CHAPTER 1

PERVASIVE ISSUES

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INTRODUCTION

The readings and notes in this chapter reflect persistent questions about the profession we have chosen. They are questions which are of particular concern to law students wanting to know just what sort of calling they are taking up. Law school courses all too frequently gloss over them, perhaps because no clear answers are at hand or because the respectability of the entire enterprise seems to be in question. These questions will, however, be central to this course. No endorsement of particular answers is intended, nor even a claim that generally applicable answers to all of the questions can be given. Our modest aim, without pretense of completeness, is rather to legitimize the questions, and to provide an entry into the rather substantial, and growing, body of critical literature about the legal profession.

We introduce these readings, as we do each section of the book, with a problem designed to illustrate a practical setting in which the issues are raised. This first problem raises issues similar to that of the principal case that follows.

The readings in this chapter will introduce you to the legal profession and the Model Rules of Professional Conduct that govern it. They will also introduce you to some of the philosophical underpinnings for the Model Rules. Many of the issues raised in this chapter will recur in the same or slightly different form in subsequent chapters. They therefore form something of a theme to the course.

PROBLEM

You represent the defendant employer in an employment discrimination suit brought in state court by Joseph Salina, his wife Sara, and his son James, each of whom is employed by the defendant. They claim that the defendant denied them promotions, raises, and preferred job assignments because of their Hispanic ancestry. The judge granted your motion to dismiss for failure to state a claim. The judge made his decision solely on the basis of a novel interpretation of the applicable statute, an interpretation you had not argued

and which is probably inconsistent with a prior decision of the state supreme court. Counsel for the Salinas makes clear his intention to appeal, and you are persuaded that the trial judge's rationale will not stand, though you remain persuaded that your theory for your motion to dismiss is still arguable. Shortly thereafter you learn that Joseph Salina died of natural causes.

Counsel for the Salinas now files his notice of appeal, with four days to spare in the appeal period. You see immediately that the notice of appeal carries the caption ''Joseph Salina, et al.,'' and that the body of the notice simply refers to ''the plaintiffs.'' You are aware that the state court of appeals, relying on a state supreme court interpretation of the applicable procedural rules, will treat this failure to name each party individually as jurisdictional with respect to the unnamed parties and will dismiss the appeal as to those parties on its own motion, but not until after the appeal period has expired. You explain the error to your client on the day that you receive the notice, including the fact that for the next four days the Salinas' counsel can amend the notice to correct the error. You advise your client that there is a good chance that the appeal would be successful on the merits, so that you would have to go to trial on the wife's and son's claims. Your client looks at you with a frown and says: ''I know you lawyers stick together and all that, but don't even think about talking to the other guy! We'll just see how smart he is!''

QUESTION

What, if anything, should you do? After answering this question to yourself now, before you have read any law in this area, please continue to consider this question as you review the materials below. Do these materials help you decide what to do?

RULE REFERENCES

Model Rules of Professional Conduct [hereinafter ''Model Rules''] Preamble, Scope, and Rules 1.0 and 1.2

SPRUNG v. NEGWER MATERIALS, INC.

Supreme Court of Missouri, En Banc, 1989.
775 S.W.2d 97.

[On December 27, 1984, attorney Godfrey Padberg filed a civil suit for damages on behalf of plaintiff Melvin James Sprung, Jr. for damages Sprung sustained when a cart that was rented from the Defendant tipped over, dumping drywall on him. The defendant was served with the summons and complaint on January 11, 1985 and delivered them to its insurance company, which sent them on to the Kortenhof and Ely law firm. A lawyer at Kortenhof and Ely had prepared an entry of appearance and request for extension of time to answer. Unfortunately, a secretary at the law firm sent all of the documents to the insurance company and none to the court. The law firm had in place several systems for checking on

pending actions, but none of them alerted the firm to the fact that no pleadings had actually been filed in the action.

On February 28, 1985, after receiving no responsive pleading or motion, the plaintiff's attorney moved for entry of default and obtained a proof hearing date of March 11, 1985. On March 11, plaintiff's attorney put on evidence of plaintiff's damages and plaintiff was awarded judgment against defendant in the amount of $1,500,000. Under Missouri procedure as it existed at the time, this judgment would likely have been set aside if defendant's attorney had filed a motion by April 11, 1985.

Defendant's attorney, who was unaware that no responsive pleading had been filed with the court, prepared an answer and requests for discovery on March 23, 1985 and mailed a copy to plaintiff's counsel.

The response of plaintiff's counsel to this motion is taken from a dissenting opinion:

> I called him [Sprung, plaintiff] to tell him that within the 30 day period there had been an answer filed and he asked me what that meant and I said, ''I don't really know what they mean by this, but there is an attorney now who thinks that it's still a lawsuit,'' and that's what I told him.
>
> Q So it appeared to you that Mr. Ely was filing an answer and had no realization that there had already been a default judgment?
>
> A That's correct.
>
> Q And you passed that information on to Mr. Sprung?
>
> A Right.
>
> Kortenhof and Ely . . . may have been responsible for the default. . . . But I said you know, ''I could talk to him about it and find out if they're involved. If they're involved, they'll file a motion to set it aside.'' I said, ''If the insurance company's involved and they're not involved, they're still going to file a motion to set it aside,'' and that was basically it and he said, ''Well, what will that mean to me?'' I said, ''There's a chance you can lose your verdict (sic),'' and he said, ''Don't do it.''

Plaintiff's counsel did not do anything and later further testified:

> So after the 30 day period I waited until 10 more days, which would be the normal appeal time and sometime after that, maybe the 41st, 42nd, depending on what day of the week it was, I don't recall, I called Ben on the phone and said, ''Ben, I'd like to come down and see you,'' and he said, ''Okay.'' And I came on downstairs and talked to him.

After defendant's attorney learned that a final judgment had been entered, the attorney filed, on defendant's behalf, two motions to set aside the default judgment. The trial court granted one of the motions, but that decision was reversed on appeal. In *Sprung v. Negwer Materials, Inc.*, 727 S.W.2d 883 (Mo. 1987) (en banc) (*Sprung I*), the Missouri Supreme Court

affirmed the denial of the motions to set aside the default judgment, but remanded the case for an evidentiary hearing on whether the actions of plaintiff's counsel would support a separate action in equity to set aside the final judgment by default. Following that hearing, the trial court denied relief to the defendant. That denial was then appealed.

This case (*Sprung II*) was finally decided with one principal opinion, three concurring opinions, and three dissenting opinions. Presented here is a portion of the principal opinion and one of the dissenting opinions from *Sprung I*, one of the concurring opinions in *Sprung II*, and one of the dissenting opinions in *Sprung II*.]

BILLINGS, JUDGE * * *

In its first point, appellant claims the trial court erred in refusing to set aside the default judgment on equitable grounds. In order for one to prevail in setting aside a default judgment on equitable grounds, he must show a meritorious defense, good reason or excuse for the default and that no injustice will accrue to the party who obtained the default judgment as a result of setting aside the judgment. [The court found that both the law firm and the insurance company had safeguards in place to prevent matters like this one from being ignored, but that all of these systems apparently failed in this case.]

The law is well-settled that the neglect of a defendant's attorney or his insurer which results in a default judgment is imputable to the defendant. * * *

A lawyer is charged during the progress of a cause with the duty, and in fact presumed, to know what is going on in his case. * * * He must vigilantly follow the progress of a case in which he is involved. * * * And, although the law favors a trial on the merits, such a generalization must be carefully applied to the facts of each case in the interest of justice; for, the law defends with equal vigor the integrity of the legal process and procedural rules and, thus, does not sanction the disregard thereof. * * *

In its second point, appellant claims the failure of respondent's attorney to advise appellant's attorney that a default judgment had been entered until after its entry provides a basis for setting aside the judgment.

[The court affirmed prior holdings refusing to recognize a duty of the respondent to notify the appellant of the entry of default in the underlying action.]

In *Friedman v. The Caring Group, Inc.*, 750 S.W.2d 102, 103–04 (Mo.Ct.App. 1988), the issue of the conduct of a plaintiff's attorney as to the entry of a default judgment was squarely before the appellate court. The court refused to hold that the failure of plaintiff's attorney to notify defendant's attorney, who had entered his appearance in the case but [had] not filed an answer, that plaintiff's attorney intended to take a default judgment provided a basis for setting aside the judgment. In the present case, respondent's attorney did not know that appellant was

represented by an attorney until after the default judgment was entered. The Court concludes plaintiff's attorney had no duty to inform the defendant or its attorney that a judgment had been entered. * * *

The judgment of the trial court [refusing to set aside the judgment of $1,500,000] is affirmed.

[CONCURRING AND DISSENTING OPINIONS]

[DONNELLY, J., dissenting from *Sprung I*, 727 S.W.2d at 893–94]

Given the holding in *Bates and* [*Van*] *O'Steen v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) [the first case granting First Amendment protection to advertising by lawyers], it may border on the ridiculous to speak of the practice of law as a profession and not a business.

However, being somewhat old-fashioned, I must express the view that a lawyer does not inevitably violate his obligation to seek the lawful objectives of his client when he treats opposing counsel with courtesy and consideration. * * *

In this case, attorney for plaintiff took a default judgment in the amount of $1,500,000 on March 11, 1985. He was on notice of facts indicating the neglect of opposing counsel on March 29, 1985, when discovery motions were filed but was instructed by his client ''to protect his judgment.'' On April 22, 1985, after time had run under [the procedural rule], he advised opposing counsel of the default judgment. On May 3, 1985, motions to set aside the default judgment were filed. * * * The trial court, in its discretion set aside the default judgment and, in my view, corrected what must be considered a miscarriage of justice. * * *

If I may conclude with a personal observation:

Judges at times become so enamored of jargon in codes of ''professional'' responsibility that they forget what it was like to practice law. Here, the attorney for plaintiff was directed by his client to conceal the taking of the default judgment from his brother lawyer. What was he to do in such circumstance? Should he have invited the wrath of his client and risked a claim of malpractice? Had he acted as a professional and not as a hired representative who did solely the bidding of his client, would/could this Court have protected him?

Of course, the equity due *the parties*, not the attorneys, is at issue here. And it was plaintiff Sprung who insisted on concealment and gained the advantage. In my view, equity demands that we * * * require the parties to resolve their controversy by a trial on the merits.

I respectfully dissent.

[BLACKMAR, C.J., dissenting in *Sprung II*, 775 S.W.2d at 106–13]

Plaintiff's counsel's own testimony shows that he was perfectly well aware of what had happened when he received communications from defendant's counsel on March 23 and March 29, 1985. He knew that

counsel was proceeding with the defense of the case, on the mistaken assumption that it was properly pending, and that the extension papers must not have reached him or the courthouse. He knew that if defense counsel were alerted, the default judgment would probably be set aside as of course. * * * He also knew that if the situation remained the same until April 10 had passed, the default would be infinitely more difficult to set aside. Knowing these circumstances, he deliberately refrained from answering his mail, or even from acknowledging the communication. His conduct should shock all right-thinking lawyers.

The Court should not hesitate to say that this kind of conduct is unacceptable in our profession. The processing of civil litigation requires that lawyers deal with each other in accordance with the highest standards of trust and candor. The two communications called for a response within a reasonable time, which in the setting of this case means ''without delay.'' Perhaps counsel did not have a duty to tell his opponent in so many words that he had taken a default, but at the very least he could dictate a letter saying, ''we have no record of your firm's involvement in the case.''

I accept the proposition that a lawyer has a duty to advance his client's interest by all honorable means, and would reject any suggestion that ''professional courtesy'' should prevail over the lawyer's duty to his client. I would like to be remembered as a lawyer who went all out for his clients. But I would stop short of taking advantage of a mistake known to me. Nor would I sanction a situation in which the Court permits other lawyers to get away with conduct which I consider the legal equivalent of fraud. * * * This Court, in the last analysis, sets the standards which Missouri lawyers must observe. It should not allow this plaintiff and his attorney to profit from deceptive conduct or deceptive silence.

In one of the earliest treatises on legal ethics the late Judge George Sharswood, sometime Chief Justice of Pennsylvania, speaks as follows:

> Let [the reader] shun most carefully the reputation of a sharp practitioner. Let him be liberal to the slips and oversights of his opponent whenever he can do so, and in plain cases not shelter himself behind the instructions of his client. The client has no right to require him to be illiberal—and he should throw up his brief sooner than do what revolts against his own sense of what is demanded by honor and propriety.

Sharswood, *An Essay on Professional Ethics*, 73–74 (6th Ed. 1930).

We should require lawyers to comply with this standard, not only as a matter of professional courtesy, but as a positive rule of law. Here there was a duty to reply to the correspondence, and, since there was a critical limit, to make some sort of response within that time limit. Lying in wait until the response was stripped of its meaning should not be countenanced. * * *

It is interesting to consider what plaintiff's counsel would have done if defense counsel had called him on the telephone seeking to arrange a time for depositions. I hardly think that he could properly have agreed on a date, without advising counsel that he had taken a default. * * * This example differs only in degree and not in kind from the actual situation before us.

It has been suggested, unfortunately, that plaintiff's counsel was justified in doing as he did because his client might have sued him for malpractice. We should certainly take this occasion to say so all can hear that communications between opposing counsel are a part of the normal practice of law, essential in the orderly handling of litigation, and that a lawyer cannot subject himself to malpractice liability by acting honorably toward his forensic opponents. * * *

I would vacate the default judgment and remand so that the case may proceed to trial.

[RENDLEN, J., concurring in *Sprung II*, 775 S.W.2d at 103]

When, during the course of this litigation, respondent's attorney received information indicating appellant was represented by counsel, he promptly communicated this fact to his client as required by [the Preamble to the Rules].

It was the attorney's responsibility as an *advisor* of his client in our adversary system to do what he did * * *.

He was, of course, more than an advisor—he was an advocate:

> As *advocate*, a lawyer zealously asserts the client's position under the rules of the *adversary system*.

[Preamble to the Rules] (Emphasis added.)

After communicating with the client and explaining the situation in explicit terms, they shared the decision as to the course of action to follow, all consistent with the provisions of Rule 1.2 * * * which indicates that, except in certain specified instances, an attorney shall abide by the client's decisions concerning the objectives of representation. Though in the case at bar we need not decide whether he was obligated absolutely to follow the client's direction, it is clear that plaintiff's counsel made a good faith, albeit difficult, decision which we cannot say was unethical. Assuming arguendo respondent's counsel had chosen to disregard his client's direction and the judgment had been vacated at his behest, or as a result of his conduct, clearly he would risk a charge of failing to comply with an obligation imposed by the Rules of Professional Conduct, to say nothing of malpractice claims by his client that could flow from the formidable choice he was required to make.

For these reasons too, I concur in the majority opinion of the Court.

A. FORMAL PROFESSIONAL RULES

Several of the opinions in *Sprung* mention either the Model Rules of Professional Conduct (the Model Rules) or the Model Code of Professional Responsibility (the Code). These are formal standards of conduct for lawyers, proposed at different times by the American Bar Association for adoption by state and federal lawyer disciplinary jurisdictions. The opinions of Judges Blackmar and Rendlen in particular seem to suggest such rules might be in conflict with what a lawyer should do under the circumstances of that case. The next excerpt offers a critical review of the development, purposes, and effects of those rules.

COLIN CROFT, RECONCEPTUALIZING AMERICAN LEGAL PROFESSIONALISM: A PROPOSAL FOR DELIBERATIVE MORAL COMMUNITY

67 New York University Law Review 1256 (1992).

* * * *The Evolution of Professional Codes of Conduct*

Frustrated republican-influenced practitioners[a] sought a universal code of conduct as early as the first quarter of the eighteenth century. Through most of the 1800s, however, informal sanctioning and socialization of local legal practice norms appeared to serve the ends sought by proponents of such a code, through enforcement by localized groups of practitioners and the apprenticeship system. By the early twentieth century, such methods increasingly were perceived as inadequate, as the bar underwent the transformation to organizational practice * * *. Drawing primarily upon the work of republican-minded lawyers like George Sharswood, and to a lesser extent David Hoffman, the ABA adopted its Canons of Professional Ethics (Canons) in 1908. Adoption by state bar associations and judicial decisions interpreting the Canons soon followed. By 1920, all but thirteen states and the District of Columbia had adopted the Canons in some form, and the ABA Committee on Professional Ethics and Grievances was beginning to receive requests for interpretation.

* * * The [Sharswood/Hoffman-influenced] Canons were, in voice, ''fraternal admonitions''—norms issuing from an autonomous professional society. As such, they presumed widely understood and approved practice norms resting upon the traditional tenets of noblesse oblige—a conceptualization of legal practice as an elite craft, practiced independently, with a commitment to civic-political affairs. Although largely hortatory, the Canons did address proper ethical conduct in specific practice situations. * * *

Initially, the Canons functioned not as an enforceable legal code, but rather as collective ''evidence'' that certain assumed practice norms existed. This evidence was gradually transformed into an enforceable legal code by the creation of integrated state bars, increased disciplinary enforce-

a. [''Republican'' is used here in its democracy, rather than political party, sense. Eds.]

ment with higher penalties enforced by courts, and an evolution of the Canons' general norms into more specific, binding legal rules through periodic interpretation. The increased issuance, and eventual publication, of formal and informal ethics opinions by the Standing Committee on Professional Ethics, * * * had the effect of clarifying and narrowing the general precepts set forth in the Canons. * * * Like a constitution, the Canons were interpreted as required, creating an organic and evolving body of norms to meet the changing needs and contexts of legal practice.

Ultimately, an increased need for clarification, as well as the uncertainty of what the Canons actually represented, convinced many members of the bar that the Canons were hopelessly outdated and outmoded; no longer were they assumed to stand as ''evidence'' of the professional norms that had been thought to exist at the time of the Canons' initial adoption. By 1965, an ABA Special Committee on Evaluation of Ethical Standards, created to study and report on the adequacy and effectiveness of the Canons, reported that ''the existing Canons are in need of substantial revision.'' The Committee emphasized the need for ''sharpening and clarification'' of the Canons' standards to ''facilitate more effective disciplinary action and . . . increase significantly the level of voluntary compliance.'' Rather than modify the existing Canons, however, the Committee decided that it was necessary to draft a new code. By 1968, a tentative draft had been produced, and after distribution to lawyers, judges, and scholars, a second draft was completed in 1969. On August 12, 1969, the ABA House of Delegates unanimously passed a final draft of the new code.

The new Model Code of Professional Responsibility (Model Code) was innovative in form, although substantively it broke little new ground, essentially restating the 1908 Canons and the numerous informal and formal ABA opinions interpreting them. However, the split from the Canons in voice and form was significant. Unlike the 1908 Canons and the Model Code's Canons and Ethical Considerations, which represented ''fraternal understandings that memorialized a shared group discourse,'' the new Model Code's set of Disciplinary Rules ''functioned as a statute defining the legal contours of a vocation whose practitioners were connected primarily by having been licensed to practice law.'' Thus, a step was made down the path of ''legalization'' of professional norms, articulated as narrow rules and prohibitions statutorily drawn.

Most states quickly adopted the Model Code, and federal courts recognized it as a set of enforceable legal standards in overseeing the conduct of federal litigators. However, motivated by an effort to augment the profession's image in the wake of Watergate, as well as to reinforce the primacy of the ABA as ''lawgiver for the practice of law,'' in the summer of 1977 a new ABA Commission on Evaluation of Professional Standards was appointed to evaluate the still infant Model Code. Six years of discussion, debate, and drafting ensued, due in large part to the personal leadership of Committee Chair Robert J. Kutak of Omaha. After significant reversals and substantive changes from the early Kutak Commission drafts, in 1983 the ABA House of Delegates adopted the Model

Rules of Professional Conduct (Model Rules) which supplanted the Code after less than fourteen years of strained existence. * * *

In form, the Model Rules abandoned the three-tiered structure of the Model Code in favor of a restatement format, in which brief, straightforward Rules are augmented by explanatory Comments. Kutak succeeded in his purpose: simplified presentation of clear standards, and reconciliation of the profession's practice norms with the substantive law of agency, contract, and torts. The end result, however, raised the question of whether a professional code that merely followed existing legal mandates properly could be understood as a ''code of ethics,'' and not merely as a glorified legal practice handbook.

In any event, the Model Rules represent a further step toward legalistic, rule-based professional standards in the law. Unlike the 1908 Canons or the 1969 Model Code's Canons and Ethical Considerations, the Model Rules largely ''eschew descriptions of morals . . . root(ing) out both the language and the discipline of ethical reasoning.'' As such, the Model Rules ''are not ethics but instead (are) a set of regulatory mandates and prohibitions.'' The Model Rules supplant professional obligations with legal mandates, moving away from the profession's norms toward an uninspired scheme of bureaucratic regulation, intentionally established, rather than organically derived. * * *

NOTES ON PROFESSIONAL RULES

1. **Ethics 2000 Commission:** The ABA continues to review and revise its Model Rules, which have been adopted by the majority of American disciplinary authorities, but with a greater degree of variance in particular rules than was the case with the Model Code of Professional Responsibility. In 1997, the ABA appointed the ''Ethics 2000 Commission'' to study the Model Rules and propose amendments where appropriate. Most of the extensive recommendations of that body were adopted by the House of Delegates of the American Bar Association in February and August, 2002, took effect at the beginning of 2003, and serve as the basis for the current version of the Model Rules. As a cursory reading of the Model Rules reveals, some rules require certain lawyer conduct, while others permit conduct or allow exceptions to otherwise required conduct. The rules are both ''partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.'' Model Rules Scope ¶ [14]. Many states have revised their rules to incorporate some of the Ethics 2000 amendments, though the states almost always modify the Model Rules to some extent.

The Model Rules continue to evolve. The ABA has enacted a few additional amendments to the Model Rules since its adoption of the Ethics 2000 Commission proposals in 2002. In 2009, ABA President Carolyn B. Lamm created the ABA Commission on Ethics 20/20, which is tasked with reviewing the Model Rules in light of advancing technology and the globalization of legal practice. Many observers expect the Ethics 20/20 process to result in further amendment of the Model Rules. *See* Bruce A. Green, *ABA Ethics Reform from ''MDP'' to ''20/20'': Some Cautionary Reflections*, 2009 ABA J.Prof.Law. 1, at

2; James Podgers, *Stage Two: Ethics 20/20 Sharpens Its Ideas on Technology, Globalization*, ABA J., January 2011, at 62. The Commission's work, including discussion drafts and proposals, can be followed at www.abanet.org/ethics 2020.

2. **American Law Institute RESTATEMENT:** Shortly after the adoption of the Model Rules, in about 1985, the American Law Institute began work on the RESTATEMENT OF THE LAW GOVERNING LAWYERS. The RESTATEMENT, which was completed and published in 2000, provides guidance beyond the scope of the Model Rules, covering the formation of the lawyer-client relationship, civil liability of lawyers to clients and third parties, and attorney-client privilege in the law of evidence, among others. The RESTATEMENT draws not only on the texts of adopted rules but also on judicial decisions and other interpretations, and states the Institute's own position on issues where consensus is lacking in the various American jurisdictions. As a result, its provisions are sometimes slightly different from those in the Model Rules. *See* AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Foreword (2000) (hereinafter ''RESTATEMENT''). The provisions of the RESTATEMENT are not binding on courts, although courts generally find the RESTATEMENT influential in dealing with lawyer conduct. *See Chem–Age Ind., Inc. v. Glover*, 2002 SD 122, ¶ 33, 652 N.W.2d 756, 770.

3. **Ethics Opinions:** Croft mentions publication of ''formal and informal ethics opinions.'' In the United States, ethics opinions are published not only by the American Bar Association, mentioned by Croft, but also by state, county, and, in some cases, local bar associations. Additionally, some specialized bar associations, such as the patent bar, offer ethics opinions. Finally, many state disciplinary authorities will provide either formal or informal opinions to lawyers upon request. *See* Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 Geo.J. Legal Ethics 313, 320 (2002). Because many questions faced by lawyers do not have a specific answer within the formal rules of professional conduct, ethics opinions provide guidance to lawyers with ethical dilemmas. In addition, ''lawyers acting in conformity with ethics opinions also receive explicit or customary protection from discipline in many jurisdictions.'' *See id*. at 330. While not even the opinions of ethics committees within the same disciplinary system are binding on courts, recent studies have found that ''federal and state courts rely on published state and local * * * ethics opinions as a source of guidance with increasing frequency.'' *Id*. at 340.

4. Consider Model Rule 1.6 in relation to our problem. Is the information you learned—that the notice of appeal contains a potentially fatal clerical error, and that your client insists on taking advantage of it—''information relating to the representation'' within the meaning of that Model Rule? If you agree that it almost certainly is, is there an exception within Model Rule 1.6 that authorizes you to reveal to your adversary the nature of the problem?

5. Next consider Model Rule 1.2(a). At this stage, you may assume that the ''objectives of representation'' include the remedies the client wants from the case. If the lawyer ''shall abide by'' the client's decision regarding the objectives, how would the lawyer ever be able to inform the other side about a procedural defect without the client's permission? If, instead, you assume that

whether or not to advise adversary counsel is an issue of the ''means'' whereby the client's objectives are accomplished, can the lawyer ever choose means that substantively disadvantage the client?

6. If the decision to not tell the adversary, thereby allowing the client to win, relates to the objectives of the representation, and if you cannot reveal such information because there are no exceptions to confidentiality, is Chief Judge Blackmar, in *Sprung*, arguing that counsel should ignore the rules when he states: ''[A] lawyer cannot subject himself to malpractice liability by acting honorably toward his forensic opponents''?

7. How would not doing anything about the mistake square with your own conscience? What does it say about the relationship between you and your client if you simply accept his command? Would you accept such conduct from a nonlawyer layperson?

8. Given your skills as an advocate, if you really wanted to, do you think you could talk your client into letting you do something about the error? Is that what the dissenting judges in *Sprung* want you to do?

The next reading may help in your consideration of these questions.

B. CRITICISM OF THE LAWYER'S ''TRADITIONAL'' ROLE

The lawyer in *Sprung* acted in accordance with what many perceive to be the lawyer's ''traditional'' role, also called the ''amoral'' role, which is understood to require the lawyer to pursue the client's goals without regard to the personal morality of those goals. The next reading and the notes following it discuss this tradition.

RICHARD WASSERSTROM, LAWYERS AS PROFESSIONALS: SOME MORAL ISSUES

5 Human Rights 1 (1975).

In this paper I examine two moral criticisms of lawyers which, if well-founded, are fundamental. Neither is new but each appears to apply with particular force today. Both tend to be made by those not in the mainstream of the legal profession and to be rejected by those who are in it. Both in some sense concern the lawyer-client relationship.

The first criticism centers around the lawyer's stance toward the world at large. The accusation is that the lawyer-client relationship renders the lawyer at best systematically amoral and at worst more than occasionally immoral in his or her dealings with the rest of mankind.

The second criticism focuses upon the relationship between the lawyer and the client. Here the charge is that it is the lawyer-client relationship which is morally objectionable because it is a relationship in which the lawyer dominates and in which the lawyer typically, and perhaps inevitably, treats the client in both an impersonal and a paternalistic fashion.

To a considerable degree these two criticisms of lawyers derive, I believe, from the fact that the lawyer is a professional. And to the extent to which this is the case, the more generic problems I will be exploring are those of professionalism generally. But in some respects, the lawyer's situation is different from that of other professionals. The lawyer is vulnerable to some moral criticism that does not readily or as easily attach to any other professional. And this, too, is an issue that I shall be examining. * * *

Conventional wisdom has it that where the attorney-client relationship exists, the point of view of the attorney is properly different—and appreciably so—from that which would be appropriate in the absence of the attorney-client relationship. For where the attorney-client relationship exists, it is often appropriate and many times even obligatory for the attorney to do things that, all other things being equal, an ordinary person need not, and should not do. What is characteristic of this role of a lawyer is the lawyer's required indifference to a wide variety of ends and consequences that in other contexts would be of undeniable moral significance. Once a lawyer represents a client, the lawyer has a duty to make his or her expertise fully available in the realization of the end sought by the client, irrespective, for the most part, of the moral worth to which the end will be put or the character of the client who seeks to utilize it. Provided that the end sought is not illegal, the lawyer is, in essence, an amoral technician whose peculiar skills and knowledge in respect to the law are available to those with whom the relationship of client is established. The question, as I have indicated, is whether this particular and pervasive feature of professionalism is itself justifiable. * * *

Most clients come to lawyers to get the lawyers to help them do things that they could not easily do without the assistance provided by the lawyer's special competence. They wish, for instance, to dispose of their property in a certain way at death. They wish to contract for the purchase or sale of a house or a business. They wish to set up a corporation which will manufacture and market a new product. They wish to minimize their income taxes. And so on. In each case, they need the assistance of the professional, the lawyer, for he or she alone has the special skill which will make it possible for the client to achieve the desired result.

And in each case, the role-differentiated character of the lawyer's way of being tends to render irrelevant what would otherwise be morally relevant considerations. * * * Suppose a client can avoid the payment of taxes through a loophole only available to a few wealthy taxpayers. Should the lawyer refuse to tell the client of a loophole because the lawyer thinks it an unfair advantage for the rich? Suppose a client wants to start a corporation that will manufacture, distribute and promote a harmful but not illegal substance, e.g., cigarettes. Should the lawyer refuse to prepare the articles of incorporation for the corporation? In each case, the accepted view within the profession is that these matters are just of no concern to the lawyer *qua* lawyer. The lawyer need not of course agree to represent the client (and that is equally true for the unpopular client accused of a

heinous crime), but there is nothing wrong with representing a client whose aims and purposes are quite immoral. And having agreed to do so, the lawyer is required to provide the best possible assistance, without regard to his or her disapproval of the objective that is sought.

The lesson, on this view, is clear. The job of the lawyer, so the argument typically concludes, is not to approve or disapprove of the character of his or her client, the cause for which the client seeks the lawyer's assistance, or the avenues provided by the law to achieve that which the client wants to accomplish. The lawyer's task is, instead, to provide that competence which the client lacks and the lawyer, as professional, possesses. In this way, the lawyer as professional comes to inhabit a simplified universe which is strikingly amoral—which regards as morally irrelevant any number of factors which nonprofessional citizens might take to be important, if not decisive, in their everyday lives. And the difficulty I have with all of this is that the arguments for such a way of life seem to be not quite so convincing to me as they do to many lawyers. I am, that is, at best uncertain that it is a good thing for lawyers to be so professional—for them to embrace so completely this role-differentiated way of approaching matters. * * *

To be sure, on occasion, a lawyer may find it uncomfortable to represent an extremely unpopular client. On occasion, too, a lawyer may feel ill at ease invoking a rule of law or practice which he or she thinks to be an unfair or undesirable one. Nonetheless, for most lawyers, most of the time, pursuing the interests of one's clients is an attractive and satisfying way to live in part just because the moral world of the lawyer is a simpler, less complicated, and less ambiguous world than the moral world of ordinary life. There is, I think, something quite seductive about being able to turn aside so many ostensibly difficult moral dilemmas and decisions with the reply: but that is not my concern; my job as a lawyer is not to judge the rights and wrong of the client or the cause; it is to defend as best I can my client's interests. For the ethical problems that can arise within this constricted point of view are, to say the least, typically neither momentous nor terribly vexing. Role-differentiated behavior is enticing and reassuring precisely because it does constrain and delimit an otherwise often intractable and confusing moral world. * * *

I do believe that the amoral behavior of the *criminal* defense lawyer is justifiable. But I think that jurisdiction depends at least as much upon the special needs of an accused as upon any more general defense of a lawyer's role-differentiated behavior. As a matter of fact I think it likely that many persons such as myself have been misled by the special features of the criminal case. Because a deprivation of liberty is so serious, because the prosecutorial resources of the state are so vast, and because, perhaps, of a serious skepticism about the rightness of punishment even where wrongdoing has occurred, it is easy to accept the view that it makes sense to charge the defense counsel with the job of making the best possible case for the accused—without regard, so to speak, for the merits. This coupled with the fact that it is an adversarial proceeding succeeds, I think, in

justifying the amorality of the criminal defense counsel. But this does not, however, justify a comparable perspective on the part of lawyers generally. Once we leave the peculiar situation of the criminal defense lawyer, I think it quite likely that the role-differentiated amorality of the lawyer is almost certainly excessive and at times inappropriate. That is to say, this special case to one side, I am inclined to think that we might all be better served if lawyers were to see themselves less as subject to role-differentiated behavior and more as subject to the demands of the moral point of view. In this sense it may be that we need a good deal less rather than more professionalism in our society generally and among lawyers in particular.

Moreover, even if I am wrong about all this, four things do seem to me to be true and important.

First, all of the arguments that support the role-differentiated amorality of the lawyer on institutional grounds can succeed only if the enormous degree of trust and confidence in the institutions themselves is itself justified. If the institutions work well and fairly, there may be good sense to deferring important moral concerns and criticisms to another time and place, to the level of institutional criticism and assessment. But the less certain we are entitled to be of either the rightness or the self-corrective nature of the larger institutions of which the professional is a part, the less apparent it is that we should encourage the professional to avoid direct engagement with the moral issues as they arise. * * *

Second, it is clear that there are definite character traits that the professional such as the lawyer must take on if the system is to work. What is less clear is that they are admirable ones. Even if the role-differentiated amorality of the professional lawyer is justified by the virtues of the adversary system, this also means that the lawyer *qua* lawyer will be encouraged to be competitive rather than cooperative; aggressive rather than accommodating; ruthless rather than compassionate; and pragmatic rather than principled. This is, I think, part of the logic of the role-differentiated behavior of lawyers in particular, and to a lesser degree of professionals in general. * * *

Third, there is a special feature of the role-differentiated behavior of the lawyer that distinguishes it from the comparable behavior of other professionals. What I have in mind can be brought out through the following question: Why is it that it seems far less plausible to talk critically about the amorality of the doctor, for instance, who treats all patients irrespective of their moral character than it does to talk critically about the comparable amorality of the lawyer? Why is it that it seems so obviously sensible, simple and right for the doctor's behavior to be narrowly and rigidly role-differentiated, i.e., just to try to cure those who are ill? And why is it that at the very least it seems so complicated, uncertain, and troublesome to decide whether it is right for the lawyer's behavior to be similarly role-differentiated?

The answer, I think, is twofold. To begin with (and this I think is the less interesting point) it is, so to speak, intrinsically good to try to cure disease, but in no comparable way is it intrinsically good to try to win every lawsuit or help every client realize his or her objective. In addition (and this I take to be the truly interesting point), the lawyer's behavior is different in kind from the doctor's. The lawyer—and especially the lawyer as advocate—directly says and affirms things. The lawyer makes the case for the client. He or she tries to explain, persuade and convince others that the client's cause should prevail. The lawyer lives with and within a dilemma that is not shared by other professionals. If the lawyer actually believes everything that he or she asserts on behalf of the client, then it appears to be proper to regard the lawyer as in fact embracing and endorsing the points of view that he or she articulates. If the lawyer does not in fact believe what is urged by way of argument, if the lawyer is only playing a role, then it appears to be proper to tax the lawyer with hypocrisy and insincerity. To be sure, actors in a play take on roles and say things that the characters, not the actors, believe. But we know it is a play and that they are actors. The law courts are not, however, theaters, and the lawyers both talk about justice and they genuinely seek to persuade. The fact that the lawyer's words, thoughts, and convictions are, apparently, for sale and at the service of the client helps us, I think, to understand the peculiar hostility which is more than occasionally uniquely directed by lay persons toward lawyers. The verbal, role-differentiated behavior of the lawyer *qua* advocate puts the lawyer's integrity into question in a way that distinguishes the lawyer from the other professionals.

Fourth, and related closely to the three points just discussed, even if on balance the role-differentiated character of the lawyer's way of thinking and acting is ultimately deemed to be justifiable within the system on systemic instrumental grounds, it still remains the case that we do pay a social price for that way of thought and action. For to become and to be a professional, such as a lawyer, is to incorporate within oneself ways of behaving and ways of thinking that shape the whole person. It is especially hard, if not impossible, because of the nature of the professions, for one's professional way of thinking not to dominate one's entire adult life.
* * *

The role-differentiated behavior of the professional also lies at the heart of the second of the two moral issues I want to discuss, namely, the character of the interpersonal relationship that exists between the lawyer and the client. As I indicated at the outset, the charge that I want to examine here is that the relationship between the lawyer and the client is typically, if not inevitably, a morally defective one in which the client is not treated with the respect and dignity that he or she deserves.

[T]he lawyer can both be overly concerned with the interest of the client and at the same time fail to view the client as a whole person, entitled to be treated in certain ways.

One way to begin to explore the problem is to see that one pervasive, and I think necessary, feature of the relationship between any professional and client or patient is that it is in some sense a relationship of inequality. This relationship of inequality is intrinsic to the existence of professionalism. * * * To be sure, the client can often decide whether or not to enter into a relationship with a professional. And often, too, the client has the power to decide whether to terminate the relationship. But the significant thing I want to focus upon is that while the relationship exists, there are important respects in which the relationship cannot be a relationship between equals and must be one in which it is the professional who is in control. * * *

To begin with, there is the fact that one characteristic of professions is that the professional is the possessor of expert knowledge of a sort not readily or easily attainable by members of the community at large. Hence, in the most straightforward of all senses the client, typically, is dependent upon the professional's skill or knowledge because the client does not possess the same knowledge.

Moreover, virtually every profession has its own technical language, a private terminology which can only be fully understood by the members of the profession. The presence of such a language plays the dual role of creating and affirming the membership of the professionals within the profession and of preventing the client from fully discussing or understanding his or her concerns in the language of the profession.

These circumstances, together with others, produce the added consequence that the client is in a poor position effectively to evaluate how well or badly the professional performs. In the professions, the professional does not look primarily to the client to evaluate the professional's work. The assessment of ongoing professional competence is something that is largely a matter of self-assessment conducted by the practi[c]ing professional. Where external assessment does occur, it is carried out not by clients or patients but by other members of the profession, themselves. It is significant, and surely surprising to the outsider, to discover to what degree the professions are self-regulating. They control who shall be admitted to the professions and they determine (typically only if there has been a serious complaint) whether the members of the profession are performing in a minimally satisfactory way. This leads professionals to have a powerful motive to be far more concerned with the way they are viewed by their colleagues than with the way they are viewed by their clients. This means, too, that clients will necessarily lack the power to make effective evaluations and criticisms of the way the professional is responding to the client's needs.

[O]ne question that is raised is whether it is a proper and serious criticism of the professions that the relationship between the professional and the client is an inherently unequal one in this sense.

One possible response would be to reject the view that all relationships of inequality (in this sense of inequality) are in fact undesirable.

Such a response might claim, for example, that there is nothing at all wrong with inequality in relationships as long as the inequality is consensually imposed. Or, it may be argued, this kind of inequality is wholly unobjectionable because it is fitting, desired, or necessary in the circumstances. And, finally, it may be urged, whatever undesirability does attach to relationships by virtue of their lack of equality is outweighed by the benefits of role-differentiated relationships.

A third possible response * * * might begin by conceding, at least for purposes of argument, that some inequality may be inevitable in any professional-client relationship. It might concede, too, that a measure of this kind of inequality may even on occasion be desirable. But it sees the relationship between the professional and the client as typically flawed in a more fundamental way, as involving far more than the kind of relatively benign inequality delineated above. This criticism focuses upon the fact that the professional often, if not systematically, interacts with the client in both a manipulative and a paternalistic fashion. The point is not that the professional is merely dominant within the relationship. Rather, it is that from the professional's point of view the client is seen and responded to more like an object than a human being, and more like a child than an adult. The professional does not, in short, treat the client like a person; the professional does not accord the client the respect that he or she deserves. And these, it is claimed, are without question genuine moral defects in any meaningful human relationship. They are, moreover, defects that are capable of being eradicated once their cause is perceived and corrective action taken. The solution, so the argument goes, is to ''deprofessionalize'' the professions; not do away with the professions entirely, but weaken or eliminate those features of professionalism that produce these kinds of defective * * * interpersonal relationships. * * *

The issue seems to me difficult just because I do think that there are important and distinctive competencies that are at the heart of the legal profession. If there were not, the solution would be simple. If there were no such competencies—if, that is, lawyers didn't really help people any more than (so it is sometimes claimed) therapists do—then no significant social goods would be furthered by the maintenance of the legal profession. But, as I have said, my own view is that there are special competencies and that they are valuable. This makes it harder to determine what to preserve and what to shed. The question, as I see it, is how to weaken the bad consequences of the role-differentiated lawyer-client relationship without destroying the good that lawyers do.

Without developing the claim at all adequately in terms of scope or detail, I want finally to suggest the direction this might take. Desirable change could be brought about in part by a sustained effort to simplify legal language and to make the legal processes less mysterious and more directly available to lay persons. The way the law works now, it is very hard for lay persons either to understand it or to evaluate or solve legal problems * * * on their own. * * *

NOTES ON PROFESSIONAL MODELS AND CRITICISMS

1. **Wasserstrom and the Current Model Rules:** Wasserstrom's article was published in 1975, prior to the adoption of the current Model Rules. At the time, none of the provisions of the Model Code of Professional Responsibility directly addressed either of his criticisms. Consider these criticisms today in light of Model Rule 2.1. That rule permits the lawyer to advise clients about not only the legal, but also the moral, political, social, and economic consequences of client conduct. Does this allow the lawyer to add a "moral" component to an otherwise "amoral" activity? Also, consider again Model Rule 1.2(a)'s attempt to specifically delineate those decisions that belong specifically to the client. Is such a rule an attempted response to Wasserstrom's inequality criticism?

2. **Other Models of Lawyer Practice:** Wasserstrom criticizes the traditional attorney-client relationship from the client's perspective. In another article, the author criticizes the relationship from the perspective of the attorney within that relationship. In William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv.L.Rev. 1083 (1988), the author suggests that two models currently describe the practice of most lawyers. The "*libertarian*" model is similar to Wasserstrom's first criticism. It favors procedure over substance. Under this model, it is entirely permissible for lawyers to assert defenses such as the statute of limitations or the statute of frauds to defeat otherwise legitimate claims. The second model seen by Simon is the "*regulatory*" model. Under this model, the lawyer's primary function is to assure enforcement of the substantive law. Simon prefers neither of these two models, because "under both approaches, the lawyer has little or no discretion to consider whether there might be legal reasons why a particular course of action should not be pursued or a particular claim not enforced, even though the course is legally permissible or the claim potentially enforceable." Instead, Simon suggests a third "*discretionary*" model.

> The lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice. This "seek justice" maxim suggests a kind of noncategorical judgment that might be called pragmatist, ad hoc, or dialectical, but that I will call discretionary. * * *
>
> There are two dimensions to the judgment that the discretionary approach requires of the lawyer. * * *
>
> #### *A. Relative Merit*
>
> Neither [the libertarian nor the regulatory] approaches adequately confronts a central fact about the legal system: [S]ome rights or interests are more important than others. [One example would be the constitutional law dichotomy between "fundamental" or "compelling" interests versus all others.] A legal system that recognizes some interests as more important than others should try to distribute legal resources in a way that protects the most important ones[,] because the practical value of some rights depends more on the relative than on the absolute amount of the citizen's enforcement resources. * * *

The proper standard requires not only a threshold judgment, but also a relative one. In deciding whether to commit herself to a client's claims and goals, a lawyer should assess their merits in relation to the merits of the claims and goals of others whom she might serve. The criteria the lawyer should employ in making this assessment are suggested by the bases of legal concern about the distribution of services: the extent to which the claims and goals are grounded in the law, the importance of the interests involved, and the extent to which the representation would contribute to the equalization of access to the legal system.

Of course, merit cannot be the only consideration to determine how the lawyer allocates her efforts. The lawyer's financial interests are also necessarily important. But the financial considerations that tacitly determine the distribution of legal services under the dominant approaches are substantially arbitrary in relation to the most basic goals of the legal system—those concerning legal merit. Lawyers can mitigate the tendency of the market to produce an inappropriate distribution of legal services by integrating considerations of relative merit into their decisions about whom to represent and how to do so. In making such judgments, lawyers will have to balance their legitimate financial concerns with their commitment to a just distribution of legal services. A lawyer who cannot refuse to assist a particular client without impairing her ability to earn a reasonable income may have to compromise her judgments of relative merit more than one who can say no without great financial sacrifice. * * *

B. Internal Merit

The second aspect of the lawyer's assessment of merit involves an attempt to reconcile the conflicting legal values implicated directly in the client's claim or goal. These conflicts usually arise in the form of the overlapping tensions between substance and procedure, purpose and form, and broad and narrow framing. * * *

Consider a well-known scenario involving two lawyers negotiating a personal injury case. The plaintiff is an indigent who has suffered severe injury as a result of the undisputed negligence of the defendant, but he may have negligently contributed to his own injury. During negotiation, the insurance company lawyer conducting the defense realizes that the plaintiff's lawyer is unaware that a recent statute abolishing the contributory negligence defense would apply retroactively to this case. The plaintiff's lawyer is negotiating under the assumption that there is a substantial probability that his client's negligence will entirely preclude recovery when in fact there is no such probability. The defense lawyer proceeds to conclude the negotiation without correcting the mistaken impression. * * *

The libertarian and regulatory approaches would resolve [this case] through categorical rules, of nondisclosure in the libertarian approach or disclosure in the regulatory approach. The discretionary approach requires a more complex judgment.

> [In this case,] the critical concern for the defense lawyer should be whether the settlement likely to occur in the absence of disclosure would be fair (in the sense that it reasonably vindicates the merits of the relevant claims). On the facts given, it seems probable that the settlement would not be fair. * * *
>
> The discretionary approach suggests that disciplinary rules should ideally be expressed as rebuttable presumptions—as instructions to behave a certain way unless circumstances indicate that the values relevant to the rule would not be served by doing so. The rules would be elaborated less by categorical specifications and more by discussions of the general values expressed in the rule and by examples, in the fashion of common law elaboration. Rules of this sort would leave a substantial range of autonomy to those subject to them, but discipline would be appropriate when someone failed to apply the rules in good faith or with minimal competence. * * *

Prof. Simon elaborates on this "seek justice" model in William H. Simon, The Practice of Justice: A Theory of Lawyers' Ethics (1998). Specifically on the hypothetical on negotiating a settlement of a tort claim involving contributory negligence, see William H. Simon, *Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives*, 23 Geo.J. Legal Ethics 987 (2010).

For an extended defense of role-differentiated morality, combined with a critique of the "working ethical theory of lawyers" about legal ethics, see W. Bradley Wendel, Lawyers and Fidelity to Law (2010). Wendel characterizes lawyers' "standard conception" as involving three principles: partisanship (exclusive concern for the legal interest of clients), neutrality toward the ordinary morality of the client's objectives, and moral non-accountability to others for those objectives. *Id.* at 29. Wendel rejects the claims of "ordinary morality" as a primary basis for judging the professional behavior of lawyers, but argues that the overriding moral principle of lawyering should be "fidelity to law," defining his theme in his introduction:

> The theory of legal ethics I will set out here places fidelity to law, not pursuit of clients' interests, at the center of lawyers' obligations. Law deserves respect because of its capacity to underwrite a distinction between raw power and lawful power * * *. Citizens can appeal to legal entitlements, * * * and only indirectly to morality, because citizens accept for moral reasons the legitimacy of laws enacted through fair procedures. Unlike the dominant tradition in academic legal ethics, it is not an appeal directly to ordinary morality, justice, or the public interest.

Id. at 2. Wendel distinguishes his critique of the "standard conception" of the lawyer's role from that of Simon, among others, concluding that "when Simon talks about justice, he means to refer to substantive justice, quite apart from the legal merits of a party's position." *Id.* at 46. Among the numerous responses to this work, see William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 Tex.L.Rev. 709 (2012); Stephen L. Pepper, *The Lawyer Knows More Than The Law*, 90 Tex.L.Rev. 691 (2012), and Alice Woolley, *To What Should Lawyers Be Faithful? A Review Essay of W. Bradley Wendel's Lawyers and Fidelity to Law*, ___ Crim.Just.Ethics ___

(2012) (working paper accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2018449).

3. **Lawyer's Own Moral Standards:** Neither Wasserstrom nor Simon mention the issue, but what is the lawyer to do when the stated rules of the profession (*e.g.*, the Model Rules) require her to act against her own moral standards? Various approaches to ''professional knavery'' are critically examined in Gerald J. Postema, *Self–Image, Integrity, and Professional Responsibility*, in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics 286 (David Luban ed., 1983). One might (i) declare lawyering to be an amoral enterprise, exempting it from all moral judgment; (ii) regard the profession as an activity requiring the lawyer to sacrifice moral integrity, and either make the sacrifice or look for another profession; (iii) integrate the essential moral imperatives of the profession into an overall conception of self, deal with the more distasteful professional duties as one does with other conflicts between moral claims that everyone faces, and accept responsibility for the resolution—which might involve withdrawal from the profession, if the conflict could not be resolved; or (iv) detach oneself from responsibility for the ''professional knavery,'' and treat it either as wholly external to oneself or as a separate self, judged by separate rules. The ''responsible person,'' argues Postema, should choose the third alternative, which he calls the ''integration strategy.'' *Id*. at 290.

Other discussions of the problem are found in John J. Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976 Wash.U.L.Q. 429, which argues that the role-morality of the profession is incomplete and must be balanced by the individual lawyer's self-conception, and Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 Ohio St.L.J. 551 (1991), which finds ample room in the traditional conception for morally active lawyering. For a further argument that the professional role does not exempt the lawyer from personal moral responsibility, see Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 Calif.L.Rev. 669 (1978). Reflections on the difficulty of resolving conflicts between moral and professional duty, together with moral support for the effort, are offered in Richard A. Matasar, *The Pain of Moral Lawyering*, 75 Iowa L.Rev. 975 (1990), and Julie A. Oseid & Stephen D. Easton, *The Trump Card: A Lawyer's Personal Conscience or Professional Duty?*, 10 Wyo.L.Rev. 415 (2010).

4. Consider the conduct of the lawyer in *Sprung* in light of both Wasserstrom's and Simon's critiques and apply your answers to our problem.

a. Is there any indication that the lawyer in *Sprung* did not discuss the moral, social, or economic consequences of the proposed action with the client? Is the lawyer's conduct simply ''amoral''?

b. Is there any indication that the lawyer in *Sprung* attempted to use his advocacy skills to overcome the free will of the client in a way that made the relationship unequal?

c. Did the lawyer in *Sprung* consider the relative merits of the claim? He knew, for example, that worker compensation benefits to Sprung had been terminated. As a result, he spent a winter unable to pay for heat. He had multiple surgeries, spent two years in a body cast, and had steel rods attached to his spine with metal clips. When the lawyer asked Sprung

about what to do, the lawyer indicated that Sprung could get an even bigger judgment with a jury, but also that the trial could go badly. The lawyer also explained that the opposing lawyers were his friends and that they would likely be sued for malpractice by their client if their mistake were not corrected. *See* Sylvia Johnson, Legal Ethics in the Eye of the Beholder: The *Sprung* Case (unpublished manuscript).

5. If none of Wasserstrom's or Simon's criticisms of the profession are applicable, why do the dissenting judges in *Sprung* criticize the lawyer? Part of the answer may lie in the nature of the adversary system, as intimated by Wasserstrom.

C. THE "ADVERSARY SYSTEM"

One of the underlying assumptions about the organizational framework within which most lawyers function is that it is an "adversary system." *Sprung* certainly reflects that system. Does either Wasserstrom or Simon fully consider its demands and expectations? Can it be argued that it is the "adversary system" itself that creates inequality between lawyer and client? Is it possible for Simon's discretion to be exercised within it? What indeed is this system, and how did it arise?

Consider these questions in connection with the next reading.

ROBERT H. ARONSON, PROFESSIONAL RESPONSIBILITY: EDUCATION AND ENFORCEMENT

51 Washington Law Review 273 (1976).

* * * *B. The System Model*

A system-oriented model of professional responsibility would define the lawyer's role in terms of the legal system's overall goals. The lawyer's primary function would be to serve those goals to the best of his or her ability regardless of personal ethics. The duty as a member of the legal profession to subordinate personal morality for the good of the system is not an adoption of the maxim "the end justifies the means." Rather, it calls for awareness of the fact that each ethical dilemma does not stand on its own as a discrete entity, unrelated to other parts of the system, and recognition that choosing the "best" or most ethical course of action in a given situation might have an adverse, "unethical" effect somewhere else in the system. * * *

Because the system model defines professional responsibility in individual cases in terms of a goal or guiding principle, it is essential that the Bar achieve consensus as to the overall goal of each subpart of our system of justice. The two most widely accepted goals of the system, each often dictating somewhat different behavior in different situations, are truth-oriented and adversary-oriented, with a subclass of the latter applying only to criminal justice: innocence-oriented. The following sections illustrate how each of these system models would operate, indicating the

advantages and disadvantages of each. The final determination as to the most preferable is left to future consideration by the legal profession.

1. Truth-oriented model

Under this model the Anglo–American trial is seen as a process ''within which man's capacity for impartial judgment can attain its fullest realization,''[55] and the function of the advocate is ''to assist the trier of fact in making this impartial judgment.''[56] On a practical level, extensive discovery procedures for civil litigation and the easing of barriers to pretrial discovery in criminal law aid in implementing the truth-oriented model. Partisan advocacy is appropriate only insofar as it aids in the correct adjudication of the facts; when it ''misleads, distorts and obfuscates,'' it is unacceptable. For example, [Model Rule 3.3(a)(2)] obligates an attorney to disclose to the court mandatory precedent which he knows is directly contrary to his client's position and which is not cited by the opposing attorney. This provision is based on ABA Opinion 146, which interpreted former Canon 22 requiring an attorney to deal with the court with ''candor and fairness.'' With respect to the duty to disclose adverse legal authority, then, an attorney is ethically required to subordinate the client's interests to the profession's interest in truth.

In addition to its intuitive appeal, the truth-oriented model permits the lawyer to subordinate the client's interest to a higher personal moral value. A lawyer is not forced to choose between what he or she personally believes to be moral and professional responsibility to the client:[62]

> He [the barrister] gives to his client the benefit of his learning, his talents, and his judgment, but he never forgets what he owes to himself and to others.... He has a prior and perpetual retainer on behalf of truth and justice. He is the professional representative but not the alter ego of his client.

[I]f our system were devoted to eliciting the truth above all other goals, professional responsibility would be both easy to teach and to enforce. If an attorney's actions for any reason hindered or distorted rather than aided and enlightened the search for truth, he would be remiss in his professional conduct. Yet in our system of adjudication, truth is often not the highest goal. Monroe Freedman has demonstrated that

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55. *See Professional Responsibility: Report of the Joint Conference,* [44 A.B.A.J.] 1159, 1161 [(1958)].

56. [John T.] Noonan, [Jr.], *The Purposes of Advocacy and the Limits of Confidentiality*, 64 Mich.L.Rev. 1485, 1487 (1966). *See also* [David G.] Bress, *Standards of Conduct of the Prosecution and Defense Function: An Attorney's Viewpoint*, 5 Am.Crim.L.Q. 23, 24–25 (1966): ''All lawyers must remember that the basic purpose of the trial is the determination of truth.''

62. [Warren E.] Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 Am.Crim.L.Q. 11, 15 (1966) (quoting an unidentified ''great British barrister, later a judge''). *See also* [Henry S.] Drinker, *Some Remarks on Mr. Curtis' ''The Ethics of Advocacy,''* 4 Stan.L.Rev. 349 (1952): ''Of course no one could say that an occasion might not possibly arise when there was no alternative except the truth or a lie and when the consequences of the truth were such that the lawyer might be tempted to lie. This, however, would not make it right for him to do so.'' *Id*. at 350.

many of the accepted rules of our legal system often serve to hinder, rather than to further, the discovery of truth:[63]

> The lawyer is an officer of the court, participating in a search for truth. Yet no lawyer would consider that he had acted unethically in pleading the statute of frauds or the statute of limitations as a bar to a just claim. Similarly, no lawyer would consider it unethical to prevent the introduction of evidence such as a murder weapon seized in violation of the fourth amendment or a truthful but involuntary confession, or to defend a guilty man on grounds of denial of a speedy trial. *Such are permissible because there are policy considerations that at times justify frustrating the search for truth and the prosecution of a just claim*.

Justice, not truth, is the overriding goal of the American legal system, and "[j]ustice is something larger and more intimate than truth. Truth is only one of the ingredients of justice. Its whole is the satisfaction of those concerned."[64]

Even if it were possible to conduct legal proceedings in such a way that the truth always emerged, neither the profession nor the public would be satisfied unless the truth was obtained in a just manner. In fact, we have demonstrated a willingness to sacrifice some measure of truth in order to assure the litigants and the public that justice has been obtained as well as the truth discovered. In a criminal proceeding, probably the best means of eliciting the truth would be skillful interrogation of the accused. Yet the fifth amendment privilege against self-incrimination protects the accused from any questioning by law enforcement officers. Although the requirement that police obtain evidence of a crime independently of the accused has truth-serving components, the primary purposes for the privilege are humanitarian in nature and unavoidably interfere with the discovery of the truth. In sum, the existing legal system is designed to effectuate goals which sometimes take precedence over the search for absolute truth. * * *

2. Adversary-oriented model

Rather than requiring the judge to perform the functions of both investigator and arbitrator, the adversary system requires that each side investigate, introduce, and argue the evidence most favorable to its own side of a legal dispute:[77]

> The philosophy of adjudication that is expressed in "the adversary system" is, speaking generally, a philosophy that insists on keeping distinct the function of the advocate, on the one hand, from that of the judge, or of the judge from that of jury, on the other. The decision

63. [Monroe H.] Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich.L.Rev. 1469, 1482 (1966) (emphasis added).

64. [Charles P.] Curtis, *The Ethics of Advocacy*, 4 Stan.L.Rev. 3, 12 (1951).

77. [Lon L.] Fuller, *The Adversary System*, in Talks on American Law 30 (H[arold J]. Berman ed. 1961).

> of the case is for the judge, or for the judge and jury. That decision must be as objective and as free from bias as it possibly can.

This method of presentation avoids the natural tendency to ''judge too swiftly in terms of the familiar that which is not yet fully known.''[78] No matter how great an effort one makes to remain neutral, past experience, subconscious biases, and preconceptions formed from preliminary investigation inevitably lead to prejudgment. Once a number of facts indicate guilt, for example, the virtually irresistible tendency is to find additional evidence substantiating the initial judgment. Contrary evidence or testimony is thereafter not as actively pursued. The adversary system recognizes this psychological tendency, but avoids its dysfunctional aspects by instructing each side of a dispute to form a bias and pursue all facts, testimony, legal precedents, and arguments in its favor, and attack all evidence and arguments for the opposing side. Through partisan advocacy, both sides are fully presented to a trier of fact.

A second function served by the adversary process of adjudication is not only to ensure that justice in fact *has* been done, but that it also *appears* to have been done. To the extent that trials take the place of self-help by wronged individuals; to the extent that rehabilitation of criminal offenders requires that those convicted believe themselves to have been tried fairly; and to the extent that the orderly functioning of government and protection against resort to violence require faith in the integrity of the legal system; it is essential that all sides in a controversy be seen to have been adequately represented. This function is aided, particularly with respect to the accused in a criminal trial, by providing a partisan advocate on either side of the controversy.

A third function of the adversary process in criminal cases, particularly related to its educative aspect of making justice apparent, is the preservation of the presumption of innocence. Professor Goldstein deems the presumption of innocence central to the accusatorial system:[81]

> An accusatorial system assumes a social equilibrium which is not lightly to be disturbed, and assigns great social value to keeping the state out of disputes, especially when stigma and sanction may follow. As a result, the person who charges another with crime cannot rely on his assertion alone to shift to the accused the obligation of proving his innocence. The accuser must, in the first instance, present reasonably persuasive evidence of guilt. It is in this sense that the presumption of innocence is at the heart of the accus[a]torial system. Until certain procedures and proofs are satisfied, the accused is to be treated by the

78. *Professional Responsibility: Report of the Joint Conference*, [44 A.B.A.J. 1159,] 1160 [(1958)].

81. [Abraham S.] Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 Stan.L.Rev. 1009, 1017 (1974) (emphasis in original). Professor Goldstein notes: ''Comparativists generally assume that inquisitorial systems are primarily concerned with enforcing criminal laws and are only incidentally concerned with the manner in which it is done.'' *Id.* at 1018.

> legal system *as if* he is innocent and need lend no aid to those who would convict him.

The best way to accomplish this goal is by providing the accused a representative who does not act according to a personal opinion on the facts, but rather assumes innocence and acts as an advocate to promote that view.

In maintaining the adversary system and the presumption of innocence in the criminal justice system, each of the participants in the system functions properly only if he understands and is able to fulfill his role. It is in part due to the nature of the adversary system—that the attorney must remain firmly in role—that he may not express a personal belief as to the guilt or innocence of the client. Personal views should be irrelevant to proper performance of this role. Loyalty to the client, within the bounds of the law, must be paid absolute deference because the system can only function properly if a member of the legal profession argues the defendant's cause as forcefully and convincingly as possible. * * *

a. Equal adversaries alternative

Proper functioning of the adversary-oriented model requires that the advocates have equal weapons and "play according to the rules." [A]ssuring that the adversaries are, as nearly as possible, of equal ability in presenting their respective sides [is difficult]. The innate and developed capacities of attorneys can only be kept above a specified minimum level through Bar examination, continuing education programs, and effective assistance of counsel doctrines. The equality of their relative resources and bargaining positions, however, might be increased through statutory reform, case law, or possibly by varying ethical rules for the conduct of attorneys according to the nature of the client.

[I]t is clear that adoption of the adversary model necessarily implies a commitment to ensuring the equality of the adversaries. Without this commitment, indigent litigants will be no better off under a true adversary model than they are under the existing situation model. * * *

b. Innocence-oriented alternative

The innocence-oriented subclassification to the adversary system would go further in affording procedural protections to the accused in criminal cases. The adversary process is primarily concerned with pitting two adversaries against each other so that the trier of fact can weigh the issues presented and be better able to render a just and enlightened decision. The innocence-oriented model, on the other hand, is founded upon a series of philosophical and social policy premises which often render irrelevant the most accurate determination of truth in a particular case, even by the adversary method. It is more important that the presumption of innocence be preserved in terms of its inherent goals. * * *

An attorney therefore can find that it is his ethical duty, under the innocence-oriented view, to defend fully and enthusiastically an accused whom he believes to be guilty. He may hold judgment in abeyance until the trier of fact determines guilt or innocence, convince himself of his client's innocence simply by constant investigation and argument to prove that innocence, or treat the process as a game which, so long as he plays by the rules, it is his job to win.

If the innocence model is to serve as a viable instrument of criminal justice, however, its purpose and rationale must constantly be explained to the public to avoid the appearance of unethical conduct and misunderstanding of the lawyer's duty to his client.

NOTES ON THE ADVERSARY SYSTEM

1. One author suggests that the adversary system is more than just a ''model,'' noting that in this country, ''the phrase 'adversary system' is synonymous with the American system for the administration of justice—a system that was constitutionalized by the Framers * * *.'' As a result, ''the adversary system represents far more than a simple model for resolving disputes. Rather, it consists of a core of basic rights that recognize and protect the dignity of the individual in a free society.'' Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 Chap.L.Rev. 57, at 57 (1998).

2. Other authors, however, disagree. Consider the following excerpt from Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 Vand.L.Rev. 697 (1988):

> The dominant ethic in the American legal profession * * * is the adversary ethic. The adversary ethic, in the words of the late Justice Abe Fortas, claims that ''[l]awyers are agents, not principals; and they should neither criticize nor tolerate criticism based upon the character of the client whom they represent or the cause that they prosecute or defend. They cannot and should not accept responsibility for the client's practices.'' This ethic is the principal—and often the only—reference point in professional discussions. Although it is embedded in our professional codes, our cases, and our law offices, this Article argues that the adversary ethic is unique, novel, and unsound. * * *
>
> The adversary ethic in America is a unique professional notion. It is a departure both from classical moral philosophy and from the American religious tradition. This lawyer's ethic is an instance of what Emile Durkheim called ''the decentralization of the moral life''—a separate morality defined by lawyers for lawyers, described within their professional associations and manifested [by codes of ethics] in a closed understanding of the morals of practice. As my colleague Steven Hobbs has expressed it, the lawyers of America give themselves ''a free pass out of the community's moral discussions.'' * * *
>
> The adversary ethic traces its origins from four events of significant concern to American lawyers, events that coincided with the emergence of the large commercial centers of the northeast—particularly in New York

City—as the dust cleared from the Civil War. The first of these events was a process of justification for lawyers who were representing the "robber barons" of the railroad, manufacturing, and financial industries. Michael Schudson's example is Daniel Drew, James Fisk, Jay Gould, and the Erie Railroad's fight against Commodore Vanderbilt and the New York Central Railroad. It was a late nineteenth century hostile take-over in which Vanderbilt was buying up Erie stock, and Drew, Fisk, and Gould, not interested in such delicacies as poison pills, white knights, or crown-jewel sales, met the competition by printing new stock.

Clients fled a jurisdiction in order to evade an injunction; clients frequently bribed legislators, and very possibly directed the commission of murder. Their lawyers included the distinguished David Dudley Field, law reformer, author of the Field code of procedure, brother of a Supreme Court justice, and advocate for the powerful. These lawyers represented their clients in the legislature and the courts. They continually frustrated the judicial process by meeting any injunction against their clients with a countermanding injunction from another judge. This tactic was possible because of the curious jurisdictional provisions of the procedural code drafted by Field. The most illustrious lawyers in New York City—Samuel Tilden, Thomas Shearman, and many other founders of the Bar Association of the City of New York—represented parties to such corporate wars in the 1870s.

The second event that contributed to the development of the adversary ethic was growth and strength for the practice of law in law firms. Although law firms in America date from the 1820s, they were not significant as professional associations until the 1870s. The third event was the founding of the first local and national bar associations. The fourth event was the appearance of the first codes of legal ethics. All four of these events provoked or occurred in response to a public and journalistic perception that America's leading lawyers were acting immorally.

The articulate laymen of that era—including, for example, Henry Adams, who was a social critic, novelist, and descendant of presidents, and Samuel Bowles, editor of the Springfield Republican—reacted publicly by expressing stern moral disapproval of the activities of the country's leading lawyers. These laymen argued that this behavior on the part of American lawyers was a betrayal of the personal public responsibility that Adams' ancestors had accepted as the burden of being American lawyers. "[P]ublic opinion," Adams said, "was silent or was disregarded."

This argument was based on the perception that the lawyers for the robber barons were refusing to cooperate with a public consideration of the common good. What was crucial, if republican[b] social ethics were to remain plausible, was the claim that Bowles, Adams, and editorials in the *New York Times* made about the relevance of the lawyers' behavior in the robber baron cases: the issue was not so much that the behavior was wrong, but that its rightness or wrongness was a matter of public concern. It was not intrusive for newspaper writers to question what

b. ["Republican" here refers to democracy-related values, not the party or the newspaper. Eds.]

lawyers did for clients because the community was within legitimate limits when it called upon lawyers to account for what they did for clients, and to do so publicly. The republicans' attempts at fraternal correction were, functionally, not so much condemnations as invitations to discuss the common good. The lawyers declined the invitations, not with the argument that what they and their clients talked about were not moral matters, but with the argument that they were private moral matters. * * *

The moral alarm sounded by Henry Adams was also alarm toward the secret power of corporate business. Alexis de Tocqueville feared the early beginnings of government by moneyed corporations in America. De Tocqueville's conception of American democracy was the basis of Adams' republican argument: corporations don't act; only people act. To take seriously the legal fiction that the corporation acts was to give up the moral argument. To behave as if lawyers for business corporations are not accountable for what the officers of their corporate clients do adds insulation to the denial of responsibility by corporate officers, as it extends the denial of responsibility by the legal profession.

Louis Auchincloss' character Henry Knox, a third-generation successor to the New York law-firm lawyers of the 1870s, remembered well the lessons of his professional grandfathers: ''Your client wants you to do something grasping and selfish. But quite within the law'', Knox said. ''As a lawyer you're not his conscience, are you? You advise him that he can do it. So he does it and tells his victim: 'My lawyer made me!' You're satisfied, and so is he. . . .''

Bowles and Adams argued that a lawyer's work for his clients is public business. The lawyers responded by invoking the notion of individual rights—especially what a later generation has come to talk of as a right to privacy. Adams and Bowles argued that power should be exercised in such a way that the people can see it and contain it. The final issue for Adams and Bowles was public sovereignty. The lawyers' defense was autonomy and the sovereignty of the individual—every man is his own tyrant.

These were important arguments. They still are. It might be useful to ponder these arguments a bit and to notice how familiar use of words of moral and legal debate were used in them. The word ''rights,'' for example shows up on the adversary ethic, robber baron side of the argument. David Dudley Field claimed that what he and his clients talked about and decided to do was not public business. He and his clients had a right to keep the legal decisions made in Field's law office from the public. Adams and the newspapermen claimed that Field's law practice was public business because corporate business and office decisions in aid of corporate business were matters of public concern. These republicans were not as interested in talking about the rights of the robber barons as they were in talking about the morals of the robber barons: the republicans insisted that a substantive, moral, public debate was a legitimate interest, as against the assertion of individual rights, privacy in lawyer-

client relationships, and autonomy in deciding, within the councils of a business enterprise, what the business should do.

The word "rules" is also useful in understanding the adversary ethic argument. As it did in Field's day, the republican professional world still talks about character, disposition, virtue, and habit. The new rhetoric of adversary ethics talks of privacy—and privacy needs rules. * * * Rights lead to rules and, during these corporate lawyers' professional lives, the rules were gathered into codes, which were promulgated by bar associations and protected by (as well as protective of) law firms. * * *

Proponents of the adversary ethic have an affinity for words such as rights, rules, privacy, individualism, contract, independence, detachment, and self-government. Proponents of the republican argument have an affinity for words such as community, commonality, connection, context, relationship, response, influence, attachment, virtue, moral discourse, and common good. The recent professional history of lawyers—and the codification of that recent history in professional regulation—is the history of a movement toward rights and rules, and a movement away from moral discourse about the common good. Most of what we now call jurisprudence, and virtually all of what we think of as constitutional jurisprudence, embodies the rules-rights side of these verbal preferences. Republican political thought in America, including republican legal ethics, embodies the context-virtue side. * * *

The recent professional history of lawyers thus describes a novel moral world. At least it would have appeared novel to earlier generations of American lawyers and to generations elsewhere. Indeed, it appears strange to some of us in this generation. The adversary ethic description of law practice does not resemble the republican moral world that the earliest American lawyers thought they had forged from the Revolution: "religious in its roots and civic in its expression." The republicans insisted—as they still insist—that law is a profession of public responsibility. Henry Adams knew it. Samuel Bowles and the editorial writers at the *New York Times* had perceived it. * * *

The point of my argument is the conclusion—which I now invite you to make—that the adversary ethic is not, for all the official, pretentious support it receives, a settled matter. If history is persuasive, my invitation is to consider the argument that the adversary ethic is not only unique and novel but also unsound. It is still possible to ask an American lawyer: Does your practice make people better—not just your client, but other people in the community? I want to be able to revive classical social ethics and apply it to the legal profession. "When you embark on a public career," Socrates asked, "pray will you concern yourself with anything else than how we citizens can be made as good as possible?" The adversary ethic supposes that such a question is irrelevant. Whether the lawyer even makes her own client better is no one's business but her own. I am arguing that the adversary ethic is not as firmly in place as it thinks it is, and that has never made sense. * * *

3. Professor Aronson writes that the adversary system requires advocates on both sides to have "equal weapons and 'play according to the rules.' "

If you follow your client's advice in our problem, do both sides of the Salinas dispute have ''equal weapons''? Did both sides in *Sprung*?

4. Whose interest would be served by your calling the opponent's attention to the error? That of the Salinas, that of their counsel, or that of the judicial system? Does that depend on the likely outcome of the appeal, and of a possible trial if the appeal is successful? Are these relevant *moral* considerations in the decision? When both sides do not have ''equal weapons,'' judges must make decisions like those espoused by the dissenters in *Sprung*. As Judge Donnelly states: ''Of course, the equity due the parties, not the attorneys, is at issue here.'' To look at the ''equities,'' however, virtually requires the court to find that Sprung, or his lawyer, did something that would justify equitable intervention on behalf of the adversary. Is such conduct what the dissenting judges are seeking? And when judges look at the equities, are they performing a different function than that of the attorney? That is, when it comes to assessing the conduct of the parties, and their attorneys, are judges much more likely to be interested in a ''truth-oriented'' model than an ''adversarial'' one?

5. How you define ''equality of representation'' and whether that definition includes a notion of improving individual or community life will, in part, determine what reforms you think will be needed to achieve this ideal. As you formulate your definition in this course, you might ask: As to my definition of ''equality of representation'' (1) To what degree is the individual lawyer responsible for achieving this goal? (2) What problems might arise as a result of achieving this goal? (3) What are the alternatives? While you are developing that definition, remember the lesson from the Preamble to the Model Rules: ''Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.'' Model Rules Preamble ¶ [9].

D. DEFINING ''PROFESSIONALISM''

Several of the readings in this chapter have used the words ''profession'' and ''professionalism'' when dealing with lawyers. You have probably heard these words used in conjunction with or even interchangeably with ''professional ethics'' or ''professional responsibility.'' In addition, the dissenting judges in *Sprung* seem to indicate that the lawyer acted unprofessionally, but we have not been able to pinpoint any deficiency in that lawyer's conduct under the Model Rules. The final readings in this chapter seek to provide a working definition of the term ''professionalism'' in a way that summarizes much of the earlier reading.

TIMOTHY P. TERRELL & JAMES H. WILDMAN, RETHINKING ''PROFESSIONALISM''

41 Emory Law Journal 403 (1992).

Over the past few years, ''professionalism'' has been much on the minds of lawyers across the country. * * * ''Professionalism'' is now the

accepted allusion to the Bar's ambitious struggle to reverse a troubling decline in the esteem in which lawyers are held—not only by the public but also, ironically, by lawyers themselves. Being a lawyer, particularly one engaged in private practice, seems suddenly an embarrassment rather than a source of pride. The Bar's response * * * has been predictably defensive and schizophrenic: members are usually reminded by their leaders that, as a group, lawyers really aren't as bad as people seem to think, but they are admonished nevertheless that the profession is threatened by a decline in common decency, attitudes, and standards. * * *

The perspective of this Essay is that the concept of professionalism has become confused and disjointed because it has been diagnosed too hastily. * * *

I. THE CHALLENGE OF PROFESSIONALISM

The Bar's quandary as it struggles to reinvigorate a sense of legal professionalism stems from two basic problems. The first is simply that we do not appreciate adequately the lofty goal we have set for ourselves—that is, determining what professionalism must entail if it is to have any real meaning in lawyers' lives. * * * The second problem is that we do not understand why the idea of professionalism is so elusive for us. If other professions can readily point with pride to a set of shared and lasting values, why do we have so much trouble doing so? * * *

A. Professionalism and "Tradition"

The debate over professionalism might be better understood if we put it in a new, but quite useful, perspective provided by the esteemed political theorist Jaroslav Pelikan. Professor Pelikan suggests that a society can assess its history in two very different ways: one he calls "tradition," the other "traditionalism." To summarize in very short form, Pelikan argues that a society's sense of "tradition" is a positive and useful social force. It is an appreciation of one's cultural heritage that provides a perspective from which to connect current circumstances to the past, and hence improve the understanding of both. By linking one generation to the next, this heritage embodies what Pelikan calls a "living faith of the dead." In contrast, "traditionalism" is "the dead faith of the living." It is a superficial and simplistic appreciation of one's heritage that provides no meaningful sense of perspective and judgment. It is a reverence of the past for its own sake—a nostalgia for the "good old days." It is empty of moral content, and therefore sadly pretentious.

Pelikan's distinction illuminates the dilemma we face concerning our understanding of the task of lawyering: our references to "professionalism" may be nothing more than a sentimental form of "traditionalism," a call for more civility and public respect simply because this is our impression of a happier past. If so, the effort amounts to little more than improving the profession's window dressing. No substance would lie behind it—no "living faith" begun by others that we feel responsible to

continue and further. Legal ''professionalism'' would instead be a ''dead faith'' with no lasting, fundamental characteristics—a fad of the moment.

If instead ''professionalism'' is to refer to a true ''professional tradition,'' lawyering must be capable of being uniquely defined by a set of essential, timeless principles that impose important restraints and create special expectations separating the attorney from others. Such a separation would in turn be a source of legitimate pride, not shame, in the services provided. * * *

II. THE BAR'S CHANGING ''TRADITION'' * * *

C. Minimum Points of ''Procedural'' Agreement Concerning Professionalism * * *

We believe there are three * * * propositions that lie behind all discussions of professionalism * * *.

1. Universality

We would argue that all lawyers believe that, if ''professionalism'' exists, then it applies to all lawyers and all areas of the practice of law, not to some smaller group within the Bar. In other words, we do not believe that some areas of legal expertise, such as tax law or criminal defense work, are inherently unprofessional or unworthy just because of the nature of the work involved. * * * By the same token, law can be practiced with a sense of professionalism in big firms or small firms, in private practice or in government law offices, or whether a fee is being charged for the service or not.

2. Relevance

As a second point of * * * agreement, we believe all lawyers accept the idea that some set of special demands is made on them—which we now characterize as ''ethics'' and ''professionalism''—even if their substance remains controversial. Despite moral diversity and competition, * * * we would all agree that there is some difference between ''proper'' and ''improper'' professional conduct, even if we are not sure where the line between the two should be drawn. * * *

3. Functions

Despite an inevitable focus on actions rather than attitudes, the demands of professionalism, whatever they may be in detail, serve two functions that can have an impact on attitudes. First, * * * professionalism would help the Bar attract people to the profession who already have the values we hope will continue within it. * * * Second, * * * professionalism would announce to all new entrants into the profession that the Bar's contemporary moral diversity and competitiveness, while consistent with the minimal standards of the [Model Rules], nevertheless have their limits. In other words, some aspirational, professional values would be

expected to be held by each lawyer regardless of his or her personal proclivities or desires.

The central issue in the professionalism debate, then, becomes: What are those values or aspirations that we must all share? * * *

V. THE ELEMENTS OF A PROFESSIONAL TRADITION: SIX VALUES * * *

The essence of professionalism is composed of six interrelated values. * * * All six must be combined together and given their proper weights to form the full meaning of the term. Blending them reveals, at a minimum, that professionalism is quite consistent with the hard work and long hours of any law practice, private or public.

A. An Ethic of Excellence

Perhaps most central of all to professionalism is a dedication to excellence in the services rendered to a client. Little else matters if the job performed is second-rate or the client's interests have not been thoroughly considered. The client, of course, can be any recipient of legal services—a private or public entity, fee-paying or pro bono, individual or institution. All deserve the lawyer's appropriate attention and the full measure of the lawyer's expertise. And the services can be of any legal type—whenever the lawyer's knowledge of and judgment concerning the law and the legal system might be relevant to a client's interests. * * *

B. An Ethic of Integrity: A Responsibility To Say "No"

At some point, the "excellence" of a lawyer's service to a client necessarily entails delivering advice that the client would rather not hear. As painful and economically dangerous as this may be in the short run, professionalism demands a recognition of the long-range good produced by forthright acknowledgment of the limits of the law.

This does not mean that lawyers have a responsibility to turn their backs on their clients and their interests in favor of some higher "good"; instead, it means more subtly that a professional attitude will help a lawyer bring the client's interests and the interests of the legal system closer together so that one need not be sacrificed so harshly to the other. But in certain instances, tough choices will be necessary: providing excellent service to a client does not include being the client's slave. Part of the service for which the client pays, and part of the concept of professionalism, is the value of professional independence.

C. A Respect for the System and Rule of Law: A Responsibility To Say "Why"

This is the direct extension of the ethic of integrity: if we must sometimes say "no," we must also be able to say "why." We must believe that there is in fact some "long-range good" to which we can refer to justify our activities generally. That good is the basic integrity of our system of law * * *.

[O]ur respect for the rule of law in society should be an active one. * * * We must recognize that the social usefulness of the law, and in turn the esteem in which lawyers are held, depends ultimately on the respect the law receives from non-lawyers. But that objective can only be achieved if we lead by example. Only if lawyers take seriously their special responsibility to hold the law in respect themselves will others understand fully its importance to our culture. * * *

D. A Respect for Other Lawyers and Their Work

Based on the first three values we have discussed, we can now see that civility within the profession is not entirely a trivial matter. It does in fact have its place among our basic professional values. This is not because of the historic background of the Bar as a ''gentlemen's club'' in which etiquette would be expected, and it is not because a law degree in and of itself entitles anyone to special deference. Instead, civility should follow from the recognition of the lawyer's social function, not his or her social status. Because that function is based on the principle of the rule of law and its critical importance to our culture, our duty to that principle demands concomitantly that we respect the law's practitioners as well. This means not only that lawyers should treat each other with a certain courteousness in order to permit the legal system to function without unnecessary interference, but in addition it means that lawyers have a particular responsibility in conversations with their clients to avoid holding judges and other lawyers in disrepute. * * *

This does not mean that lawyers should stop criticizing each other, or that we should consider it unseemly for one lawyer to sue another for malpractice. To adopt these attitudes would be to limit professionalism to this one value, when in fact civility must be understood in its relation to several other principles, including quite fundamentally the lawyer's responsibility to his or her clients and their rights. * * *

E. A Commitment to Accountability

This value of respect within professionalism requires lawyers to recognize that their clients (and by extension, society as a whole) are entitled to understand the services that the lawyer renders, and moreover to have the sense that the fees charged for those services are fair. This accountability is the cornerstone of the professional independence lawyers enjoy: people generally accept the idea that lawyers need independence in order to provide their full value to society, but the public will continue to believe this only if lawyers respect the reciprocal social demand that they be accountable for their services. * * *

F. A Responsibility for Adequate Distribution of Legal Services

The final value we would include within the essence of professionalism is a lawyer's special responsibility to assist in the effort to distribute legal services widely in our society. This moral duty * * * follows from the importance of law to our culture. Because law pervades all significant

social arrangements and institutions, legal services must be widely available to the citizenry, and the legal system should be functioning adequately on their behalf. [R]egardless of the government's proper role in this regard, lawyers have a special professional responsibility here as well. * * *

VI. CONCLUSION

Our list of fundamental professional values does not contain anything about the public popularity that lawyers may or may not enjoy. We believe any such concern with external perceptions is misplaced because it has the issue backwards. The principal purpose of professionalism is to generate and maintain a core sense of *self*-respect within lawyers individually and the Bar generally. The respect of the public can be achieved only *after* that internal effort has been successful.

NOTES ON TRADITION/TRADITIONALISM

1. In *Sprung*, Judge Blackmar writes that the lawyer's conduct "is unacceptable in our profession. * * * I would like to be remembered as a lawyer who went all out for his clients. But I would stop short of taking advantage of a mistake known to me." Are his statements looking at the "tradition" of being a lawyer? Or, are they yearning for "traditionalism"?

2. One lawyer many consider to represent the best "traditions" of the legal profession is Morris Dees, a former book publisher who is now the Chief Counsel and Co–Founder of the Southern Poverty Law Center. Dees represents clients in various civil rights activities. Consider his view of "professionalism" and "tradition" in Morris Dees, *Remember Me By My Clients, They Make My Life Worthwhile*, Trial, Apr. 1990, at 64, 65:

> [A]bout a week before Christmas in 1985, my 16–year–old daughter, Ellie, and I were decorating the Christmas tree about 10:30 at night.
>
> The guard inside my house ran to me and said, "Mr. Dees, the outer perimeter guard on the walkie-talkie said he spotted a white guy on the property in a paramilitary uniform with an AR–15 across his chest."
>
> The guard asked us to go to the safe room the FBI had set up inside my house. The FBI had word that some people in the Aryan Nation in Coeur d'Alene, Idaho, were trying to kill me. That all stemmed from some cases I had been working on against the Ku Klux Klan in Alabama and other places.
>
> Ellie and I went into this small room. She was afraid. She turned to me and said, "Daddy, why do you do this kind of work?" [That night,] I lay in bed thinking, "Why do I do this? How did I get messed up doing these kinds of cases and risking my family's lives?" * * *
>
> In 1982, Vietnamese fishermen in Houston and the Galveston Bay area were being harassed by the Ku Klux Klan. The Klan burned a couple of Vietnamese fisherman's boats and threatened to blow more boats out of the bay if they went fishing on opening day, May 15, 1982.

I was asked to represent the fisherman to see whether I could stop the Klan from blowing boats out of the water. We filed suit 30 days before the shrimping season opened. * * *

When we started taking depositions, the Klan threatened our clients. One plaintiff, Nguyen Van Nam, the leader, said, ''We've got to drop this lawsuit.''

I said, ''We can't. If you drop this case, then the Vietnamese earning a living at the 7–Elevens are going to have to pull out of there because the Klan's going to go after them next and then other Vietnamese businesses later. They won't stop.''

''The council of elders told us to drop this case.'' (Each Vietnamese community has a council of old people to advise the community in these resettlement areas.)

''Let me talk to the elders,'' I said. I remember going into a Catholic church to speak to them—about 30 or 35 old men, fine-looking folks, who spoke very little English. I had an interpreter with me. * * *

I drew on every bit of the reserve I had to try to put the present problem in the simplest, easiest terms to understand. * * * So I told them that we have something called a Bill of Rights, something called a Constitution, and something called a Declaration of Independence that says all people are created equal.

''The Klan doesn't represent the American people. The Klan may be getting a lot of publicity, but don't back off. Stand up to them.'' I was saying this to refugees from Vietnam who had come to start a new life, who mistakenly thought they were being attacked because the American people as a whole—not just a fringe element—didn't want them here. And just about three-quarters of the way through the talk, they began to understand, and they began to clap lightly. Finally, the whole room broke out in applause. The interpreter told me the elders would continue the lawsuit.

The day that [the judge] issued the temporary restraining order—later made into a permanent injunction against the Klan, ordering them not even to appear before a Vietnamese in a Klan uniform—and on May 15 when the U.S. Marshals lined both sides of the Seabrook, Texas, pass into Galveston Bay as a Catholic priest blessed those shrimp boats, I felt proud indeed to be a lawyer. * * *

Another client comes to mind: Tommy Whisenhaut. He murdered at least three women. Tommy is a psychopathic killer.

I was appointed to represent him in 1976, three death sentences ago. We got two of them reversed.

I believe in insanity as a defense. An insane person is not responsible for the acts he commits. Richard Cohen and I intend to stick in there until the year [2010], if we have to for Tommy. But even my wife asks how I can represent this man who obviously raped and murdered these women.

God knows it's not the money. I don't get a penny for representing Tommy Whisenhaut. I can't even get the state to pay the $1,000 fee Alabama allows for indigent defendants in criminal cases. * * *

Then there was Beulah Mae Donald, whose son was lynched by the Klan. She's a courageous woman. She was the plaintiff in [a lawsuit I filed against seven Klansmen and the United Klans of America. In an earlier case, a "black man had killed a white police officer. A black man was tried for the crime. The Klan met and decided that if that black defendant got off for killing the officer, they were going 'to kill a nigger.' If a black could get away with killing a white, then whites should get away with killing a black. Such was their reasoning. There was a hung jury, 11 to 1 for acquittal. Two Klansmen picked Michael Donald, a 19–year–old college student, off the street that night and lynched him." After these Klansmen were arrested and convicted, suit was filed against the Klan for sponsoring the actions. Mrs. Donald was afraid to be the plaintiff, fearing that she and her family would be harassed. She, however,] agreed to go through with the case. It would be the first time she faced the men who had killed her son, but she wanted everyone to know that her son was not an evil person. She also wanted to find out who had been involved in the lynching—every last one of them.

She sat through that trial and heard our main witness, one of the lynchers who had decided he was going to testify for the plaintiff. His name was James Knowles.

Knowles told in graphic detail about picking Michael up from the street, about how he and another Klansman put the rope around Michael's neck after beating him senseless in the bushes at the edge of town. He told how one of them put his boot on Michael's face and pulled hard so the rope would choke him to death. He told how the boot left a print on the side of Michael's face. The mother listened quietly, occasionally crying.

During closing, Knowles asked me if he could say something to the jury. (He had heard the judge ask the other defendants if they wanted to say something at that time.) I said, "Sure, tell them anything you want to tell them."

Knowles stood before the jury and said, "Ladies and gentlemen, everything that Mr. Dees said happened, happened. We did everything he said, and I hope that you all can return a large verdict that will send a message not only to these Klansmen here but to Klansmen and people living all over the United States."

He then began to shake as he grasped the jury rail. His body shook with sobs. As he regained his composure, he turned to Mrs. Donald, and said, "Mrs. Donald, I hope you can forgive me for what I did to your son."

She looked at him in front of that jury and whispered, "Son, I've already forgiven you."

That was the most dramatic and moving moment I have had in a courtroom in almost 30 years of practice.

I thought to myself, here's a woman who has lost one of the most precious things in her life, her son, and she can look at the Klansman who killed him and say, ''I forgive you.'' * * *

If we are ever going to change the attitudes of manufacturers who market unsafe products [and] of the white supremacists and skinheads who beat people over the head, we've first got to change their hearts and their minds.

I want to thank Mrs. Donald for teaching me that the way you do this is to start loving more than you hate. You have to be willing to forgive those who hurt you and have sincere concern for the welfare of those whose lives you affect. And I want to thank all my other clients. They represent what the law means to me.

3. Now assume that in one of his cases, Dees discovered the attorneys for the Klan had not filed documents on time and, as a result, would likely be barred from pursuing their arguments. Assume Dees met with his clients, told them of the legal issues involved, and told them that if the Klan was unable to continue, they would likely win. Assume Dees also told his clients that if the Klan was allowed back in the case, the Klan might win, but that Dees believed his case was very strong. Assume the clients were able to determine that if they won in a shortened hearing without the Klan, they would not have to face the people who had harassed them for so many years. As a result, assume the clients told Dees to not let the Klan back into the case if that were at all possible. Finally, assume Dees went along with his clients' demand. Would Dees be upholding the ''traditions'' of the profession by taking judgment on behalf of his clients without letting the Klan back into the case?