, that would persuade the lawyer nevertheless to introduce it despite such a reasonable belief? If there is a reasonable suspicion of falsity of particular potential evidence, then as a practical matter, the second step is easy: may = must! The ethical lawyer may not submit evidence that he "reasonably believes" is false.[66]

Of the exceptions to the duty of confidentiality, three require that the lawyer "reasonably believes" disclosure is necessary to protect interests of third persons,[67] and two allow the lawyer to reveal secrets in order to protect

63. *Id.* at R. 1.0(f).

64. *Id.* at R. 1.0(h).

65. *See, e.g.*, Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1271–73 (2003).

66. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2007).

67. *See id.* at R. 1.6(b)(1)–(3).

> A lawyer may reveal information relating to the representation of a client to the extent that the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services . . . .

Id.

himself.[68] What is "reasonably believed necessary" to protect the lawyer's interests under Rule 1.6(b)(5)[69] is likely to be very broadly construed by the bar and the courts.[70] Is there more to be said about exercising this option? More likely than not, the same liberality will be shown with regard to the lawyer's determination of "reasonable belief" under Rule 1.6(b)(4), if only because it is an invitation to the conscientious lawyer to make sure he is in compliance with the rules.

As to the first three exceptions, the area for lawyer's discretion is more difficult to discern. The lawyer must have a "reasonable belief" as to the importance of revelation of information to some future event—preventing or ameliorating harm.[71] The future harm must be "reasonably certain."[72] Again, the lawyer (and the student) must ask about the level of skepticism with which a loyal lawyer must greet the information suggesting preventable or ameliorable harm and, indeed, whether the lawyer should seek further information (there being no duty under the Model Rules or in the Restatement to investigate further). When death or substantial bodily harm is the thing to be prevented, I suspect the "reasonable belief" will be easier to achieve than it will in the case of harm to financial or property interests.[73] But that, of course, does not end the inquiry. What does, what *must,* the lawyer do? By the language of the rule, a lawyer may ignore the consequences and keep the secrets, whether the impending danger is to a life or a business or an interest in

68. *See id.* at R. 1.6(b)(4)–(5).

> A lawyer may reveal information relating to the representation of a client to the extent that the lawyer reasonably believes necessary:
>
> (4) to secure legal advice about the lawyer's compliance with these Rules;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client . . . .

Id.

69. *See id.* at R. 1.6(b)(5).

70. *See supra* note 12.

71. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)–(3) (2007).

72. *See id.* at R. 1.6(b)(1). I read "reasonably certain" to modify both "death" and "substantial bodily harm" under Model Rule 1.6(b)(1).

73. Some states' versions of the Model Rules take seriously the distinction between life and bodily injury on the one hand and harm to property or finances on the other, taking the former far more seriously in terms of required as opposed to voluntary disclosure (at least, in some states, with respect to information about criminal conduct). *See* ARIZ. RULES OF PROF'L CONDUCT R. 1.6 (2006); FLA. RULES OF PROF'L CONDUCT R. 4.1.6 (2006); HAW. RULES OF PROF'L CONDUCT R. 1.6 (2006); IOWA RULES OF PROF'L CONDUCT R. 32:1.6 (2006); ILL. RULES OF PROF'L CONDUCT R. 1.6 (2006), N.J. RULES OF PROF'L CONDUCT RPC 1.6 (2006); N.M. RULES OF PROF'L CONDUCT R. 16-106 (2006); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.05 (2006); WIS. RULES OF PROF'L CONDUCT SCR 20:1.6 (2006).

property.[74] With respect to the latter, notice that the lawyer, if involved in any way with the possible financial harm, may reveal the information to limit his own exposure to civil or criminal penalties for aiding the client's fraud or crime, under the self-defense rule.[75] Should it be harder for the lawyer to protect a third person from financial ruin than to protect the lawyer from civil liability?

That the information was received in confidence, and that the lawyer induced the belief in confidentiality by her own actions, still counts for something, of course. Revelation of secrets is very much like promise breaking in that it is allowed but only where the reason for the breach is plainly good enough. The client, whatever she may have done and whatever the harm that might be done or threatened, is still entitled to the lawyer's concern. Whatever the rule says, it should be easy to show that saving a life is the best thing to do, all things considered, given that the apparent necessity of the revelation to the saving of the life is questionable and that the harm to the client by the revelation is great.

A fairly commonly given hypothetical case that raises both the problem of interpretation of predicate conditions and the problem of choice of action is one in which the client violates pollution law by letting arsenic flow into a lake used by others for fishing and swimming. The amounts are small, but arsenic accumulates in the bones and eventually can kill. If a person eats enough fish caught in the lake or if a person swims enough in the lake then the person will likely die. Warn everyone now and the harm will certainly be prevented, but is that harm within the terms of the rule that allows the disclosure? A lawyer who is neither a chemist nor a biologist believes that someone will die eventually. He really doesn't know how much arsenic is dangerous, how much fish from the lake has been consumed during the toxic emissions, or how many times each person swam in the lake and swallowed lake water. Is that enough to go on? If it is, must the lawyer tell? The attitude of the lawyer to the problem is critically important, in my opinion.

A client is married and has informed the lawyer that she is trying to conceive a child. The information is confidential and relates to the representation. The lawyer knows that she has been having an affair, and that the affair was broken off shortly after the lover was diagnosed HIV positive. The husband does not know of the affair and the client is anxious that he not find out. Substantial bodily harm? The family is wealthy and can easily afford treatment to palliate the effects of the infection. But the husband is in danger of getting infected from the wife (or is he having an affair, etc.?), and then there is the potential person who will result from a successful attempt at conception. That is all the lawyer knows. He has no medical knowledge and

74. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2007).

75. *See id.* at R. 1.6(b)(5).

is only aware of some of the more generally-accessible material on AIDS. May the lawyer tell? Must the lawyer tell? In both cases the problem the lawyer faces is not soluble by looking at the words of the Rule, nor is it by the purpose of the Rule.[76]

Compare the case in which the harm to be prevented or ameliorated is financial and was or is likely to be caused by the client's fraud or crime "in furtherance of which the client has used or is using the lawyer's services."[77] The same sort of problem arises as to the satisfaction of the predicate, but it is less serious than is the danger posed to third persons in the preceding paragraph. Does that make the decision to tell harder? What of corporate counsel who is considering disclosure under Rule 1.13(c)?[78] In the case of corporate counsel, the interests are different. The lawyer's role relationship with the client is mediated by people who, in law, have no claim on the lawyer's loyalty. Yet the revelation of the information, reasonably believed to be necessary to protect the client because of a probable violation of law that the lawyer reasonably believes is reasonably certain to harm the client, will plainly harm someone with whom the human relationship looks like a relationship of trust.

The lawyer's own interests are plainly in view with respect to the decision to terminate the representation.[79] A reading of the catch-all phrase at the end

76. *See supra* notes 45–51 and accompanying text. Is the permission to disclose simply a safety-valve for the ethically-troubled lawyer, or is it a more powerful statement that such protection of confidentiality is not necessary to the socially optimal availability of legal assistance?

77. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2007).

78. *See id.* at R. 1.13(c).

> Except as provided in paragraph (d), if
>
> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

Id.

79. I do not discuss the ethics of refusing or accepting a client. That requires a different law review article. On the other hand, there is some intertwining of the discussion of the ethics of refusing continued aid with the discussion of refusing the representation at the beginning. There are two major differences: One is that there is traditionally a strong individualist undercurrent in our common culture, which strongly cuts in favor of the lawyer's free choice; the other is that when the question of withdrawal from service comes up, there is already a relationship established with the client and some expectation on the part of the latter, consistent with the role of client with respect to that lawyer, of special consideration.

of the list of grounds for withdrawal[80] as limited to the kinds of grounds already listed, would be in keeping with the often-cited rule of statutory interpretation, ejusdem generis.[81] Once again, the ethics issue is raised by the existing human relationship between the client and the lawyer, and the continuing need of the client for legal help from a person who understands that client's situation.

Finally, there's Rule 4.3, which allows a lawyer who is dealing "on behalf of a client with a person who is not represented by counsel" to advise that person to get a lawyer.[82] In some cases, that advice could serve the lawyer's own client by assuring a competent negotiation partner and hence a deal that will stand up. In other cases, the advice could hinder the lawyer's efforts to achieve success for the client. The purpose of the rule seems to be to protect the unrepresented person's interests. It also protects the lawyer from inadvertently slipping into the role of lawyer to that third person, thereby sinking the lawyer into a conflict of interests that might compel the lawyer to withdraw from the case. According to the District of Columbia Bar and The Restatement (Third) of the Law Governing Lawyers, the lawyer may provide at least such advice to the third person.[83] The Restatement position, which

80. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (2007) ("Except as stated in paragraph (c), a lawyer may withdraw from representing a client if . . . (7) other good cause for withdrawal exists.").

81. "Ejusdem generis" is "a canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed." BLACK'S LAW DICTIONARY 556 (8th ed. 2001).

82. *See* MODEL RULES OF PROF'L CONDUCT R. 4.3 (2007).

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. *The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.*

Id. (emphasis added).

83. *See* D.C. Bar Legal Ethics Comm., Formal Op. 326 (2004), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion326.cfm; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15 cmt. e (2000).

> A lawyer's duty of reasonable care to a prospective client. When a prospective client and a lawyer discuss the possibility of representation, the lawyer might comment on such matters as whether the person has a promising claim or defense, whether the lawyer is appropriate for the matter in question, whether conflicts of interest exist and if so how they might be dealt with, the time within which action must be taken and, if the representation does not proceed, what other lawyer might represent the prospective client. Prospective clients might rely on such advice, and lawyers therefore must use reasonable care in rendering it. The lawyer must also not harm a prospective client through unreasonable delay after indicating that the lawyer might undertake the representation.

provides that the lawyer has a minimal duty of care to the third person, whether or not that third person opposes a current client of the lawyer's, seems right.[84] It is consistent with the idea that the lawyer's undivided loyalty to the client is justified by an oft-failed basic assumption of the adversary system, as stated in D.C. Bar opinion 326:

> More basically, inherent in our adversary system is the principle that persons ought to be represented by competent lawyers and that disputes ought to be resolved on their merits. Assisting a person to obtain competent representation is entirely consistent with that principle. Once the issue is joined, a lawyer can and should take whatever lawful and ethical measures that are required to vindicate her client's position. Assisting an adversary to obtain competent representation, so that the issue can be joined, is not inconsistent with that duty. It is consistent, however, with the lawyer's obligation to the administration of justice. At times, the interests of the legal system and the public interest may prevail over that of the client, e.g., Rule 3.3(a)(3). We believe that recommending competent counsel to an unrepresented person, can never constitute prejudice to a client within the meaning of Rule 1.3(a).[85]

This leaves the question of the lawyer's knowledge about her clients—that advice to seek counsel might affect a client adversely—when such advice is actually to be disclosed. I cannot find any reason for not advising the third person to get legal counsel (or, for that matter, that the period of limitations is running) when the lawyer is not aware that he represents the opponent. The case law and the Restatement indicate that the lawyer must give such advice and, indeed, advise the client about the period of limitations.[86] What if the lawyer knows that she represents the third person's opponent and that getting a lawyer will put the third party in a better position to oppose her client? Both the Restatement comment and the D.C. Bar opinion indicate that giving such advice does not conflict with the duty of loyalty.[87] That is, there is no role-

> What care is reasonable depends on the circumstances, including the lawyer's expertise and the time available for consideration.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15 cmt. e (2000).

84. For a contrary view, see *Flatt v. Superior Court*, 885 P.2d 950 (1994).

85. D.C. Bar Legal Ethics Comm., Formal Op. 326 (2004), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion326.cfm.

86. *See* Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980) (affirming a finding that an attorney was guilty of negligence for failing to advise the plaintiff of the two-year medical malpractice limitations period); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15 cmt. e (2000).

87. *See* D.C. Bar Legal Ethics Comm., Formal Op. 326 (2004), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinmions/opinion326.cfm; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15 cmt. e (2000).

based reason for not providing it. Hence, the *Togstad* case and the Restatement counsel in favor of providing it.[88]

CONCLUSION

The ethics of representation is a relatively small part of the course in the law governing lawyers. It is unique to the course insofar as it calls upon the student to examine his or her own ethics as lawyers. This is especially poignant for the student when confronted with the chance to make a decision that goes against the client's interests, either by an act of civil disobedience—open disloyalty in the name of the common good—or by accepting and exercising the discretion granted the lawyer by the rules. In such discussions the student is compelled to recall that there are, in fact, norms to which that student has subscribed governing social conduct and that the student's rationalization of conduct of questionable ethics must stand against the student's own honest assessment of that conduct. Of course, the student can deny ethical responsibility for conduct and take the strong self-serving position that both accepts the duty of loyalty (reduced to a legal duty) and at the same time fearlessly embraces the self-defense and similar rules that allow the lawyer to jump ship when the seas get too rough.

What should be the instructor's role in all of this? Is the instructor a neutral observer, leading the student through the exercise but taking no position on the point of that exercise? Neutrality should prevent the instructor from raising ethics issues at all. Raising questions of ethics at least takes the position that those questions are important to the student. Unfortunately, it is usually the instructor who will raise them.

88. *See Togstad*, 291 N.W.2d at 694–95; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15 cmt. e (2000).

APPENDIX

RULE 1.3: A GRANT OF DISCRETION?

Model Rule 1.3 states, "A lawyer shall act with reasonable diligence and promptness in representing a client."[89] This formulation of the lawyer's duty replaced various Disciplinary Rules (DRs) of the Model Code of Professional Responsibility.[90] DR 7-101, entitled "Representing a Client Zealously," enjoined the lawyer to "seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules . . . ."[91] Comment 1 to Model Rule 1.3 elaborates on the term "reasonable diligence":

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. *A lawyer is not bound, however, to press for every advantage that might be realized for a client*. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.[92]

The first two sentences of this comment are consistent with the predecessors' insistence on "zealous representation," but the third sentence, italicized in the above quote, seems to say that the lawyer may decide to bank the fires of zeal and refuse to "press for every advantage that might be realized for a client."[93] It is a grant of discretion with respect to "the means by which a matter should be pursued," but what sort discretion; as to what? Might it be: (a) full discretion as to means, in order to avoid harsh or unfair measures?[94]

89. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2007).

90. The relevant DRs are 6-101(A)(3) and 7-101(A)(1,3). *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101(A)(3), DR 7-101(A)(1), (3) (1983).

91. *Id.* at DR 7-101(A)(1).

92. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2007) (emphasis added).

93. *Id.* at R. 1.3 cmt. 1.

94. A comment is a strange place for such a large grant of discretion—discretion to choose a less effective means for the sake of fairness. For another odd apparent grant of discretion free of the client's veto, see Comment 3 to Model Rule 4.4, which allows the lawyer to refuse to read a mis-sent document and return the document to opposing counsel. *See id.* at R. 4.4 cmt. 3. That move could prevent the lawyer from using information beneficial to the client's cause, which would seem to violate, or disregard the duty of loyalty to the client. For more on that comment, see *supra* note 35. I suspect that the decision to read or not read, return or not return, will be

(b) full discretion as to means in those cases in which the selection of means is not important to the expeditious achievement of the client's ends? (c) discretion to adjust the lawyer's conduct to prevailing norms of conduct in the locality or the other social context in which the lawyer practices?

The decisions as to both ends and means are up to the client according to Model Rule 1.2(a).[95] As to ends, the client controls. As to means, the lawyer must consult with the client who, by the ordinary rules of agency law, may order the lawyer to take such means as the lawyer may pursue legally. The lawyer's only way out is to resign, if that is allowed.[96] Unless there is some set of "means" that are beyond the reach of the terms of Model Rule 1.2(a), either Comment 1 is at war with Rule 1.2(a) or there is nothing to which the grant of discretion in Comment 1 of Model Rule 1.3 applies. Means to which Rule 1.2(a) does not apply includes means as to which there is no chance to confer with the client reasonably or intelligently, such as decisions as to tactics in court or in negotiation.[97] But, even here, does not the duty of loyalty to the client command that counsel choose the most efficient means to achieve the client's ends? Before concluding that it means nothing whatever, perhaps a look at the history of this provision will help determine what sort of discretion it gives the lawyer to choose conduct that does not further, and may hinder, the pursuit of the client's objectives.

The closest ancestors to Comment 1 of Model Rule 1.3 are DR 7-101, and Ethical Considerations (ECs) 7-9, 7-10, and 7-38 of the 1983 Model Code of Professional Responsibility. The Disciplinary Rule, which commands the lawyer to pursue the client's goals with all legal means, states that:

> [a] lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.[98]

made according to local custom, which is a limit on the duty of zealous loyalty that may be referred to in Comment 1 to Rule 1.3.

95. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007). The relevant provision states that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." *Id.* at R. 1.2(a). Model Rule 1.4 requires that the lawyer provide information sufficient to let the client "make informed decisions regarding the representation." *Id.* at R. 1.4(b).

96. *See id.* at R. 1.16(b). "[A] lawyer may withdraw from representing a client if . . . the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement . . . ." *Id.* at R. 1.16(b)(4). The 2001 version of this Model Rule limited the lawyer's option to leave cases in which the lawyer found "an objective . . . repugnant." MODEL RULES OF PROF'L CONDUCT R. 1.16 (2001).

97. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 3 (2007).

98. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1) (1983).

Both ECs 7-9 and 7-10 enjoin the lawyer to seek the "best interests of his client" (EC 7-9)[99] and "represent his client with zeal" (EC 7-10).[100] But, according to EC 7-9, "when an action in the best interests of his client seems to him to be unjust, he may ask his client for permission to forego such action."[101] EC 7-10 adds that the duty to the client "does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."[102] EC 7-38 advises the lawyer to be courteous to opposing counsel and to "accede to reasonable requests . . . which do not prejudice the rights of his client," and to "follow local customs of courtesy or practice" or give notice of an intention not to.[103]

Farther back along this provision's family tree lie the 1963 ABA Canons of Professional Ethics. Canon 5 limits the defender of the criminally accused to "all fair and honorable means."[104] The Canon goes on to condemn "the suppression of facts or the secreting of witnesses" by the prosecutor.[105] Canon 15 states that a lawyer does not have "the duty . . . to do whatever may enable him to succeed in winning his client's cause," but also insists that the lawyer exert "entire devotion to the interest of the client."[106] Canon 17 distinguishes between serving the client's "ill feeling" toward the other side and pursuing the client's interests.[107] The latter is commanded, the former should be avoided.[108] Moreover, a lawyer should not attack opposing counsel's character or deportment.[109] Canon 18 adds an injunction against ministering to the client's "malevolence or prejudices" and calls upon the lawyer to treat "adverse witnesses and suitors with fairness and due consideration."[110] Canon 22 calls upon the lawyer in court to act "with candor and fairness," but this Canon is generally concerned with truthfulness and respect for applicable law in the presentation of legal argument or evidence.[111] More informative is Canon 24, which relates to "the incidents of the trial."[112] It calls for consideration of the other side's convenience when it does not "[work] substantial prejudice to the

99. *Id.* at EC 7-9.
100. *Id.* at EC 7-10.
101. *Id.* at EC 7-9.
102. *Id.* at EC 7-10.
103. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-38 (1983).
104. ABA CANONS OF PROF'L ETHICS Canon 5 (1963).
105. *Id.*
106. *Id.* at 15.
107. *Id.* at 17.
108. *See id.*
109. ABA CANONS OF PROF'L ETHICS Canon 17 (1963).
110. *Id.* at 18.
111. *Id.* at 22.
112. *Id.* at 24.

rights of the client," including refusing to accept a continuance "when no harm will result from a trial at a different time."[113]

These comments, ECs, and canons point in two directions. In one direction lies the enthusiastic furtherance of the client's goals subject only to the client's informed decision as to tactics and objectives, rendering Comment 1 to Rule 1.3 meaningless. In the other direction lies what seems to be a reference to the current rules of etiquette governing deportment in those social contexts (in court, responding to discovery requests, negotiating, etc.) in which the attorney finds herself the course of the representation. Yet, the Canons and the ECs seem always to return to the lawyer's duty of zealous representation and seem to limit acts of consideration to acts that do not make much of a difference to the client's ultimate success; acts of inexpensive consideration for others. If one wanted to draw a map showing the resulting tendency of the applicable rules of conduct as set forth in the Canons, the Code, and the black letter Rules, the resultant always points in the direction of achieving success for the client, leaving the reference to consideration for others and etiquette to those situations in which the client's ultimate victory is not prejudiced.

If harsh tactics are more likely than soft tactics to gain a good result at less cost, may the lawyer choose the latter over the former without seeking the client's informed approval or despite the client's refusal to consent? If the answer is "no," then what is the point of the phrase holding the lawyer not to be bound to "press for every advantage that might be realized for a client?" Yet, the answer seems to be "no" in all cases in which the choice of tactic can make a difference between success and failure. The phrase in question then is simply a recommendation against unnecessary roughness.

There is one more place to look for some content in the statement in Comment 1 to Model Rule 1.3—the customs of the community in which the lawyer works.[114] The lawyer must work for clients who have their own ideas of their goals and what is permitted in the pursuit of those goals, trumping the less aggressive measures that the lawyer ordinarily would favor. A lawyer desiring to maintain a functioning and profitable relationship with a client will be influenced by that client's ideas and attitudes regarding the reasonableness and rightness of harsh measures in the pursuit of the client's ends. The lawyer must work in a particular community of lawyers and judges, and that community may have a normative substructure that simply rejects particular tactics, however necessary they might be in the pursuit of success for the

113. *Id.* at 24.

114. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-38 (1983) ("He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so.").

client.[115] Perhaps the puzzling phrase in Comment 1 of Model Rule 1.3 is there to allow the lawyer to conform to the customs of the community in which she functions,[116] for the protection of her reputation and in furtherance of her ability to represent others, even though such conduct might prejudice the interests of the relevant client.

115. *See* Ted Schneyer, *Moral Philosophy's Misconception of Legal Ethics*, 1984 WISC. L. REV. 1529, 1544–49 (1984); W. Bradley Wendel, *Informal Methods of Enhancing the Accountability of Lawyers*, 54 S.C. L. REV 967, 979 (2003).

116. By "community" I include, among other things, a group of attorneys with whom the attorney in question is a "repeat player," and the courts or administrative tribunals before which the attorney in question appears with some frequency. This conflict between the lawyer's need to conform to "local" custom and the zealous pursuit of the client's interests is one of several unavoidable conflicts of interest in the practice of law that necessarily compromises the duty of loyalty. *See* Dennis J. Tuchler, *Unavoidable Conflicts of Interest and the Duty of Loyalty*, 44 ST. LOUIS U. L.J. 1025 (2000).