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ACKNOWLEDGEMENTS

NO ANIMALS OR BUGS (EXCLUDING THE N.S.A.) WERE HARMED IN THE REHEARSAL AND PERFORMANCE OF THIS PRODUCTION

THE PRODUCERS WOULD LIKE TO THANK WOLF FILMS AND UNIVERSAL TELEVISION FOR USE OF THAT UBIQUITOUS "DOINK DOINK"

THE LAWYER'S BILL

Naples Theatre At The Inns

The Ethical Implications of a Lawyer's Conscientious Objection to a Client's Course of Conduct

Opening Night: December 17, 2013

NAPLES THEATRE AT THE INNS

THE TEAM THREE THEATRE COMPANY PRESENTS:

A Boatman Production of:

The Ethical Implications of a Lawyer's Conscientious Objection to a Client's Course of Conduct

Inspired by Abraham Lincoln, Esq. Mr. Lincoln also served as the 16th President of the United States of America. He said: "Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough."

CAST

The Devil.....The Honorable Lauren Brodie
Pragmatist Partner.....Magistrate David "DCS" Friedman
Judge James Douglas.....Jim Boatman
Narrator.....Amy Garrard
He Who Shall Inquire of the Audience.....Jason Korn
Moderator.....Rich Montecalvo
The Angel.....Keely Smith
Associate.....Guichard St. Surin
She Who Shall Inquire of the Audience.....Rebecca Vacciarello
Lincoln Lawyer Partner.....Christie Wohlbrandt

The action passes in the offices of the Law Firm of Preamble & Pragmatist and extends over a period of time that seems like an eternity to the Associate.

Act I: A weekday.
Act II: Another weekday.

THERE WILL BE A SHORT BREAK BETWEEN ACTS FOR EXPOSITORY DISCUSSION.
A PERIOD OF FURTHER DISCUSSION WILL FOLLOW THE END OF ACT II.

All actors appear courtesy of The Florida Bar. Actors Equity will most certainly not be offering membership into their professional acting guild at any time in the near future.

THERE IS NO SMOKING OR FLASH PHOTOGRAPHY ALLOWED IN THE THEATRE. THANK YOU.
PLEASE SILENCE ALL PAGERS, CELL PHONES, LAPTOPS AND MAIN-FRAME COMPUTERS.

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4 PREAMBLE - A LAWYER'S RESPONSIBILITIES

4 RULES OF PROFESSIONAL CONDUCT
4 PREAMBLE

4 PREAMBLE - A LAWYER'S RESPONSIBILITIES

PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., rules 4-1.12 and 4-2.4. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See rule 4-8.4.

In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or by law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use

the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system, because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of the lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct and in substantive and procedural law. A lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Zealous advocacy is not inconsistent with justice. Moreover, unless violations of law or injury to another or another's property is involved, preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the practice of law conflicting responsibilities are often encountered. Difficult ethical problems may arise from a conflict between a lawyer's responsibility to a client and the lawyer's own sense of personal honor, including obligations to society and the legal

profession. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. Within that context, the legal profession has been granted powers of self-government. Self-regulation helps maintain the legal profession's independence from undue government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on the executive and legislative branches of government for the right to practice. Supervision by an independent judiciary, and conformity with the rules the judiciary adopts for the profession, assures both independence and responsibility.

Thus, every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.

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RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

4 RULES OF PROFESSIONAL CONDUCT
4-1 CLIENT-LAWYER RELATIONSHIP

RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

(a) Lawyer to Abide by Client's Decisions. Subject to subdivisions (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by rule 4-1.4, shall reasonably consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) No Endorsement of Client's Views or Activities. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) Limitation of Objectives and Scope of Representation. If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.

(d) Criminal or Fraudulent Conduct. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Comment

Allocation of authority between client and lawyer

Subdivision (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional

obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions. The decisions specified in subdivision (a), such as whether to settle a civil matter, must also be made by the client. See rule 4-1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by rule 4-1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. The lawyer should consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See rule 4-1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See rule 4-1.16(a)(3).

At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to rule 4-1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

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4 RULES OF PROFESSIONAL CONDUCT
4-1 CLIENT-LAWYER RELATIONSHIP

RULE 4-1.16 DECLINING OR TERMINATING REPRESENTATION

(a) When Lawyer Must Decline or Terminate Representation. Except as stated in subdivision (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged;

(4) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud; or

(5) the client has used the lawyer's services to perpetrate a crime or fraud, unless the client agrees to disclose and rectify the crime or fraud.

(b) When Withdrawal Is Allowed. Except as stated in subdivision (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client insists upon taking action that the lawyer considers repugnant, imprudent, or with which the lawyer has a fundamental disagreement;

(3) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(4) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(5) other good cause for withdrawal exists.

(c) Compliance With Order of Tribunal. A lawyer must comply with applicable law requiring notice or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Protection of Client's Interest. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.

Comment

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See rule 4-1.2, and the comment to rule 4-1.3.

Mandatory withdrawal

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Withdrawal is also mandatory if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud. Withdrawal is also required if the lawyer's services were misused in the past even if that would materially prejudice the client.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires

approval of the appointing authority. See also rule 4-6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under rules 4-1.6 and 4-3.3.

Discharge

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to be self-represented.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in rule 4-1.14.

Optional withdrawal

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. The lawyer also may withdraw where the client insists on taking action that the lawyer considers repugnant, imprudent, or with which the lawyer has a fundamental disagreement.

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4 RULES OF PROFESSIONAL CONDUCT
4-2 COUNSELOR

RULE 4-2.1 ADVISER

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

Comment

Scope of advice

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral adviser as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as adviser may include indicating that more may be involved than strictly legal considerations.

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RULE 4-3.1 MERITORIOUS CLAIMS AND CONTENTIONS

4 RULES OF PROFESSIONAL CONDUCT
4-3 ADVOCATE

RULE 4-3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

The lawyer's obligations under this rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

ABA CANONS OF PROFESSIONAL ETHICS[1]

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CANON 30. JUSTIFIABLE AND UNJUSTIFIABLE LITIGATIONS.

The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's cause is one proper for judicial determination.

CANON 31. RESPONSIBILITY FOR LITIGATION.[7]

No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, what causes he will contest in Court for defendants. The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

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THE FLORIDA BAR ETHICS HOTLINE:
(800) 235-8619

[1] The Preamble and Canons 1 through 32 were first adopted in 1908. [The ABA Model Code of Professional Responsibility was derived from and replaced the ABA Canons of Professional Ethics in 1969, and the Code was later rewritten and replaced with the Model Rules of Professional Conduct in 1983. The Florida Rules of Professional Conduct, found in Chapter 4 of the Rules Regulating the Florida Bar, were derived from the ABA Model Rules and adopted in 1987 to replace the old Code of Professional Responsibility.]

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[7] Canon 31 was amended September 30, 1937.

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June, 1997 Volume LXXI, No. 6

Journal HOME

The Pain of Moral Lawyering

by Richard A. Matasar

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There is something odd when a lapsed lawyer writes about the practice of law, but I've got something to get off my chest. I didn't like some of the things I did as a lawyer. I took positions I didn't believe in. I made arguments that I thought bordered on untrue. I postured. I bluffed. I pursued advantages provided more by clients' resources than the value of their claims. And, I found out that doing the things that lawyers do—ethical things!—can be painful. The problem is, I didn't learn this lesson until I became a lawyer.

As a lawyer, I barely recognized why practice was so emotionally testing; I'm still not sure I fully understand. But, by sharing some thoughts on the subject I thought I might ease my guilty conscience from sending out new shock troops year after year to make the same discovery I made. Good lawyering is not merely nuts and bolts. It is the exquisite balancing of your agenda, your client's, your boss', and the legal system's—a balance that is virtually certain to make you hurt.

In this essay I highlight the conflicting demands placed on the good lawyer: as advisor, facilitator, and advocate; as zealous representative and manipulator; as self and alter ego of the client. I ask what it means to be a moral lawyer in a system that often sets practice norms at odds with one's moral vision. I explore lawyers' partial and inadequate coping strategies and conclude that they have no simple cure for their conflicts and must learn to live with the pain of moral lawyering. Yet, I don't intend to play a dirge to the practice of law. Rather, I celebrate the profession's potential for moral growth, and society's need for lawyers to feel pain to ensure that growth.

Lawyers do many things. As advisors they counsel clients to help them resolve problems, many of which are not "legal." Through lawyering they do for clients what clients themselves could do—negotiate with others, speak formally about various subjects, and undertake public service. But much of what law schools teach about lawyering, and, not surprisingly, much of what lawyers actually do, involves advocacy. In court, before an agency, in front of a legislative body, lawyers attempt to persuade. The art of persuasion and its demands on lawyers as persons are the core of the conflict many lawyers feel.

Lawyers are zealous advocates for their clients. They had better be, as there is no clearer command in our ethical code. Being a zealous advocate is intellectually rigorous business. Lawyers become masters of manipulation, reconstructing the words of rules and fitting them to clients' goals. They cajole and coax cases into precedential value. They create distinctions, creatively. They revel in ambiguity, a desirable tool utilized to serve the client. Skillful practitioners operate instrumentally, understanding that pliability of legal principles is essential to the craft. The lawyer who represents the plaintiff today, defends the defendant tomorrow. To make it work, the law provides wiggle room for both sides.

The lawyer went to law school, however, and law schools play it a little straighter. They demand a different posture—noninstrumental, evaluative. They force students to articulate a "right" answer. Students continually provide one, only to have it undermined and replaced by another. Yet, the quest remains: find the "true" answer.

You can't take the law student out of the lawyer. Every master manipulator of the law also has another voice, an evaluative voice that forms views on the correctness of the client's position. It is the rare lawyer who cannot say with great certainty that he or she has often believed a client's position to be wrong, though arguably acceptable. It is the lawyer's odd lot to argue simultaneously the correctness of matters he or she subjectively believes to be incorrect. Doing so for oneself

conjures up images of split personalities and fundamental contradictions. But lawyers suffer no outright schizophrenia, because they argue not for themselves, but as representatives. Though they believe an argument to be incorrect, they make it for their client. Though they may hope the law will not move in a particular direction, for their client's sake they argue, persuasively, to move the law that very way.

Lawyers separate themselves from their clients. It is fundamental to the enterprise. A lawyer who rejects arguments that favor a client's position because the lawyer believes them unsound or wrong is acting as a judge, not as a lawyer. That is not to say that the lawyer does not make judgments about potential arguments for a client, for not every argument that *can* be made *should* be made. Some arguments will not fly, or will put the client in a bad light, or will undermine more important contentions in other parts of the case. This type of judgment is not based on the lawyer's personal beliefs, however. It is cold and impersonal, based on pursuing the client's best interests. The lawyer's own evaluation of the merits of an argument, or more importantly of the wisdom of the client's ends, is held separate, the stuff of idle office chatter, late night drinks with coworkers, or pillow talk.

Estrangement of lawyers from the positions they must take is an incomplete picture. If it were not, there would be virtually no constraint on the lawyer. After all, the lawyer also could lie on behalf of the client or could omit material facts or contrary authority. But the lawyer cannot do such things because they are unethical. The profession cabins zealous representation with disciplinary rules that map the boundary of ethical lawyering.

That there are ethical limits to lawyering is also an incomplete picture, for as with substantive law, ethical rules are manipulable. The rules set minimum, oft-times flexible, ethical standards that depend upon a lawyer's good faith. The rules are subject to a broad range of escape mechanisms. Thus, the lawyer who twists and turns doctrine to suit a client's ends may also have space to argue around disciplinary rules, accomplish client goals, and fulfill professional norms at the same time. What one lawyer may be queasy doing, another may do without hesitation, and in neither event would the profession blink. With so much room, even if a lawyer has personal qualms about conduct, the lawyer faces strong pressure to act instrumentally when that conduct will benefit the client and be judged as ethical. To do less is inconsistent with ethical obligations of the profession.

The lawyer, therefore, has a strong incentive to resolve doubts about both legal and ethical matters in favor of the client. Regardless of the lawyer's personal belief as to the correctness of substantive law, he or she ought to make the colorable arguments that best serve the client. Regardless of the lawyer's belief as to the morality of a particular move, he or she ought to consider the move if it is likely to be judged as ethical and is in the client's interests. In either event, the lawyer's skill at manipulating the appropriate standard is the important measure of the lawyer's next step.

Lawyers, masters of manipulation, take on a role that potentially alienates their moral judgments from their actions on behalf of clients. But lawyers are not merely professionals, they are people who belong to religious organizations, study moral philosophers, read popular texts on justice, and have complicated sets of beliefs about what is right and what is wrong. And whether their beliefs spring from complex and unbending external standards or from less definite or flexible idiosyncratic feelings, lawyers cannot escape from themselves. Lawyers who can argue for any position—either substantive or ethical—are not absolved from measuring their conduct against other moral standards. The real question is what to do when lawyering is at odds with one's sense of right and wrong.

Ought lawyers make all colorable arguments that benefit their clients? Must they take on all possible cases? All clients? Should lawyers do what is "ethical," though personally abhorrent? These questions have simple answers when moral beliefs parallel the Code of Professional Responsibility. Nothing makes lawyering more simple than complete symmetry between what one would like to do, what one's clients need, and what the rules permit. But where lawyers' beliefs vary from the profession's ethical code, where their sense of what is correct differs from a client's needs and arguably applicable law, lawyers are under enormous pressure.

How does one resolve the conflict between personal and client interests, or between client and societal interests? Worse yet, how does one do all this resolving when one works for others who do not share the same moral views or societal vision?

A lawyer faces two significant gaps. The first involves the gulf between norms in the practice of law and rules of ethics. The second involves the potentially wider chasm between the profession's code of ethics and the lawyer's personal moral vision. Both cause considerable anguish for the practitioner whose moral self is under attack.

Lawyers' actual practice sometimes differs from the profession's ethical or procedural rules. Where certain conduct, though apparently beyond an applicable rule, benefits a lawyer's client, there is strong pressure to engage in the conduct. When that pressure is widespread and is felt by large numbers of practitioners, the conduct may become the norm despite rules to the contrary. Thus, depositions take place daily in which lawyers instruct their witnesses not to answer questions, even though discovery rules do not permit such actions to take place. Lawyers provide answers to interrogatories directed to their clients, who then sign the interrogatories, although the rules contemplate that the person answering the interrogatories should sign them. Lawyers engage in fruitless discovery and make motions that have little likelihood of success when doing so provides an advantage to the client, as long as they can conjure up "good faith" justifications for their actions that avoid basic ethical restraints against delay tactics. Lawyers finance litigation that otherwise would not be brought, despite ethical rules barring such conduct.

Such problems might be explained away as mere aberrations or the conduct of unethical lawyers, but the labels are inaccurate and simple-minded. When the conduct is widespread and there is relative consensus within the profession that the conduct is acceptable, one can argue that the common law of the rules differs from their text. The rules are nuisances that conflict with the ethos of the profession—much like jaywalking or the 55-mile-an-hour speed limit are inconveniences that are avoided regularly by the public at large. Moreover, the sporadic enforcement of ethical prohibitions or rules that generally are ignored makes them appear to be arbitrary or discriminatory against some lawyers or some causes. Thus, it is understandable that particular ethical or legal rules are ignored by large numbers of lawyers.

For the lawyer who adopts the cultural norm of zealous representation, it is not difficult to follow the crowd and feel justified in doing so. Similarly, lawyers uncomfortable with practice norms can avoid dealing with those norms simply by following applicable ethical principles and taking the high road. Of course, it helps for such lawyers to have an ample supply of clients and alternative tactics that will be equally successful for the client. But the high road is not as readily available to those working for others who would play faster and looser with rules or whose client base is weak or whose clients may be significantly disadvantaged by the lawyer's failure to keep up with the actual practice of the profession.

The gap between professional mores and written ethical rules is uncomfortable because the actual conduct of lawyers conflicts with professional norms. Disobedience of ethical rules, no matter how widespread, is always an occasion for painful reflection. But it is an easily avoidable pain, since one can rationalize either ignoring or following the rules for instrumental reasons central to the law.

Even lawyers who rely on instrumentalism to close the gap between practice norms and professional ethics still may face a gap of a different kind: that between morality and the ethics of the profession. Sometimes the rules of ethics authorize conduct that a lawyer believes is immoral. Since the rules themselves are powerful statements that stake out a "proper" moral stance for a lawyer, a failure to follow the rules places the lawyer in jeopardy of being "unethical," even while the lawyer believes she or he is moral. Closing that gap may not be a simple matter of blind allegiance to the Code of Professional Responsibility. Neither can instrumentalism serve as a bridge, since it is part of the problem.

Every day lawyers encounter challenges to their own sense of right and wrong in activities the profession condones or even encourages: cross-examining truthful witnesses to discredit their testimony; arguing for what one believes to be incorrect because it might be accepted by a court; defending the guilty; taking advantage of a less informed opponent by not revealing important information for which the other side has not asked; answering narrowly the actual questions propounded in a discovery request rather than the questions intended. The list is endless, but each entry shares a common characteristic: the ethical rules permit the lawyer to engage in conduct that will help the client, but will cause the lawyer to do something that she or he considers wrong. Such is the stuff of a major anxiety attack.

Instrumental justifications cannot bridge the gap between ethical rules and a lawyer's moral vision. The lawyer whose moral beliefs conflict with the rules of ethics has no legal guideline that will rationalize imposing his or her moral code on the client. A lawyer cannot salve his or her conscience by arguing that the client's self-interest would be served by doing what the lawyer would prefer to do, since what the lawyer would prefer to do may harm the client. The options that remain are almost too awful to contemplate: Lawyers can ignore the client's needs or their own. Neither option seems acceptable.

So what is to be done by the lawyer whose professional obligation would seem to call for ignoring his or her own sense of what is right and wrong? There is a short answer and a long answer. First, the short. Do what the profession demands. That is the price of being a lawyer and that is the end of the story. The long answer is more complicated.

Lawyers may take several steps to soothe their consciences. They can separate their private selves from the roles they play as lawyers. This might entail relegating the “bad” professional self to paid clients and the “good” self to charitable deeds, either in the law or out. Perhaps lawyers can resolve the conflict by letting their professional self control—revelling in professional skills, deferring to the profession’s ethical judgments, or working solely within the system’s procedures for challenging its rules. They may withdraw from the profession altogether and find another way of life that presents fewer tough problems. They may become guerilla fighters of the law who seek to change others to their vision and take a higher moral stance than the profession generally condones. Or, they may learn to live with a daily gnawing sensation that being a moral lawyer is a painful business.

Separating one’s two selves—professional and personal—might allow the lawyer whose morals vary from professional norms to cope. By segregating his or her two selves the lawyer can act in accord with professional norms, but offset the costs of doing so with penance. One whose day at work is spent practicing law that teeters on the edge of what the individual considers immoral may do good by performing service in the community, making charitable contributions, and regularly attending an appropriate house of worship. Even as professionals, lawyers develop similar dichotomies. For pay (or keeping their employment) they represent polluters, defective product manufacturers, and antitrust violators whose views they find abhorrent. To ease their consciences, they take on civil rights plaintiffs, consumer challenges, and other pro bono work.

But split personalities are not necessarily happy ones. The lawyer who goes to work each morning to represent interests that are inimical to the lawyer’s beliefs, who practices law resolving all moral doubts in favor of client or self-interest, and who then leaves work to spend the rest of the day performing public service at best is breaking even. Regularly accomplishing little net moral gain can lead to frustration and alienation. Moreover, the ever-present strain on the lawyer cannot over the long run be borne. Lawyers who each day represent environmental despoilers, give their salaries to save the whales, push to ethical and legal limits, take on pro bono clients, drive home in their Jaguars, and tithe to the local homeless relief organization are masses of contradictions. Something must give someplace. The incentive is strong to reconcile one’s two selves. Given the economic security and prestige of the job, it is tempting to resolve oneself to the index of self-worth provided by success at work—a success keyed to serving client needs, not moral purity.

That lawyers may be alienated from their work comes as no surprise to anyone who has worked in a law firm or other legal organization. Lawyers often cannot choose their clients, their cases, the positions they must argue, or the persons for whom they will work. Lawyers frequently have too little time to let their private selves make up for their professional lives. They must search for other means to maintain an even keel when facing the gap between their own views and the demands of the job.

For many lawyers, professionalism becomes an end in itself allowing them to avoid the need to reconcile personal morals and professional ethics. Professionalism is a commitment to producing the highest quality of legal work consistent with a client’s needs. By practicing law as a master of the craft a lawyer can take pride in the resulting product. By focusing on the product and divorcing it from the ends ultimately sought, the lawyer is freed from doubt. The profession itself is the answer to the dilemma. The individual is a lawyer. The law has its own rules. Our society has adopted those rules and requested legal practitioners to follow them for their clients. The system cleanses us of our shame.

Thus, the guilty may be defended, for our society values the principle that the guilty receive process before they are punished. Thus, one may argue by characterizing facts favorably, construing ambiguity to further the client’s position, and reading precedent narrowly or broadly depending who is favored by the reading, for our society asserts that through characterization, construction, and interpretation, all modulated by self-interest, we will achieve justice. The commitment to professional excellence allows lawyers to take pride in their work, to revel in winning the unwinnable, and to obstruct their adversaries. Yet, the escape to professionalism is a mere palliative if the profession does things that conflict with an individual’s core beliefs. Unless one is willing to suspend one’s own views of what is right and wrong, professionalism of this type is just another word for selling out.

People can, however, moderate their views without losing them. Unless individuals are “true believers,” they probably carry doubts about many values that conflict with those of the profession. Those who are willing to acknowledge that their values are contingent, or are not shared by others who in fact might have it right, may well be able to adjust to professional norms. Adjustment in that situation is not the same thing as acquiescence, for beliefs changed in response to new norms, embraced after consideration and thought, are hard to label as tainted. Therefore, those who maintain deep humility about

their values may best be able to cope with gaps between personal values and professional demands. The hallmark of those who live comfortably with professional demands is an openness to reinvestigating their most cherished beliefs. As one grows in a profession, one adopts its norms, not without conflict, but with conscious (and sometimes uncomfortable) effort.

Yet, true willful conversion of one's values may be difficult, especially given the coercive power of the legal culture, the law office, and one's peers. Moreover, the line between those who are morally humble and those who are morally bankrupt may be quite thin. Skepticism about one's own values may lead to their investigation; it also may be a reflection of one who has no moral bearing other than "if it's billable, it's ethical." Thus, a coping strategy that encourages people to give up the values they cherish may ultimately produce individuals so jaded by the conversion process that they have lost a moral compass.

So what do we do? I offer no easy solution, for none exists. We lawyers must accept one simple truth: no pain, no gain. For the law to matter, to grow, to make important moral choices, its practitioners must be the ones who work out its message. Lawyers are the vehicles of substantive and procedural change. They must also be the driving force behind ethical and moral change. It is not enough to bump along, oblivious of the questionable tactics the profession engages in under the name of advocacy, zealous representation, or lawyerly posturing. Doing so diminishes us as individuals and collectively gives the profession a bad name. No, our strategies must be different. We must be disobedient when it matters most; we must be reformers, constantly seeking a more moral profession; and we must be willing to withdraw. But we cannot lose sight of the fact that not every lawyer shares the same ethical and moral vision and that we are a pluralist profession, with varied and subtle shades. While we agitate, we also must be humble in our own moral judgments, give the profession its due, pick our shots, and be ready to find that sometimes, as much as we want to escape it, we lawyers must do things that cause us pain.

Ultimately, then, we must be prepared to endure gut-wrenching, sleepless nights. That is the price of entry to our profession, the admission fee to moral lawyering in an adversarial system. q

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