Reconciling Professionalism and Client Interests

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INTRODUCTION

Professional responsibility ethicists posit a world in which legal practice conflicts with lawyers' natural inclinations to act morally. Most conclude that lawyers cannot remain sane without sublimating objectivity to their systemic role in achieving client ends. This Article challenges that perspective.

Part of the lawyer's routine professional life includes committing herself to client ends. Yet the assumption that serving clients exacts a significant psychological toll on lawyers is misplaced. In practice, many lawyers happily surrender their personal ethics. Lawyers have obvious economic incentives to pursue client desires aggressively. Lawyers typically also feel comfortable allying themselves with clients whom they know personally and who may exert an influence on their well-being. Thus, the lawyer's true challenge lies not in surviving internal moral pressure, but rather in serving clients while simultaneously maintaining an objective view of her responsibilities.

1. See generally THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban ed., 1983) [collection as a whole hereinafter THE GOOD LAWYER] (collection of essays by ethicists from a variety of disciplines). Most of these ethicists focus on the concept of role-differentiation, the process by which lawyers make decisions regarding appropriate conduct differently than laypersons would, based in part on their conception of the role they must play to make the legal system effective. See, e.g., David Luban, The Adversary System Excuse, in THE GOOD LAWYER, supra, at 83-84 (identifying tension between role-differentiated conduct and universal morality); Richard Wasserstrom, Roles and Morality, in THE GOOD LAWYER, supra, at 25-26 (describing role-differentiation in the context of other people's needs to consider role in making moral decisions).

2. See, e.g., Alan Donagan, Justifying Legal Practice in the Adversary System, in THE GOOD LAWYER, supra note 1, at 123 (describing the role-differentiated behavior that a morally-justified legal system requires of lawyers); Virginia Held, The Division of Moral Labor and the Role of the Lawyer, in THE GOOD LAWYER, supra note 1, at 60, 63 (suggesting amended mandates of role-differentiation); cf. Andreas Eshete, Does a Lawyer's Character Matter, in THE GOOD LAWYER, supra note 1, at 270, 274-79 (discussing damage to character resulting from role-differentiation); Gerald J. Postema, Self-Image, Integrity, and Professional Responsibility, in THE GOOD LAWYER, supra note 1, at 286, 289-94 (discussing strategies lawyers can use to reconcile role-differentiated conduct with personal morality).

3. To avoid confusion, I refer to the primary lawyer under discussion in the female gender. For balance, I treat the other actors in the process (e.g., clients and adversaries) as male.

4. Charles Fried once described a lawyer as the client's “friend.” See Charles
The following pages consider the tension between client orientation and professionalism. Commentators already have described role-differentiation, analyzed the effect of legal codes in promoting role-differentiated behavior, and discussed the tendency of ethicists to overstate the impact of the codes. I take their observations as a starting point. I both assume that there are risks inherent in requiring lawyers to think only of their cli-

Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 YALE L.J. 1060 (1976) (contrasting the ethical duty to advance a client's interests and the moral duty to advance the general good). The contrary is often true as well. Lawyers want their clients to like them, not only for economic reasons (future business, referrals), but also because the lawyers come to know the clients and must work with them—often quite closely. Sometimes lawyers socialize with clients. Even if they do not, an atmosphere of mutual objectives and trust is more conducive to a happy workplace than one in which the lawyer and client are at odds. See Donald C. Langevoort, Where Were the Lawyers? A Behavioral Inquiry into Lawyers’ Responsibility for Clients’ Fraud, 46 VAND. L. REV. 75, 95-111 (1993) (discussing psychological reasons why lawyers are disposed to like and trust clients).


6. The professional codes unquestionably incorporate the notion of role-differentiation as a fundamental principle. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (1993) [hereinafter MODEL RULES] (“[v]irtually 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 upright person while earning a satisfactory living. The [Model Rules] prescribe terms for resolving such conflicts.”); MODEL CODE OF PROFESSIONAL RESPONSIBILITY, pmbl. (1983) [hereinafter MODEL CODE] (noting that “[i]n fulfilling his professional responsibilities, a lawyer necessarily assumes various roles”). Scholars have suggested that, in effect, the codes lead lawyers to avoid moral decisionmaking or to think only of the systemic effects of their conduct. See, e.g., ALAN GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 33 (1980) (arguing that because lawyers unthinkingly abide by principles in the code, they fail to consider whether they should act in a different manner); William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083, 1088-91 (1988) (urging lawyers to set “aside parsing of . . . [ethics] rules” and to exercise discretionary moral judgment); Fred C. Zacharias, Specificity in Professional Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics, 69 NOTRE DAME L. REV. 223, 257-65 (1993) (discussing the effect of different types of drafting approaches on lawyers' adoption of particular roles).

7. See, e.g., Ted Schneyer, Moral Philosophy's Standard Misconception of Legal Ethics, 1984 WIS. L. REV. 1529, 1531-66 (criticizing “legal philosophers” for overemphasizing the codes’ effects and showing that lawyers often role-differentiate despite the mandate of the codes); Serena Stier, Legal Ethics: The Integrity Thesis, 52 OHIO ST. L.J. 551, 554 (1991) (same).
ents and recognize that most ethics codes do not demand such an absolute approach. My goal is to analyze how the ethos of practice has developed to minimize lawyers' exercise of that objective judgment which the codes allow. The analysis should help identify steps the bar can take to counteract the trend.

Part I identifies the central relevance of objectivity to the outstanding theories of lawyer professionalism. It considers the extent to which client orientation is, and is not, consistent with independent moral decisionmaking by lawyers. Part II traces the changing emphasis the legal profession has placed on client orientation. Part III links those changes to claims that professionalism has declined. It suggests that the historical pendulum has swung from a situation in which lawyers failed to ally themselves with clients sufficiently to one in which lawyers avoid making moral decisions and rely upon fictions concerning client rights to achieve personal ends. Part IV concludes that although ethics codes carefully safeguard the authority of lawyers to exercise discretion, the rules, legal training, and custom fail to emphasize adequately the lawyer's duty to act objectively. It proposes institutional steps that the legal profession should consider to rebalance the scales.

8. See generally Luban, supra note 1 (indicting systemic rationales as inadequate justifications for pure client orientation); Murray Schwartz, The Professionalism and Accountability of Lawyers, 66 CAL. L. REV. 669 (1978) (leveling similar criticisms with respect to non-advocate attorneys). Even the strongest critics of moral philosophers' attacks on the "standard conception" of lawyering agree that a pure client-orientation would be inappropriate. See, e.g., Schneyer, supra note 7, at 1539.

9. See Geoffrey C. Hazard, Jr., Lawyers and Client Fraud: They Still Don't Get It, 6 GEO. J. LEGAL ETHICS 701, 701 (1993) (arguing that confidentiality rules in codes should and do incorporate a range of discretion in a lawyer's exercise of zeal); Schneyer, supra note 7, at 1550-55 (demonstrating the codes' limits on unrestrained advocacy); Stier, supra note 7, at 554 (same). The strongest proponents of client orientation also agree that there should be limits. See, e.g., MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 121-23 (1990) (arguing that a lawyer may put a client that he knows will commit perjury on the stand, but may not help the client perfect his testimony); id. at 71 (discussing other limits on zeal).
I. THE RELATIONSHIP BETWEEN OBJECTIVITY AND PROFESSIONALISM

No term in the legal lexicon has been more abused than "professionalism."10 Because lawyers typically are presumed to fit the model of professionals, the term often is used to mean no more than "to act as we want lawyers to act." This concept varies with the speaker.

Nevertheless, from the vast literature on the subject of professionalism, one can identify several core normative themes concerning the term's meaning.11 Virtually all of the themes encompass the notion that the lawyer's function includes a measure of objectivity in the implementation of legal skills, goals, or practices. By objectivity, I refer to a sense of impartiality in evaluating conflicting interests. In other words, objectivity is the ability to distance oneself from personal and client desires in order to evaluate the effect of potential actions on clients, third parties, and the legal system.12

10. See, e.g., Eugene A. Cook, Professionalism and the Practice of Law, 23 TEX. TECH. L. REV. 955, 956 (1992) ("Professionalism means different things to different people."); Nancy J. Moore, Professionalism Reconsidered, 1987 AM. B. FOUND. RES. J. 773, 777-78 (discussing many meanings attributed to the term "professionalism"); Timothy P. Terrell & James Wildman, Rethinking Professionalism, 41 EMORY L.J. 403, 406 (1992) (noting the lack of uniformity in the use of the term and suggesting that "our references to 'professionalism' may be nothing more than a sentimental form of 'traditionalism'").

11. Over the past two decades, hundreds of articles and speeches have focused on the meaning of professionalism, its perceived "decline", and steps the bar should take to improve it. Among the most important are CHARLES WOLFRAM, MODERN LEGAL ETHICS § 1.5 at 14-16 (1986) (summarizing shared characteristics of various theories of professionalism); PROFITS AND PROFESSIONS; ESSAYS IN BUSINESS AND PROFESSIONAL ETHICS 3-73 (Wade L. Robison et al. eds., 1983) [hereinafter PROFITS] (collection of essays on professionalism); Richard L. Abel, Taking Professionalism Seriously, 1989 ANN. SURV. AM. L. 41, 41-63 (discussing values inherent in maintaining a profession). See generally Thomas D. Morgan, The Fall and Rise of Professionalism, 19 U. RICH. L. REV. 451 (1985) (discussing history of the legal profession's self-view); Kenneth L. Penegar, The Five Pillars of Professionalism, 49 U. PITT. L. REV. 307 (1988) (arguing that the Model Code of Professional Responsibility reflects an autonomous, individualistic norm for the profession that is at odds with other conflicting norms of the profession). I distinguish these attempts to identify "normative" principles governing legal practice from other professionalism literature that focuses on the organizational structure and makeup of the bar. See generally RICHARD ABEL, AMERICAN LAWYERS (1989).

12. As Owen Fiss discusses in the context of judicial interpretation, objectivity
Initially, characterizing an occupation as a profession assumes something about the members and the subject matter of their trade. One branch of the professionalism literature posits that what distinguishes professionals from other laborers is lengthy education, the accumulation of skills others cannot provide, and an intellectual subject that typical laypersons cannot understand or contend with, even assuming a reasonable term of training. For proponents of this view, the core of professionalism is a special competence to perform work on behalf of clients that others cannot perform.\textsuperscript{13}

Something more is implicit in the skills approach. Plumbers and car mechanics, for example, also possess training and abilities that nonmechanically-inclined persons cannot duplicate. The significance of the lawyer's skills is that the lawyer is expected

"imparts a notion of impersonality"—a sense that results "can be measured against a set of norms that transcend the particular vantage point" of the individual (here, the client or lawyer) making the judgment. Owen M. Fiss, \textit{Objectivity and Interpretation}, 34 STAN. L. REV. 739, 744 (1982). The norms need not dictate each result but should provide a constraining influence on the decisionmaker's ability to reach any conclusion he or she wishes to reach. \textit{Id.}

The objectivity I discuss should be distinguished from the "independence" of lawyers that Robert Gordon discusses. \textit{See} Robert Gordon, \textit{The Independence of Lawyers}, 68 B.U. L. REV. 1 (1988). Gordon focuses more on a political concept—the degree to which lawyers should maintain and act upon social views about the law and objectives that are distinct from their clients' views. \textit{Id.} at 2-30. Lawyers' practice habits are relevant to Gordon's topic insofar as he calls for "purposive lawyering" or "public-minded counseling" that furthers the public interest. \textit{Id.} at 33, 34-48. I focus on the smaller matters that arise in everyday practice and consider how lawyers should exercise the professional detachment which Gordon assumes should be the norm. \textit{See id.} at 13 ("[L]awyers in [all] groups routinely urge upon each other . . . a sort of detachment, aloofness, professional distance from the clients' ends.").

to exercise them on the client's behalf as a fiduciary, with only limited client input (i.e., because the client cannot understand or cope with the subject matter). Those who emphasize lawyers' qualifications and training as the key to professionalism assume that lawyers will exercise their skills objectively, both in the sense of furthering the client's interests and in the sense of making intelligent decisions regarding the strategies and tactics that are most appropriate.  

The same assumption pervades the dominant modern perspective on professionalism, which focuses on commercialism in legal practice. This perspective takes one of three forms. First, some observers assert that part of lawyers' professional obligation is to subordinate personal financial interests in favor of clients' need for legal services. As a consequence, these observers conclude that lawyers should limit fees, accept unpaying clients, and employ means that maximize client ends even when doing so is unprofitable. A second, related argument centers upon

14. See, e.g., Lisa H. Newton, Professionalization: The Intractable Plurality of Values, in PROFITS, supra note 11, at 23 (stating that professionalism includes a commitment to the welfare of lay individuals in their charge); Morgan, supra note 11, at 451 (noting that professionalism encompasses the notion that laypersons are ordinarily not able to understand and evaluate the services performed); David A.J. Richards, Moral Theory, the Developmental Psychology of Ethical Autonomy and Professionalism, 31 J. LEGAL EDUC. 359, 359 (1981) (discussing professionals' "discretion in risk-taking" on behalf of client).

15. See, e.g., E. Osborne Ayscue, Jr., Professionalism, 21 TENN. B.J. 17, 17 (1985) (arguing that lawyers have a duty to subordinate financial reward to social responsibility); Reginald T. Hamner, Executive Director's Report: Professionalism and a Shrinking Volunteer Base, 4 ALA. LAW. 127, 128 (1987) (defining a professional as "one who puts in more than he takes out"); Robert P. Lawry, The Central Moral Tradition of Lawyering, 19 Hofstra L. Rev. 311, 331 (1990) ("[L]awyers are professionals, supposedly wedded to the idea that service to the public comes before their own monetary gain."); Giandomenico Majone, Professionalism and Nonprofit Organizations, 8 J. HEALTH POL., POL'Y & LAW 639, 640 (1984) (arguing that "altruism" is part of professionalism); Ronald D. Rotunda, Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism, 18 LOY. U. CHI. L.J. 1149, 1158 (1987) (defining professionalism by quoting Roscoe Pound's belief that it encompasses "pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood").

the delivery of pro bono services. Some states have adopted ethics rules requiring lawyers to donate a minimum number of hours to public service. Many commentators suggest that this pro bono obligation is part and parcel of being a member of a profession. Third, commercial practices of lawyers, such as advertising, solicitation, and the creation of ancillary businesses, have drawn criticism as demeaning lawyers and therefore undermining society's trust in them.
Central to the focus on commercialism is the belief that the free market does not order lawyers' behavior in a satisfactory way. Lawyers should not act as normal businessmen or service-providers maximizing their own interests, but rather should respond to higher societal values that transcend economics. This theory necessarily assumes that lawyers can identify the higher values despite conflicting self-interest. In other words, the theory assumes that lawyers can analyze impartially which of their actions will maximize society's interests, however defined, and can act in accordance with those interests. AGAIN, lawyer objectivity is critical to the theory.

The relevance of objectivity to professionalism is even more obvious with respect to two other schools of thought that define professionalism with reference to the regulation of lawyers. One school posits that an essential element of professionalism is that an occupation must regulate itself fairly, as the bar regulates lawyers. To the extent this approach incorporates the idea that self-regulation includes consideration of interests other than those of the members of the profession (e.g., societal interests, client interests), the theory assumes that lawyers can as-

20. See, e.g., DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE 177 (1966) (arguing for more client participation in decisionmaking but acknowledging that it would reduce the “ability [lawyers] now have to restrain clients from taking immoral, illegal, or simply unfortunate actions”); Frederick A. Elliston, Ethics, PROFESSIONALISM AND THE PRACTICE OF LAW, 16 LOY. L.J. 529, 532-33 (1984) (arguing for the need to develop the conscience of the lawyers so that they can fulfill their prescribed role); Parker, supra note 19, at 21 (stating that professional service includes lawyers committing themselves to an ideal of “public service”); Terrell & Wildman, supra note 10, at 414 (identifying the function of professionalism as “reaching beyond the basic and uninspiring values enforced by the codes, and demonstrating that lawyer's share, or ought to share, higher, more ambitious moral aspirations”); cf. Stephen L. Pepper, The Lawyer's Amoral Ethical Role: A Defense, A PROBLEM, AND SOME POSSIBILITIES, 1986 AM. B. FOUND. RES. J. 613, 617-18 (noting that a lawyer's judgment of morality may not be better than a client's).

21. See, e.g., James M. Dolliver, Law as a Profession: Will it Survive?, 26 GONZ. L. REV. 267, 268 (1990-91) (noting traditional view that a profession is a body whose members have their own system of internal discipline and are relatively free from lay evaluation and control); Elliston, supra note 20, at 532 (noting the importance of self-regulation in identifying a profession); Richards, supra note 14, at 359 (discussing the importance of self-regulation to traditional theories of professionalism).
sess and implement third-party values.\textsuperscript{22}

The second regulatory school of thought explicitly assumes objectivity. It defines professionals as members of an occupation that maintains standards or written codes and, pursuant to these standards or codes, pursues (or internalizes) societally-beneficial ideals.\textsuperscript{23} Tautologically, this approach requires lawyers to order their conduct with reference to some ascertainable standard rather than through instinct or pursuit of selfish interests.

Interestingly, scholars who define professionalism in a way contrary to the regulatory schools also assume that lawyers will maintain objectivity toward legal practice. These scholars suggest that professional lawyering requires an emphasis on personal, uncodified standards of morality. They identify lawyer self-awareness and introspection as avenues for determining appropriate behavior.\textsuperscript{24} They reject total reliance on ethics rules

\textsuperscript{22} See, e.g., Edward J. Eberle, Three Foundations of Legal Ethics: Autonomy, Community, and Morality, 7 GEO. J. LEGAL ETHICS 89, 91 (1993) ("As professionals, lawyers owe duties to clients, society, and conscience."); Kearney & Sinha, supra note 13, at 571 (characterizing professionalism as including self-regulation and "autonomy . . . restrained by responsibility"); Penegar, supra note 11, at 310-11 (discussing "five pillars" of lawyer self-regulation).

\textsuperscript{23} See, e.g., Abel, supra note 11, at 62-63 (noting that one factor separating professions from occupations is the willingness to strive for professional ideals); Harold G. Clarke, The Rewards of Professionalism, PROF. LAW., Aug. 1991, at 1, 3 (asserting that professionalism is a "higher standard" and that lawyers should adhere to it for loftier reasons than the mere threat of sanction); Michael Davis, Professional Means Putting Your Profession First, 2 GEO. J. LEGAL ETHICS 341, 343 (1988) (arguing that professionalism includes a commitment to act in accordance with the profession's code of ethics); cf. Elkins, supra note 13, at 947 (arguing that the term "professionalism" enables lawyers to pay lip service to lofty ideals while acting in their own self-interests).

\textsuperscript{24} See, e.g., Gerald J. Postema, Moral Responsibility in Professional Ethics, in PROFESSIONS, supra note 11, at 41 (arguing that lawyers must bridge personal and professional morality by exercising practical judgment); John J. Flynn, Professional Ethics and the Lawyer's Duty to Self, 1976 WASH. U. L.Q. 429, 444 (asserting the importance of lawyer introspection); Thomas L. Shaffer, Legal Ethics and the Good Client, 36 CATH. U. L. REV. 319, 328 (1987) (stating that a good lawyer "may need to insist . . . on the little, little area where . . . he will have to decide for himself whether he will follow his friend [the client]"); William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. REV. 29, 130 (proposing "non-professional advocacy" through which lawyers must present their personal ethics to clients); Zacharias, supra note 6, at 237 (discussing introspection as an aspect of professional regulation); cf. Jack L. Sammons, The Professionalism
precisely because overemphasis of the rules may inhibit lawyers from implementing independent principles.\textsuperscript{25} Central to this theory is the notion that lawyers must view situations and relationships from all perspectives and evaluate the situations on an objective moral basis.\textsuperscript{26}

In the last decade, one other approach to professionalism has gathered support, particularly among nonacademics. Proponents of this approach consider "civility" within the bar as the core of professionalism.\textsuperscript{27} For them, the perceived decline in professionalism stems from an increase in "hardball" tactics and a decrease in the respect with which lawyers treat each other, the courts, and clients.\textsuperscript{28} Interpreted as an observation regarding

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\textit{Movement: The Problems Defined}, 7 NOTRE DAME J.L. ETHICS & PUB. POLY 269, 300 (1993) ("The ethic of our practice is chiefly an ethic of character.").

25. See, e.g., Simon, supra note 6, at 1083-84 (arguing that lawyers must exercise discretion in making ethical decisions); Wasserstrom, supra note 5, at 8 (discussing the effect of rules on a lawyer's willingness to exercise independent judgment); cf. John Leubsdorf, \textit{Three Models of Professional Reform}, 67 CORNELL L. REV. 1021, 1045-52 (1988) (noting the emerging branch of scholarship that calls upon lawyers "to stop hiding behind rules, roles, and institutions, and to take responsibility for their actions") and authorities cited therein.

26. See, e.g., Gordon, supra note 12, at 11-30 (arguing that lawyers outside of the criminal context do, and should, exercise independent judgment); Simon, supra note 6, at 1140-43 (arguing that lawyers must consider societal interests in applying strict confidentiality rules).


etiquette, this approach has little moral force. When interpreted in the context of the practice tactics it addresses, however, the approach has substance. In calling upon lawyers to restrain their tactics—even when they serve some purpose (e.g., wearing down the adversary)—proponents of civility again are positing that lawyers should act with reference to a standard of conduct that does not maximize results.29 In other words, lawyers must step back and view their strategies objectively, with reference to some, undefined, third-party values.

I have not discussed additional theories that define professionalism on the basis of the prestige or status that members of the occupation enjoy, because I assume that the prestige or status must derive from some source.30 I also have postponed consideration of theories that define professionals as those who gauge their conduct solely by client interests.31 At this stage, my point simply is to identify the key role that objectivity plays in the popular theories of professionalism. Most of these theories encompass an image of lawyers who remain independent from personal interests and uninformed client requests and who exercise skill with reference to standards and values that they alone are expected to understand.

II. THE HISTORY OF CLIENT ORIENTATION AS AN ASPECT OF PROFESSIONALISM

The concept of professionalism has existed as long as the bar has been organized. Our visualization of early professionals is

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29. See Cook, supra note 10, at 979 (attributing decline of professionalism to an increase in “Rambo” tactics and proposing new standards of civility to limit such tactics); Dettmer, supra note 27, at 842 (arguing that lawyers should pursue the truth-seeking process, not just the goal of winning).

30. Among the commentators that refer to prestige or status as a defining characteristic of a profession are WOLFRAM, supra note 11, § 1.5 at 15; Newton, supra note 14, at 31-32.

an idealized image: Abraham Lincoln, the repository of wisdom and model of civility; Alexander Hamilton and John Adams, the guardians of justice against public opinion. However, as the bar took shape as a guild, it began to develop more concrete norms for lawyers that ultimately found their way into professional codes.

From the beginning, professional standards evinced an ambivalence between client orientation and a desire to maintain independent judgement. The classic early statement of the lawyer's function is Lord Brougham's: the lawyer "knows but one person in all the world, and that person is his client." As Russell Pearce has pointed out, however, the bar never accepted Brougham's principle as an absolute. Hoffman's Resolutions and Sharswood's lectures, the precursors of the first professional codes, emphasized loyalty to clients, but at the same time de-

32. See Emanuel Hertz, Book Review, 11 ST. JOHN'S L. REV. 354, 358 (1937) (lauding Lincoln's "human sympathy, his humor, his lawyer-like caution, his common sense, his fairness to opponents, his dislike of arbitrary rule, his willingness to take the people into his confidence and to set forth the reasons for unusual measures.")


34. Alabama adopted the first codified set of professional standards in 1887. Craig Enoch, Incivility in the Legal System? Maybe it's the Rules, 47 SMU L. REV. 199, 210 (1994). In 1908, the ABA followed suit by adopting the Canons of Ethics, a largely generalized and hortatory set of norms. The ABA did not promulgate concrete, enforceable rules until the 1969 Code of Professional Responsibility. For discussions of the history of professional regulation, see Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 YALE L.J. 1239, 1249-60 (1991); Zacharias, supra note 6, at 223-24.


37. DAVID HOFFMAN, A COURSE OF LEGAL STUDIES 758 (1836) ("To my clients I
lineated important areas in which lawyers were to remain true to their objective moral beliefs. The initial professional codes, Alabama’s 1887 formulation and the 1908 ABA Canons, incorporated this tension between extreme client orientation and objectivity. In the early years of the organized bar, lawyers were governed by loose standards that left difficult ethical and tactical dilemmas to discretion and individual conscience.

As the bar expanded, became more organized, and exerted more influence on American society in the early twentieth century, perceptions of the bar began to change. The public paradigm moved from the poor country lawyer—Abe Lincoln—to the rich, patrician elite. Within the bar, the number of lawyers entering the profession exploded. Although this increase is partly attributable to economic forces, equally relevant were post-

will be faithful; and in their causes zealous and industrious.”); George Sharswood, An Essay; Professional Ethics 76-125 (1854) (stressing the “importance” of lawyers and “loyalty” to clients).

38. See, e.g., Hoffman, supra note 37, at 752 (“I will never permit professional zeal to carry me beyond the limits of sobriety and decorum”); Sharswood, supra note 37, at 62-63 (stressing lawyer’s need to maintain “dignity” and “respect”).

39. See L. Ray Patterson, Legal Ethics: The Law of Professional Responsibility 5 (2d ed. 1984) (describing the history of early legal ethics codes). Compare Canons of Professional Ethics Canon 15 (1908) (“The lawyer owes ‘entire devotion to the interest of the client, warm zeal in the maintenance of his rights’”) with Canon 16 (“A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do.”) and Canon 18 (“A lawyer should always treat adverse witnesses and suitors with fairness and due consideration.”).

40. See Pearce, supra note 36, at 261-72 (describing Sharswood’s code and the 1908 Canons of Ethics).

41. See David R. Papke, The Legal Profession and its Ethical Responsibilities: A History, in Ethics and the Legal Profession 29, 36 (Michael Davis & Frederick Elliston eds., 1986) [collection as a whole hereinafter ETHICS] (describing the contrast between the elite “Wall Street” Bar on one hand and solo practitioners and the “ethnic bar” on the other). Government funded legal services were not available in the early twentieth century, so lawyers tended to associate only with those who could afford representation. See, e.g., Louis D. Brandeis, The Opportunity in the Law, in Business—A Profession 321 (1914) (decrying the bar’s aligning too much with corporate America and too little with “the people”); Harlan F. Stone, The Public Influence of the Bar, 48 Harv. L. Rev. 1, 6-7 (1934) (arguing that the bar had become loyal only to business); cf. Alexis De Tocqueville, Democracy in America 245 (J.P. Mayer & Max Lerner eds., George Lawrence, trans. 1966) (noting early the “aristocratic” leanings of American lawyers).

42. Papke, supra note 41, at 41.

43. The post-war economic expansion undoubtedly created economic opportunities
New Deal and post-World War II idealism and the anticipation that the law would play a major role in reforming America’s ills.44 Both in the public’s eyes and in the eyes of new members of the bar, lawyers increasingly had become instruments of the upper class, used to maintain dominance over the poor.45

The bar’s elite relied upon professional self-regulation to maintain their status as “bar leaders” and to control the direction of the profession.46 Their response to the declining image of lawyers was to emphasize pro bono activities and the primacy of clients.47 Born was the public service ideal that most codes now

for more lawyers.

44. See, e.g., JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 6 (1972) (describing post-New Deal history); Papke, supra note 41, at 41 (describing development of the bar and the professional self-criticism of civil rights lawyers in the post-New Deal and civil rights eras). Thus, it is during this period that organizations such as the NAACP and the ACLU began to focus on lawsuits as the primary means of achieving reform in the areas of civil rights and individual liberties. See generally AUERBACH, supra, at 263-68 (describing change in attitudes toward the law during the civil rights movement); RICHARD KLUGER, SIMPLE JUSTICE 139-72 (1976) (describing the evolution of the NAACP’s litigation strategy in the 1930s and 1940s).

45. See, e.g., AUERBACH, supra note 44, at 281-82 (noting the perception that “only corporate clients and wealthy individuals were assured of access to lawyers”); REGINALD H. SMITH, JUSTICE AND THE POOR 12 (3d ed. 1972) (arguing that “differences in the ability of the classes to use the machinery of the law” was leading to “disparity between the rights of classes in the law itself”); Ferdinand Lundberg, The Priesthood of the Law, 1939 HARPER’S MAG., 515, 526 (arguing that the legal system has perpetuated economic and social injustice because lawyers are allied with the sources of “economic power”, leaving most injured parties with no redress).

46. See, e.g., AUERBACH, supra note 44, at 6 (“A weakened professional elite ... tacitly acceded to a quid pro quo: some outsiders finally would be admitted to elite positions within the professional structure in return for their loyalty to dominant professional values.”); cf. Albert P. Blaustein, What Do Laymen Think of Lawyers? Polls Show the Need for Better Public Relations, 38 A.B.A. J. 39, 41 (1952) (noting profession’s responses to Reginald Heber Smith’s criticisms of the bar, calling upon lawyers to “clean house,” and describing the bar’s attempts to serve the public with “committees on professional ethics and grievances, law reform, legal aid and lawyer reference plans”); O.A. Byington, Lo! The Poor Lawyer!, IOWA ST. B. ASS’N 73 (1927) (responding to the declining image of attorneys by stressing the need for educating the public that the lawyers were not to be associated with the criminality of their clients); Guy A. Thompson, Relationships and Responsibilities of the Legal Profession, 18 A.B.A. J. 631, 632-34 (1932) (ABA president noting the declining public image and calling upon the profession to embark upon an “organized, systematic, continuous and universal effort” to “discharge the duties that we owe [to the public] as members of a great profession.”).

47. Of course, these notions were not original. See, e.g., Pearce, supra note 36, at
include and that many commentators today identify as professionalism's core: lawyers should serve the poor at no cost, help make legal services widely available, and zealously protect each individual's interests.

A related response stemmed from a new judicial emphasis on individual rights and due process, particularly in criminal matters. As the Warren Court identified and protected constitutional rights through the 1950s and 1960s, and as the liberal press gave increasing coverage to that trend, the bar reevaluated its own role. The due process model of criminal litigation highlighted the importance of lawyers in helping clients vindicate their rights. Lawyers came to view client orientation as the key to their role. The category of legal "heroes" continued to include lawyers who defended innocent clients, but also extended to those who vindicated client rights regardless of their own client's guilt.

262-63 (discussing Sharswood's view that "the time will never come . . . when a poor man with an honest cause, though without a fee, cannot obtain the services of honorable counsel") and authorities cited therein; see also Anthony T. Kronman, The Lost Lawyer 11-52 (1993) (discussing changes in lawyers' attitudes over time).

48. See, e.g., Model Rules Rule 6.1 (1993) (targeting 50 hours of public service and financial contributions to legal assistance for the poor); Model Rules Rule 6.1 (1983) ("A lawyer should render public service."); Model Code EC 2-25 (1983) ("Every lawyer . . . should find time to participate in serving the disadvantaged."); see also Auerbach, supra note 44, at 286 (describing the bar's new emphasis on access to legal services).

49. See supra notes 6-7 and accompanying text.

50. See, e.g., Arthur J. Goldberg, Equal Justice 5-6 (1971) (discussing the Court's effect in producing "a profound change in the mechanics of our political democracy and the revolution in criminal justice" and praising the Court for bringing "legal rules into consonance with the human reality to which they purport to respond"); Luther A. Huston, Pathway to Judgment: A Study of Earl Warren 155-66 (1966) (praising the Warren Court's contributions to the protection of individual rights in the criminal context); John D. Weaver, Warren: The Man, The Court, The Era 219-38 (1967) (glorifying the Warren Court's contribution to criminal procedure); Robert B. McKay, Reapportionment: Success Story of the Warren Court, in The Warren Court: A Critical Analysis 32-34 (Richard H. Sayler et al., eds., 1968) (noting the unique importance of Supreme Court decisions from 1953 to 1968 and lauding the Court for speaking "the conscience of the majority" and for reasserting "the values of the open society for which the Constitution stands").


52. See Attorney for the Damned: Clarence Darrow in His Own Words (Ar-
Entering the 1970s, therefore, we see the full development of a theory of lawyering that emphasizes client rights and client desires over lawyers' independent assessments of what cases and tactics are good or just. Monroe Freedman led the intellectual development of this theory, characterizing client orientation as a constitutional guarantee and as an essential element in upholding the dignity of individuals. Notwithstanding scholar-

thur Weinberg ed., 1957) (popularizing in retrospect the unpopular causes represented by Clarence Darrow); Terrell & Wildman, supra note 10, at 415 (discussing development of "rights-consciousness" among members of the public and the bar).

Thus, for example, Anthony Lewis' acclaimed account of Gideon v. Wainwright, 372 U.S. 335 (1963) (recognizing indigent criminal defendants' right to counsel), lionized Abe Fortas for his argument for an indigent criminal defendant's right to counsel. Fortas, however, did not vindicate Gideon's innocence, just his right to counsel. Fortas did not even represent Gideon at the subsequent retrial because Gideon did not want Fortas as his lawyer. See ANTHONY LEWIS, GIDEON'S TRUMPET (1964).

53. I say "full development" because the general notion of client-oriented lawyering had proponents as early as the nineteenth century. See Pearce, supra note 36, at 257-58.

54. FREEDMAN, supra note 9, at 54 (quoting Justice William J. Brennan and asserting that the Sixth Amendment guarantees that "[t]he role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process"); Monroe H. Freedman, Ethical Ends and Ethical Means, 41 J. LEGAL EDUC. 55-56 (1991) [hereinafter Freedman, Ethical Ends] ("I think of lawyers' ethics as rooted in the Bill of Rights as expressed in our constitutionalized adversary system."); cf. Jay S. Silver, Professionalism and the Hidden Assault on the Adversarial Process, 55 OHIO ST. L.J. 855, 857-66 (1994) (arguing, somewhat hysterically, that modern attempts to reconceptualize professionalism reflect a hidden assault on constitutionally-required adversarial processes that protect criminal defendants' rights).

Commentators and the bar have sometimes mischaracterized Freedman and his philosophy. See id., at 57 (accusing William Simon of misstating his views). Freedman emphasizes the importance of client-oriented lawyering, particularly in criminal practice. However, he also expects lawyers to engage in introspection and to take seriously their responsibility to engage in objective, moral decisionmaking. Thus, Freedman encourages lawyers to reject cases in which the objectives offend the lawyers. FREEDMAN, supra note 9, at 68 ("[O]ne of the most important considerations in making a decision to accept or reject a client is that the lawyer, in representing the client, might be required to use tactics that the lawyer finds offensive."); see also Monroe H. Freedman, Legal Ethics and the Suffering Client, 36 CATH. U. L. REV. 331, 332 (1987) [hereinafter Freedman, Suffering Client] ("A lawyer who finds a potential client or cause to be morally offensive can simply decline the retainer."); Monroe H. Freedman, Personal Responsibility in a Professional System, 27 CATH U. L. REV. 191, 204 (1977) [hereinafter Freedman, Personal Responsibility] (asserting that lawyers act "morally" in helping clients and may exercise their personal judgment in choosing clients). He also discourages rationalization by lawyers considering participation in unlawful or fraudulent conduct. FREEDMAN, supra note 9, at B1
arly disapproval of the extremes of Freedman's position,\(^5\) his model became mainstream.\(^6\) Defense lawyers, in particular, routinely put into practice Freedman's attitudes, regardless of the mandates of the state professional codes governing their behavior.\(^5\)

(arguing that it is "disingenuous and morally irresponsible to say that lawyers never know the truth about our clients' cases"). Perhaps most importantly, Freedman admonishes lawyers to discuss moral issues with clients in the hope that the clients themselves will do the right thing. Freedman, Ethical Ends, supra, at 56.

55. See, e.g., David G. Bress, Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility, 64 MICH. L. REV. 1493, 1494-97 (1966) (disagreeing with Freedman's belief that a lawyer's duty to have his client acquitted is paramount to his or her obligation to the court, and emphasizing the lawyer's obligations to use "fair and honorable" means in defending a client); Teresa S. Collett, Understanding Freedman's Ethics, 33 ARIZ. L. REV. 455, 456 (1991) (questioning Freedman's "elevat[ing] client service above almost all other amoral considerations."); Marvin E. Frankel, The Search for the Truth: An Utopia View, 123 U. PENN. L. REV. 1031, 1055 (1975) (questioning whether counsel's paramount commitment should be to the discovery of truth or to the advancement of clients' interests); John T. Noonan, Jr., The Purposes of Advocacy and the Limits of Confidentiality, 64 MICH. L. REV. 1485, 1486-89 (1965) (criticizing Freedman's model as overemphasizing the "battle" aspects of trials); Ronald D. Rotunda, Book Review, 89 HARV. L. REV. 622, 623 (1976) (criticizing "Freedman's overly broad view of the need for confidentiality and zeal"); Harry I. Subin, The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm, 70 IOWA L. REV. 1091, 1126 n.190 (1985) (arguing that Freedman "missed" the point in insisting that the Fifth Amendment prohibits an attorney from revealing a client's perjury in all contexts).


57. See MANN, supra note 56, at 8 ("[T]here are many opportunities for information control, and experienced defense attorneys have developed special skills for
The ABA adopted a new code, the Model Code of Professional Responsibility, that retained some of the Canons' preferences for professional objectivity but was nevertheless susceptible to an interpretation that client loyalty should be the dominant professional creed. The Model Code treated attorney-client confidentiality as virtually absolute and elevated the requirement of zealous advocacy to a canonical level. The changes were popular; the Model Code was adopted almost unanimously, with little criticism from scholars and the press. For a brief period from the 1950s through the early 1970s, society perceived lawyers as heroes as often as villains. Lawyers were the architects of social justice—as in Brown v. Board of Education and Baker v. Carr—and the guardians of civil liberties through the Warren Court decisions that they helped to promote. The public perception of lawyers as "professionals" seemed secure.

What happened, then, to produce the modern notion that professionalism again has declined? First, the criminal justice system seems to have broken down. By all accounts, the courts are incapable of dealing with the increasing crime rate. More-
over, unlike in the Warren Court period when lawyers and courts established core rights of defendants.\textsuperscript{64} modern cases address the fine-tuning of those rights.\textsuperscript{65} When defendants win, lawyers no longer are exalted for vindicating basic rights, but rather are blamed for contributing to a system in which legal technicalities triumph over substance.\textsuperscript{66} Lawyers who go to the

cussing the social impact of court decisions involving criminal law reform); Jay Folberg et al., \textit{Use of ADR in California Courts: Findings and Proposals}, 26 U.S.F. L. Rev. 343, 348 (1992) (discussing the California courts' inability to deal with the dramatic increase in criminal cases which consume a disproportionate amount of judicial resources); \textit{Final Report to Honorable Thomas C. Platt, Chief Judge: The Causes of Unnecessary Delay and Expense in Civil Litigation in the Eastern District of New York}, 142 F.R.D. 185, 189 (1992) (critically noting the dominating and "burgeoning" criminal docket created by the national commitment to federalizing an increasing variety of crimes); cf. Harry T. Edwards, \textit{The Rising Work Load and Perceived 'Bureaucracy' of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies}, 68 Iowa L. Rev. 871, 878 (1983) (noting that courts of appeal have coped with increases in their criminal workload by reducing or eliminating oral argument and refraining from issuing written opinions whenever possible).

\textsuperscript{64} See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966) (relying on the Fifth Amendment to create a prophylactic rule limiting stationhouse interrogations of suspects without counsel); Gideon v. Wainwright, 372 U.S. 335 (1963) (establishing a Sixth Amendment right to counsel in felony cases).


\textsuperscript{66} See, e.g., Norman Darwick, \textit{Why Keep Good Evidence Out of Court?}, Wash. Post, Mar. 22, 1983, at A17 ("The [exclusionary] rule punishes society in the long run, for a criminal, often a dangerous one, is released to continue his unlawful behavior."); Harold Evans, \textit{When the Guilty Go Free}, U.S. News & World Rep., May 22, 1989, at 84 (editorial account of societal anger and frustration at the courts' frequent release of guilty defendants and calling upon the Supreme Court to "restore a clear, sensible balance between the rights of the victims and victimizers before public anger turns to disillusion and panic."); Michael Kinsley, \textit{Unleashing the Police: It's Actually the Fourth Amendment That Critics of the Exclusionary Rule Don't Like}, L.A. Daily J., June 25, 1991, at 6 (discussing public opinion against the exclusionary rule and quoting a Wall Street Journal article arguing that the exclusionary rule "degrades law into a lawyers' game"); \textit{On Searches: Trust the Experts}, N.Y. Times, Dec. 6, 1988 at A34 (describing increasing calls to overturn the [exclusionary] rule on the basis that "a crime-ridden society can't afford to lose a
mat for their clients are seen as contributors to the system’s breakdown.

Accompanying the breakdown is the renewed perception that justice is administered unequally. This perception probably always has existed to some degree. However, because of the easy dispositions in the matters of Richard Nixon and Spiro Agnew and the defendants in the Watergate break-

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case merely because . . . the police officer should have obtained a warrant before he rummaged in the laundry hamper that held the murder weapon”). Many of the publicized modern decisions involve highly contestable applications of the exclusionary rule. See, e.g., Arizona v. Hicks, 480 U.S. 321 (1987) (holding that turning stereo equipment to view the serial numbers was an unreasonable search not fitting within the “plain view” exception to the Fourth Amendment); INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (holding the exclusionary rule inapplicable in deportation hearings); United States v. Janis, 428 U.S. 433 (1976) (holding that the exclusionary rule did not bar IRS from pursuing assessment based on unlawfully attained evidence).

67. Perhaps most notably, racial bias in the criminal justice system has long been noted both in fictional accounts and reports of current cases. See, e.g., HARPER LEE, TO KILL A MOCKINGBIRD (1960) (describing fictional trial of a falsely accused African-American in the deep South); CARTER, supra note 51 (an account of racism and the operation of the southern court system in the case of nine African-American boys charged with raping two white girls). Moreover, to the extent that wealthy or famous defendants, such as John DeLorean, Claus von Bulow, Michael Jackson, and Tonya Harding, obtain the highest quality legal assistance and appear to win unwinnable cases or to buy their way out of criminal liability, the perception of unequal justice grows. See, e.g., Hugh Delligios, Jackson Civil Suit Settled Out of Court; Deal, Reportedly in Millions, May Hinder Criminal Inquiry, CHIC. TRIB., Jan. 26, 1994, at 1 (describing outraged reactions to Michael Jackson’s settlement of civil suit which ultimately led to the termination of a grand jury investigation into Jackson’s alleged child molestation); Irving R. Kaufman, The Insanity Plea on Trial, N.Y. TIMES, Aug. 8, 1982, § 6, at 16, (describing public outrage after “an eight-week trial replete with conflicting psychiatric testimony and capped by complex legal instructions” resulted in John Hinkley, Jr.’s acquittal by reason of insanity for his attempted assassination of President Reagan); Tom Maurstad, Jackson Settles Sex Abuse Suit; Attorney Says Accord Is No Admission of Guilt, DALLAS MORN. NEWS, Jan. 26, 1994, at 1A (discussing reactions to Michael Jackson settlement, including a criminal law professor’s comment that, “[i]f you have a lot of money, you can buy your way out of trouble.”).

68. John M. Crewdson, Jaworski Won’t Challenge Pardon, Spokesman Says, N.Y. TIMES, Sept. 9, 1974, at 1 (reporting President Ford’s pardon of Richard Nixon and disapproval by lawmakers and members of the office of Watergate Special Prosecutor Leon Jaworski); John Herbers, No Conditions Set, Action Taken to Spare Nation and Ex-Chief, President Asserts, N.Y. TIMES, Sept. 9, 1974, at 1 (stating that President Ford’s decision was based on the “public good”); Michael C. Jensen, Stocks Off on Agnew News: Move Shocks Businessmen, N.Y. TIMES, Oct. 11, 1973, at 69 (reporting Agnew resignation and no contest plea to income tax evasion, and the business community’s “shocked” and “dismayed” reaction to the plea).
ins—most of whom were themselves lawyers—the inequalities became more visible and publicized. As the part of the criminal justice system that represents clients' interests without regard to the merits, lawyers increasingly became viewed as amoral.

Although lawyers in criminal practice led the way in creating this image, civil litigators were not far behind. With industrial expansion and corporate liquidity, the use of lawyers increased dramatically. Corporations, guided by counsel, recognized the economic benefits that the due process model of lawyering offered well-represented clients. Lawyers applied Freedman's client-centered approach beyond the criminal and individual client context. Protracted and hardball civil litigation began to dominate the courts. Partly in response to and partly as a

69. See Auerbach, supra note 44, at 305 ("the Watergate prosecutions revealed a special standard of justice reserved for those who knew how 'to buy or bargain their way out of trouble . . . .'"; Simon, supra note 24, at 31 ("The public disgust at the behavior of the lawyers in the Watergate affair has prompted an elaborate pretense of soul-searching on the part of the profession . . . .'"; cf. Wasserstrom, supra note 5, at 3, 11 (discussing significance of the lawyer status of Watergate participants).

70. In tandem, scholarly commentary denouncing lawyer amorality came to be routine. See, e.g., Flynn, supra note 24, at 429-34 (discussing lawyers' unthinking acceptance of client positions); William Powers, Jr., Structural Aspects of the Impact of Law on Moral Duty Within Utilitarianism and Social Contract Theory, 26 UCLA L. REV. 1263, 1264 (1979) (discussing the "transparency" of law to moral considerations); Wasserstrom, supra note 5, at 10 (equating lawyers' perception of professionalism with amorality); cf. Gordon, supra note 12, at 48-51 (questioning the claim that lawyers' moral independence has decreased over time).

71. To the extent that lawyers are willing to attempt to vindicate all of the rights clients arguably have, rather than exercising a claim-screening function, clients who can afford unlimited lawyer effort benefit the most. Under the due process model, the substitute for lawyer screening is the marketplace; in other words, the amount of money clients are willing and able to spend on claims that their lawyers identify as marginal.


73. See, e.g., ABA COMM'N ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR REKINDLING PROFESSIONALISM 5 (1986) (discussing increase in the "scorched earth" strategy of litigation); Jethro K. Lieberman, The Litigious Society 3-10 (1981) (discussing the increase in conflict in society and litigation during the 1960s and 1970s); Walter K. Olson, The Litigation Explosion 1 (1991) (detailing why litigation increased during the 1960s and 1970s); Fred C. Zacharias, Rethinking Confidentiality, 74 IOWA L. REV. 351, 374 n.103 (1989) (citing authori-
result of the due process model, a plaintiff's bar grew and adopted the client-centered approach. Civil litigation proliferated.\textsuperscript{74}

The increase in civil and criminal litigation is not itself evil.\textsuperscript{75} However, when combined with a model of lawyering that emphasizes zealous advocacy over most other values, it results in a congested justice system and a general societal perception that the process only tangentially focuses on achieving accurate results.\textsuperscript{76} The recent advent of legal advertising, through which lawyers prompt litigation, increases our sense that lawyers not only are partly responsible, but also that they like the process.\textsuperscript{77}

\textsuperscript{74} As the due process model developed, courts and legislatures joined in developing rules and practices that made it easier for plaintiffs to file and maintain lawsuits. See, e.g., \textit{FED. R. CIV. P.} 23 (facilitating the commencement of class actions in matters involving limited individual damages).

\textsuperscript{75} Indeed, the increase may signify that justice is being dispensed more widely. See, e.g., \textit{BARLOW F. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS} 137-38 (1970) (arguing that increased utilization of lawyers is the most important value that may be served by allowing lawyers the freedom to advertise and solicit business); \textit{BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC} 228 (1977) (discussing the importance of publicizing lawyers as "reasonable, appropriate or readily identifiable problem-solving resources"); \textit{Comment, A Critical Analysis of Rules Against Solicitation by Lawyers}, 25 \textit{U. CHI. L. REV.} 674, 676-77 (1958) (arguing that attorney solicitation is beneficial because it enables clients to enforce valid claims that would otherwise be neglected); Whitney Thier, Comment, \textit{In a Dignified Manner: The Bar, the Court, and Lawyer Advertising}, 66 \textit{TUL. L. REV.} 527, 542 (1991) (canvassing arguments that legal advertising is a "good" because it enables people to better understand and pursue their legal rights) and authorities cited therein; cf. \textit{Bates v. State Bar}, 433 \textit{U.S.} 350, 376-77 (1977) (suggesting that increasing the use of advertising is beneficial in helping people of moderate means vindicate their rights in court).

\textsuperscript{76} \textit{See Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice}, 44 \textit{VAND. L. REV.} 45, 55-56 (1991) (noting defects in the adversary system as a truth-determining mechanism and suggesting alternative justifications for the system); \textit{see also} authorities cited in \textit{id.} at 55 nn.43-50.

\textsuperscript{77} Legal advertising, of course, may prompt worthy litigation. However, advertising by lawyers who suggest contacting a lawyer for every misfortune (e.g., "have you ever had a bicycle accident?") encourages the public to use litigation to resolve problems that might better be forgotten or addressed through other means. Cf. Thier, \textit{ supra} note 75, at 543 (discussing arguments that lawyers misuse advertising to "encourage nonmeritorious litigation").
There probably is some truth to that perception. In practice, lawyers gravitate to the notion that they should act in purely partisan fashion. The professional codes do not require this approach; most afford lawyers significant discretion in accepting clients, giving advice, and selecting litigation tactics. Yet lawyers often do not even consider exercising their discretion, because they choose to filter the codes through the lens of the due process model. Although their interpretation of the rules may derive from the attitude developed in the history of the 1960s and early 1970s, at least equally relevant is the fact that unthinking client orientation fills lawyers' pocketbooks. Blind adherence to a due process model allows lawyers to accept and prosecute most cases without qualm, resulting in increased legal work and higher fees. A strict policy of client orientation enables lawyers to satisfy their employers. It avoids the need to confront what might be difficult moral choices for lawyers and their clients.

The upshot is that by the 1980s, a backlash against lawyers' attitudes developed. Commentators have reacted to Freedman's philosophy, many charging that his view of appropriate partisanship goes too far. A relatively new branch of philosophical

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78. The discretionary aspects of the codes are discussed at length at infra Part III. Geoffrey Hazard suggests that, even in the attorney-client confidentiality area, in which codes seek to control lawyer discretion, the code drafters have recognized and preserved important sanctuaries of lawyer autonomy. Geoffrey C. Hazard, Jr., Lawyers and Client Fraud: They Still Don't Get It, 6 GEO. J. LEGAL ETHICS 701 (1993) (arguing the need for a zone of discretion in confidentiality rules).

79. See Langevoort, supra note 4, at 94 (arguing that economic incentives predispose lawyers to accept that principles of client loyalty make “continued involvement with a wrongdoing client . . . ethically acceptable, perhaps even laudable”).

80. See Warren E. Burger, Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint, 5 AM. CRIM. L.Q. 11, 12 (1966) (rejecting Freedman's response to difficult questions faced by defense attorneys); Noonan, supra note 55, at 1492 (arguing that a lawyer must balance the requirements of the adversary system, his own "standards as a human person," and the "requirements of the society which the system serves"); Kenneth Pye, The Role of Counsel in the Suppression of Truth, 1978 DUKE L.J. 921, 922-25 (arguing that a lawyer should balance client interests against the degree to which tactics impede the purposes of the criminal process); Simon, supra note 24, at 114-15 (arguing that conflict between lawyer and client should be possible within and outside the lawyer-client relationship and that lawyers should treat problems inherent in advocacy as a matter of personal ethics); Harry I. Subin, The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Pres-
scholarship concentrates so heavily on the perceived client orientation of lawyers that it suggests that objectivity in legal practice is virtually non-existent.\textsuperscript{51} Although this school of thought may overstate the case,\textsuperscript{82} it has focused renewed attention on the subject of professionalism, just as Freedman did in the 1970s. In 1983, the ABA adopted the Model Rules which, even in their diluted final form, diminish the Code of Professional Responsibility's emphasis on zealous advocacy.\textsuperscript{83}

Yet, insofar as modern professional regulation recognizes the importance of lawyers' exercising objectivity, it grants lawyers leeway. Lawyers who continue to interpret their role as that of a pure advocate—for historical or personal and financial reasons—will decline to incorporate other values. Society's perception of professionalism was enhanced in the civil rights period with Freedman's call for lawyers to role-differentiate more—to consider their obligations to individual clients and the legal system over personal moral instincts. The swinging of the pendulum to the other extreme, in which members of the bar often rely on client-oriented rules to decline exercising moral judgment, has contributed to society's perception that professionalism has declined once again.

\section*{III. Objectivity Under the Professional Codes}

All legal ethics codes expect lawyers to role-differentiate. In principle, role-differentiation is consistent with objective moral decisionmaking. It simply requires lawyers to order their con-\begin{footnotesize}

\footnotesize\textsuperscript{ent a False Case, 1 GEO. J. LEGAL ETHICS 125 (1987) (attempting to define limits "on the methods a lawyer should be willing to use when his or her client's goals are inconsistent with the truth").}

\footnotesize\textsuperscript{81. See authorities cited supra notes 9-11.}

\footnotesize\textsuperscript{82. See, e.g., Schneyer, supra note 7, at 1542-43 (challenging five empirical claims of the "philosophers' school" and arguing that the school overstates its case).}

\footnotesize\textsuperscript{83. For example, MODEL RULES Rule 1.3 cmt. states: A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a client is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See also Zacharias, supra note 6, at 224 nn.3-4 (discussing the development of the professional codes).}
\end{footnotesize}
duct with a view to the effects of the conduct on the legal system. At times, lawyers must forgo action that seems morally appropriate because the action or similar actions by all lawyers cumulatively might have a negative effect on the system's ability to achieve justice. However, in pursuing the "higher values" that zealous advocacy furthers, lawyers retain their discretion.

Lawyer objectivity often loses out when role-differentiation theory is committed to ethics rules. The theory only calls upon lawyers to consider their systemic role in making moral judg-

84. See, e.g., PROFESSIONAL RESPONSIBILITY: REPORT OF THE JOINT CONFERENCE, reprinted in 44 A.B.A. J. 1159, 1159-62 (1958) (discussing the importance of adversarial advocacy in obtaining the system's intended results); Luban, supra note 1, at 111-13 (discussing argument that the adversary system as a whole produces a good body of results); Wasserstrom, supra note 1, at 30 (discussing the argument that "the legal system will end up doing more justice to more persons than would be the case under any less . . . focused mode of moral deliberation."). Thus, for example, a lawyer must represent even guilty or blameworthy clients zealously so that potential clients will use lawyers and the adversary system can operate efficiently. John Kaplan, Defending Guilty People, 7 U. BRIDGEPORT L. REV. 223 (1986) (offering systemic justification); John B. Mitchell, The Ethics of the Criminal Defense Attorney—New Answers to Old Questions, 32 STAN. L. REV. 293, 297-98 (1980) (asserting the need for lawyers to represent guilty clients so the system's "screening" function will work). Similarly, lawyers must refrain from disclosing confidences to help third parties, because disclosure would undermine the trust all clients are expected to place in the profession. See Zacharias, supra note 73, at 358 (discussing systemic justifications for confidentiality rules) and authorities cited id. at 358 nn. 28-29.

85. See MONROE FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 3-6 (1976) (discussing the lawyer's "obligation" to impose barriers to the discovery of truth); cf. Morgan, supra note 11, at 451-52 (arguing that the larger societal goals of the legal profession have become increasingly lost in the contemporary emphasis on short-term client goals); Stier, supra note 7, at 555 (characterizing role-differentiation theory as positing "a total separation between personal morality and the law of lawyering").

My analysis of the interrelationship between role-differentiation, objectivity, and the professional codes describes the manner in which most ethicists and commentators view the codes. It might be possible to adopt a highly specific code of professional conduct, which all lawyers must obey, that reflects the shared wisdom of the bar. In other words, professional regulation might instruct lawyers in how to balance competing interests in all situations. Virtually all existing codes, however, avoid that approach, probably for good reason. See Zacharias, supra note 6, at 249-85 (discussing the problems inherent in drafting overly specific codes); cf. Bruce A. Green, Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law, 69 N.C. L. REV. 687 (1991) (advocating more specificity in particular aspects of the codes). That approach also is inconsistent with most lawyers' image of themselves as "professionals" empowered to exercise independent judgment.
ments; in other words, to consider the needs of the legal system in balancing moral values. Professional rules, either in their terms or application, may encourage lawyers to overemphasize role. When lawyers rely on inflexible rules instead of making judgments concerning the appropriateness of different courses of conduct in light of all the relevant interests, they risk losing

86. Consider, for example, a case featured in a recent California ethics opinion. San Diego County Bar Ass'n Legal Ethics and Unlawful Practices Comm., Op. 1990-1. At the time the opinion was issued, California law seemed to mandate absolute attorney-client confidentiality. Cal. Bus. & Pro. Code § 6068(e) (West 1994) ("It is the duty of an attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."). A client told his lawyer that he intended to kill his co-defendant. Believing the client, the lawyer sought advice from the local bar and was informed that the California rules did require him to maintain his silence. Cf. Fred C. Zacharias, Privilege and Confidentiality in California, 28 U.C. Davis L. Rev. 365 (1995) (describing December, 1993 amendment to California's attorney-client privilege and the arguments that this amendment implicitly amended California's confidentiality statute or codified existing public policy exceptions to confidentiality).

Role-differentiation theory does not mandate this result. It only suggests that, in deciding whether to disclose, a lawyer should consider the implications of disclosure on the legal system. In other words, the lawyer should consider whether her role and the importance of having professionals serve that role morally justify silence in the face of the negative effects on the third-party. The California rule (as interpreted by the bar committee) changes the approach by depriving lawyers of the right or obligation to weigh values. It establishes an absolute principle that a lawyer's role in the system includes a duty not to weigh considerations militating against confidentiality.

87. Few rules are as rigid as the California confidentiality rule discussed in supra note 86. Lawyers, however, have interpreted many ethics provisions as foreclosing consideration of third-party and societal values. Some lawyers interpret the duty of zealous advocacy as requiring them to take all steps on behalf of clients that are not expressly forbidden. See Model Code Canon 7 ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.") and accompanying disciplinary rules; Model Rules Rule 1.3 cmt. ("A lawyer should act . . . with zeal in advocacy."); Freedman, Ethical Ends, supra note 54, at 55-57 (1991) ("[M]y central concern is . . . how far I can ethically go . . . to achieve for my client full and equal rights under law. . . . I expressly reject moral neutrality and nonaccountability."); Stephanie B. Goldberg, Playing Hardball, A.B.A. J., July 1, 1987, at 48, 50 (quoting attorney Gerry Spence as stating that the lawyer's role is to go "right up to the line"). Other lawyers interpret provisions that permit them to make nonfrivolous claims as requiring the lawyers to engage in hardball or dilatory tactics without concern for third-party interests or the effect of those tactics on results. See Model Rules Rule 3.1 (permitting a lawyer to assert all nonfrivolous arguments and claims); Model Code DR 7-102(A)(1)-(2) (stating that a lawyer shall not take action "merely to harass . . . another", but may advance any claim "if it can be supported by good faith argument for an extension, modification, or reversal of existing law") (emphasis add-
the very independence that role-differentiation theory seeks to maximize.\footnote{88}

The following pages evaluate several categories of hypothetical situations in which a significant segment of society, as well as commentators, would question the appropriateness of the hypothetical lawyer's conduct.\footnote{89} I analyze how a lawyer who maintains a sense of objectivity would approach each problem; I try to identify what society might expect an honest, "professional" lawyer to do. Next, I consider whether the codes resolve the issues and, if not, where the hypothetical lawyer's personal or economic incentives lead. Finally, I consider how the lawyer who acts upon those incentives would justify her conduct.

I make several assumptions. Perhaps most significant, I assume that society has simultaneous interests in maintaining a bar that will do its best for clients and in achieving fair and

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The above rules all are written in permissive terms. The codes also include separate indications that lawyers should not always exercise their prerogative to act aggressively. See, e.g., \textit{MODEL RULES} Rule 1.3 cmt. ("[A] lawyer is not bound to press for every advantage."); \textit{MODEL CODE} EC 7-10 ("The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."). Modern lawyers, however, routinely interpret the rules so as to avoid introspection.

88. Lawyers often are subject to extra-code sanctions for their actions. One might expect these sanctions to create an incentive for lawyers to exercise their discretion under the codes. However, courts applying extra-code sanctions typically have accepted as a defense to sanctions that the ethics codes permitted a lawyer's conduct. The most recent draft of the Restatement of the Law Governing Lawyers proposes that lawyers should be deemed immune from malpractice liability "for any action or inaction the lawyer reasonably believed to be required by . . . a professional rule." \textit{RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS} § 76(4) (Tentative Draft No. 7, April 7, 1994). The ALI is considering an amendment that would extend the immunity, to "any action or inaction the lawyer reasonably believed to be required, or reasonably believed to be discretionary in the judgment of the lawyer, under . . . a professional rule." Motion submitted to the ALI (May 1994) (taken under advise-ment). This approach would enable lawyers to assert virtually any exercise of discretion under the codes as a defense to civil liability.

89. Of course, the term "society" encompasses a variety of views. Moreover, clients may have different, subjective, views than they would hold if they were observing the system at arm's length. In this Article, I refer primarily to the mainstream views that most reasonable laypersons would hold in considering the legal system on an objective basis.
accurate resolutions of disputes. The analysis also assumes that both interests are not absolute. In other words, the notion of legal partisanship does not mean that lawyers should operate without rules or limits on their behavior. Nor should society’s interest in ascertaining truth in any given case be allowed to undermine client “rights” or the long-term adversarial system to which we are currently committed.

Exploring the hypotheticals should provide several insights. First, it will illustrate the extent to which the codes themselves are likely to produce “professional” behavior and the manner in which lawyers will respond to ambiguities in the code. Second, the focus on lawyers’ explanations for their conduct will demonstrate how the codes, as they have developed, can be misused to defeat the codes’ very purpose of fostering lawyer introspection and objectivity. Third, by highlighting this process, the analysis may help identify mechanisms for restoring a better balance between partisanship and objectivity in the modern lawyer’s everyday role.

A. Lawyer Misrepresentations

There are many settings in which clients want lawyers to misrepresent what the lawyers actually believe or know to be the truth. In negotiations, for example, clients do not expect lawyers to volunteer the clients’ bottom-line positions. Puffing is routine (e.g., “we won’t settle for a penny less than $1,000,000”). In situations in which delay benefits the client, lawyers often will promise to move matters along even when they have no intention of doing so (e.g., “I’ll discuss it with my client and get back to you”).

When lawyers speak with the press about publicized cases, they also frequently overstate or misstate their own opinions. No lawyer would ever tell the press of her reservations about the client’s innocence or the justness of the client’s cause.

Once in court, lawyers routinely dissemble. By arguing marginal positions as if they are meritorious, lawyers at a minimum

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90. Cf. Paul T. Hayden, Reconsidering the Litigator’s Absolute Privilege to Defame, 54 OHIO ST. L.J. 985, 988 (1993) (citing data that suggests lawyers increasingly are being sued for defamation arising from public statements in litigation).
give a false impression regarding their own evaluation of the issues. Pleadings, and motions may present a range of incomplete, misleading, or downright deceitful information. Although some, perhaps even most, lawyers never lie outright, virtually all lawyers stretch points, take positions that they would reject as a decisionmaker, and argue perverse interpretations of the facts.


2. These practices are not confined to pure litigation. Lawyers practicing before administrative bodies also tend to act like advocates. See Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 368-69 (1994) (discussing controversial position of the Office of Thrift Supervision and other government agencies that lawyers representing regulated industries before administrative agencies act as agents rather than advocates) and authorities cited at id. at nn.152-56. Similarly, lawyers who advise clients with respect to regulations often are willing to assert outlandish positions, so long as they are “arguable.” Tax lawyers, for example, typically will claim any exemption that cannot be shown to be in “bad faith” (e.g., because it has been rejected previously). Cf Gordon, *supra* note 12, at 27-29 (discussing possible approaches of lawyers in the context of providing advice).


who exaggerate their cause. America's adversarial legal tradi-
tion, however, is sufficiently ingrained that observers of the le-
gal system do not expect total candor from lawyers. Most lay
observers would be horrified were a defense lawyer to announce
a client's guilt. In most of the potential misrepresentation situa-
tions described above, society's perception of professionalism
would not require lawyers to volunteer objective truth.\footnote{95}{Sissela
Bok has noted that "[t]he whole truth is out of reach. But that has
very little to do with our choices about whether to lie or speak
honesty." \textit{\textsc{Sisella Bok}, Lying: Moral Choice in Public and Private Life} 4
(1978). Like Bok, I focus on those core misrepresentations that,
when viewed honestly, everyone would agree are intentional
misrepresentations designed to mislead other persons into acting
differently than they might otherwise act. See \textit{id.} at 6, 8, 13.}
It therefore may be useful to consider the scenarios, to try to iden-
tify what neutral lay observers would expect of the profession-
al,\footnote{96}{In evaluating lay perceptions of what is appropriate
behavior, it is important to distinguish laypersons as a whole from
laypersons involved in the particular legal matter. Clients may
want or expect their lawyers to act in an aggressive manner to
maximize the clients' interests even though neutral observers—or
the clients themselves were they uninvolved—would disapprove
of the conduct. In determining what behavior is appropriate, the
clients' personal viewpoints may sometimes be significant; for
example, in evaluating the effect of confidentiality on the legal
system. See \textit{Zacharias, supra} note 73, at 395 n.227 (discussing the
tension between attitudes of observers and clients). For other
purposes—including determining how society as a whole would
prefer lawyers to approach practice—it makes more sense to
emphasize laypersons' objective normative assessments. See
Ronald J. Gilson, \textit{The Devolution of the Legal Profession: A Demand
Side Perspective}, 49 Md. L Rev. 869, 875-76 (1990)
(demonstrating the importance of evaluating lawyer tactics from
the perspective of clients who do not know whether they will be
targets or beneficiaries of the tactics).} and to look at how the codes
currently require lawyers to act.

As a general matter, most laypersons probably believe that
advocacy or client-orientation does not justify direct lying. In
other words, lawyers should not assert facts that they know to
be false for the purpose of inducing others to rely on those asser-
tions.\footnote{97}{Bok notes that "the casual approach of professionals [to
lying] is wholly out of joint with the [public's] view." \textit{id.} at xvii; see
\textit{also} Stanley, \textit{supra} note 16, at 3 (being an officer of the court
"means that lawyers will be totally honest with the courts and
with each other").} At the opposite extreme, most observers of the legal
system would expect lawyers to try to achieve a good result for even guilty or liable clients.98

In the negotiation context, one can imagine that a society interested in just results would expect lawyers to seek not the best deal for their clients, but rather a result that, viewed objectively, is both good for the clients and fair.99 That would entail (1) avoiding assertions designed to confuse or mislead adversaries, (2) attempting to persuade clients to agree to settlements that are reasonable in light of the clients’ obligations, and (3) avoiding lawyering tactics that artificially prevent reasonable

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98. See H. Richard Uviller, The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel’s Idea, 123 U. Pa. L. Rev. 1067, 1076-80 (1975) (noting the difficulty in determining how a lawyer should “know or recognize the truth,” but accepting the postulate that there is a core of “known or knowable truth”). Lawyers clearly make some statements that, viewed fairly, can only be considered truthful through rationalization; for example, in situations in which the client informs the lawyer of contrary facts. See, e.g., Harry I. Subin, The Criminal Lawyer’s “Different Mission”: Reflections on the “Right” to Present a False Case, 1 Geo. J. Legal Ethics 125, 126-28 (1987) (defining when a lawyer can reasonably be presumed to know a defense is “false”). Even where there is a serious possibility that the client is being truthful, this Article’s observations remain pertinent, for they address how lawyers should respond to statements of questionable veracity without rationalization. Cf. BOK, supra note 95, at 4 (focusing on core statements that reasonably can be deemed lies).

99. One reason for this orientation is that negotiated settlements do not result from an objective determination of “rights” and “obligations,” because a judge is not involved. Thus, almost by definition, the goal of negotiations should be a “fair” result or compromise that both parties can live with given the realities of the litigation. See Philip Sperber, Attorney’s Practice Guide to Negotiations 10-11 (1985) (arguing that the key to a successful negotiation is to put the other party “in the proper state of mind to permit the changing of the status quo” and to convince the other party that “you made all possible concessions”). In practice, however, the absence of a neutral arbitrator may lead to more lying by lawyers because the lawyers do not fear judicial oversight. See Lisa G. Lerman, Lying to Clients, 138 U. Pa. L. Rev. 659, 664 (1990) (noting that deception of clients usually happens in private, and therefore receives “less scrutiny than when the lawyer appears before a tribunal”); cf. Charles B. Craver, Effective Legal Negotiation and Settlement xvi-xvii (2d ed. 1993) (positing that, while observers may believe negotiations should be conducted on a “win-win” basis, advocates have a duty to maximize the result for their clients); Gerald R. Williams, Legal Negotiation and Settlement 8 (1983) (citing authorities which urge lawyers to maximize results of negotiations at virtually all cost).
settlements, including threats to use the lawyer’s skill to delay, injure, or prevent future recovery if the opposing party does not agree to accept a low offer.\textsuperscript{100}

The codes allow lawyers to satisfy these expectations, but the codes are ambiguous. The Model Rules for example, forbid making false statements in negotiations,\textsuperscript{101} while condoning “puffing” and adherence to negotiation “conventions.”\textsuperscript{102} The Rules encourage lawyers to communicate with clients regarding appropriate means and objectives,\textsuperscript{103} while emphasizing the lawyer’s duty to maximize client interests\textsuperscript{104} and the client’s right to

100. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1283 (1973) (holding that a lawyer may threaten a class action upon the adversary’s failure to settle even though her client cannot bear the cost, provided that the lawyer truly intends to bring the class action). The principles noted in the text are malleable and would require better definition if this Article’s proposals were adopted. See generally Reed E. Loder, Moral Truth Seeking and the Virtuous Negotiator, 8 GEO. J. LEG. ETHICS 45, 50-57, 93-101 (1994) (cataloguing different kinds of deception in negotiations and offering a “moral theory” for identifying appropriate conduct.). The goal here simply is to identify the contours of what society might expect professional behavior to include.

101. MODEL RULES Rule 4.1 (“[A] lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.”); accord MODEL CODE DR 7-102(A)(5).

102. MODEL RULES Rule 4.1 cmt. (“Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.”).

103. MODEL RULES Rule 1.4(g) (requiring a lawyer to keep clients informed).

104. MODEL RULES Rule 1.4 cmt. (“The guiding principle is that the lawyer should
control settlements and pleas. The codes express disapproval of delay and state that lawyers need not employ all possible tactics, but also appear to subordinate these preferences to client interests. In practice, therefore, the codes provide authority for virtually any approach the negotiating lawyer chooses to take.

How are lawyers likely to react? Only the most outrageous lies in negotiations are likely to affect a lawyer's reputation enough to harm her practice. Negotiations tend to be private, so that in any given case only opposing counsel and the opposing party will know what the lawyer has said. Once the matter is settled, they are unlikely to develop the facts further to uncover the mistruths.
Lawyers' economic incentives should cause them to act in a partisan fashion even without the encouragement of professional regulation. A lawyer's willingness to misrepresent enhances her standing with the client.112 If the misrepresentation is successful, the recovery and the concomitant fees will increase. Indeed, the bar as a whole has reason to countenance misrepresentations. A general practice of puffing in the bar allows all lawyers to demonstrate their client orientation to clients. To the extent that clients themselves or other negotiators would hesitate to overstate facts, lawyers become more indispensable.113 Admittedly, the bar has an interest in establishing some conventions regarding lying, because the ability to predict the quality of lawyers' representations reduces transaction costs among lawyers.114 However, the standards set in those conventions will be low. The long-term effect deceptive practices have in undermining society's confidence in lawyer professionalism is relatively abstract and is unlikely to seem economically significant to lawyers currently engaged in the practices.115

112. Even clients who value their own integrity may appreciate a lawyer's willingness to "do the dirty work" for them in a system that appears to depend upon aggressiveness to achieve fair results.

113. For example, accountants accustomed to disclosure requirements under securities laws might not consider absolute client orientation as part of their role. Clients themselves might hesitate to misrepresent because they do not feel right doing so. In other words, clients' roles as moral individuals may lead them to impose self-restraints on their conduct.

114. See generally Hazard, supra note 102, at 183-84. In contrast, the absence of conventions deprives lawyers of "norms of fairness in negotiation and the institutional means to give effect to [those] norms." Id. at 193.

115. In assessing lawyers' personal and economic incentives, it is important to recognize that people tend to evaluate the consequences of their acts on a short-term
A similar phenomenon exists with respect to the courtroom context. Society’s increasingly dim view of lawyer professionalism stems, in part, from the perceived contribution of lawyers to several flaws in the legal system: court congestion that delays justice, the expense of pursuing one’s day in court, and the system’s failure to achieve correct results. Yet society still expects lawyers to advocate for clients. Presumably, where lawyers fall short is in failing to screen their activities to avoid arguments and filings that are made for the wrong reasons or that have little realistic chance of success.

Again, ambiguity pervades the codes, this time perhaps tipping the balance more clearly in favor of lawyers making all possible arguments. The codes start with a premise of zeal. Although stating that lawyers need not “press for every advantage,” the clear implication of the codes is that lawyers should maximize client interests. The codes disapprove of frivolous arguments and those made solely for reasons of delay or harassment, but by their terms seem to approve of marginal basis. Liars, in particular, are likely to “weigh only the immediate harm to others from the lie against the benefits they want to achieve.” BOK, supra note 95, at 24. This approach overlooks both the long-term harm that lying does to the liar herself and the “harm done to the general level of trust and social cooperation.” Id.


117. These reasons may include delay, overwhelming the opponent financially, or taking advantage of favorable prejudgment interest rates.

118. A lawyer might file such claims when a client is wealthy and agrees to file because he has nothing to lose, or when the client has appointed or legal aid counsel and therefore does not need to pay the cost of wasteful litigation.

119. See MODEL RULES Rule 1.3 cmt.; MODEL CODE Canon 7.

120. MODEL RULES Rule 1.3 cmt. The comments to the Model Rules express this warning explicitly, but the Model Code only suggests it. See MODEL CODE EC 7-10 (noting other obligations that are concurrent with the duty of zeal).

121. The Model Code for example, devotes an entire “Canon” to the principle of zealoussness. See MODEL CODE Canon 7. Throughout the Model Rules one finds references to the dominance of client wishes. See, e.g., MODEL RULES Rule 1.2(a) (“A lawyer shall abide by a client’s decisions concerning the objectives of representation . . . . ”); id. Rule 1.2 cmt. (requiring lawyers to defer to clients on questions of potential harm to third parties); id. Rule 1.7 cmt. (“Loyalty is an essential element in the lawyer’s relationship to a client.”).
arguments that have some, albeit slight, chance of success. 122

Both personal and economic incentives encourage the lawyer not to screen arguments. The more arguments she makes, the more zealous she appears to the client. It also builds her workload and the accompanying billing opportunities. Moreover, presenting all plausible arguments is the economically safest course. Accidental overscreening of a good argument can subject the lawyer to malpractice liability or discipline for "lack of diligence," as well as to criticism from other lawyers attempting to steal the client.

The media context presents a different set of issues. In negotiations, society may want a lawyer to temper her assertions in recognition of the fact that some results are fairer than others; in other words, to acknowledge the other party's rights. In the courtroom, society may want the lawyer to take into account the societal interest in an efficient judicial system. Where publicity is involved, the lawyer's own integrity is at stake, because the lawyer voluntarily exposes herself to public view; she could carry out her mission without addressing the media. Recognizing this fact, the public probably would expect the lawyer to be zealous but, as a moral person, not to lie. 123 Acceptable public comment might include only (1) honest statements, (2) "no-comments," or (3) responses to statements others (including the press) have made that prejudice the client.

Here the codes are slightly more explicit. They limit trial publicity, enumerating specific types of acceptable speech. 124 The regulations, however, do not refer to the lawyer's own belief in her statements or to the publicity to which the lawyer may be responding. Perhaps more significantly, the trial publicity rules tend not to be enforced, even in the face of clear violations. 125

122. See MODEL RULES Rule 3.1; MODEL CODE DR 7-102(A)(2).
123. Carrie Menkel-Meadow has noted academia's failure to consider lawyers' "public" deceptions in the media. Carrie Menkel-Meadow, Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor, 138 U. PA. L. REV. 761, 777-80 (1990). Menkel-Meadow suggests that, by exploring this form of deception, one can better examine the real concerns about lawyer deception; namely, the public's sense that it cannot trust lawyers as a whole. Id.
124. See MODEL RULES Rule 3.6(b) (listing topics likely to violate the rules); id. Rule 3.6(c) (describing acceptable topics); MODEL CODE DR 7-107(A) (describing acceptable topics).
125. See, e.g., Bennett L. Gershman, The New Prosecutors, 53 U. PITT. L. REV. 393,
As a consequence, the rules in practice provide less guidance to lawyers, and are more ambiguous, than appears on the surface. It is more difficult to identify lawyers' natural incentives in this context than in the others previously discussed. Because lawyers are themselves on the line and visible, their personal sense of integrity may assume more importance. On the other hand, their time in the spotlight is limited. By using the press to appear partisan and aggressive, they may garner respect and new clients. A lawyer's false assertion of strength, later disproved by the facts at trial, ordinarily will never become the focus of negative publicity because post-trial media attention is likely to address the verdict and jurors rather than the advocates at the earlier trial. At a minimum, the lawyer reasonably may conclude that the bird-in-the-hand of positive pretrial publicity is more valuable than the risk of negative publicity later on.

The above scenarios in which lawyers might engage in misrepresentation demonstrate that the current regulatory scheme offers lawyers the option of acting objectively—of remaining true to generally-accepted values in a way that most observers would consider "professional." The codes, however, do not require such conduct. When the codes authorize lawyers to choose between emphasizing partisanship and important third party or societal interests, lawyers' natural incentives encourage them to select partisanship. Lawyers who make that choice can readily justify their conduct as mandated by the code by claiming adherence to the code provisions that call for zeal.\textsuperscript{126}

\textbf{B. Employing Proper Tactics To Help Wrongful Clients Win}

Every lawyer at some point must answer the question "how can you represent a guilty (or liable) person?"\textsuperscript{127} The typical

\textsuperscript{126} For a description of "fictions" about the codes that lawyers might assert to shield their conduct, see \textit{infra} part III.E.

\textsuperscript{127} \textit{See generally} Kaplan, supra note 84 (addressing the question of why lawyers
answer, that "the legal system depends on everyone being represented," never seems to satisfy the questioner, for the questioner himself would never take the evil client's side. Laypersons, perhaps, cannot understand the essence of role-differentiation—the need for lawyers to consider long-term systemic interests in making individual moral choices.  

Lawyers, in turn, sometimes forget that systemic interests do not outweigh all other societal values. Even the issue of whether to accept a client is not always obvious. Clients may be entitled to some lawyer to achieve some purposes, but this entitlement does not mean that a particular client deserves a particular lawyer or that the lawyer should be willing to do all kinds of legal work for the client. Laypersons are justified in questioning lawyers who, without thought, sell their services as "hired guns."

Once they accept clients, some lawyers assume that their sole mission is to maximize the clients' chances of obtaining their desired results. This approach overlooks the possibility that lawyers can exercise objective judgment as to the merits of a client's desires, at least in giving the client advice to avoid or desist from pursuing wrongful positions. Many laypersons probably would take the analysis one step further. Arguably, lawyers should not be willing to help clients manipulate the law to achieve a result to which, objectively, the clients are not legally entitled. Criminal defense lawyers should not provide information that would help a client perjure himself or concoct a...
Civil litigators should not harass or intimidate opposing parties into conceding for nonsubstantive reasons. Lawyers should not rely on false inferences or attempt to win by falsely casting doubt on truthful witnesses. To the extent that lawyers contribute to clients' ability to achieve wrongful results, society perceives lawyers as a problem rather than a positive force.

How do the codes address these subjects? They again are silent or ambiguous. The codes say nothing about which clients lawyers should agree to represent, beyond noting that lawyers should help assure that legal services are generally available. The codes hope that lawyers will remonstrate with clients and dissuade them from acting unreasonably, but do not require it. They allow lawyers to choose among tactics and to
refrain "from press[ing] for every advantage" but also leave to the clients the decision of whether third-party interests should take precedence. Although the codes forbid lawyers to participate in criminal or fraudulent activity, they do not prevent lawyers from giving clients information or advice that enables the clients to engage in misconduct on their own.

Typically, the lawyer's self-interest will be to align her own thinking with a client's wishes. A policy of accepting all clients who can pay maximizes the lawyer's financial interests. Blind obedience to the client's wishes regarding objectives and strategy keeps the lawyer in the client's good graces, so long as the client's approach is not tactically erroneous. Providing advice that enables the client to serve his self-interest, even if the lawyer could not take the same action, helps prove to the client that the lawyer is on his side and deserves compensation for loyalty. Under the codes, lawyers have the option of exercising objective, independent judgment regarding the propriety of the client, his goals, and his actions. Practical considerations, however, militate against implementing the option and encourage lawyers to adopt principles of zeal and blind partisanship as their prime directives.

137. MODEL RULES Rule 1.3 cmt. ("[A] lawyer is not bound to press for every advantage that might be realized for a client."); see also MODEL CODE EC 7-10 (noting limits to duty of zeal).

138. See, e.g., MODEL RULES Rule 1.2 cmt. (requiring lawyer to defer to client "regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected"); MODEL CODE EC 7-8 ("In the final analysis . . . whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client.").

139. MODEL RULES Rules 1.2(d), 8.4(b)-(c); MODEL CODE DR 1-102(A)(3)-(4), 7-102(A)(7).

140. Indeed, the codes seem to encourage lawyers to provide clients with full information. See, e.g., MODEL RULES Rule 1.4(b) (requiring lawyers to inform clients sufficiently to make informed decisions regarding the representation). Contra id. Rule 3.3 cmt. (requiring lawyers to remedy client perjury).

141. See JEROME E. CARLIN, LAWYERS' ETHICS 66-71 (1966) (discussing an empirical study concluding that clients have significant influence over lawyers' ethical thinking and conduct); Gordon, supra note 12, at 34-35 (discussing institutional conditions under which "[i]ndependence in the [c]ourse of [r]epresentation" is possible).
C. Employing Proper Tactics To Help Clients Commit New Wrongful Acts

The literature on zealous advocacy often fails to distinguish among the many roles lawyers play.142 Even if one accepts the premise that advocates must employ all permissible tactics to help a client win litigation, lawyers need not apply the same principle in nonlitigation contexts.

In part, the societal view of lawyers as "hired guns" stems from the perception that lawyers are willing to use the law affirmatively to help clients commit wrongful acts. Clients and attorneys today routinely assume that tax lawyers should help clients circumvent their tax obligations, that lawyers for regulated industries should help clients avoid onerous but legitimate regulatory requirements, and that the commercial bar should manipulate corporate structures to minimize clients' liability and regulatory obligations.143 Should lawyers in these advice set-

142. In recent years, a few commentators have urged reconsideration of uniform ethical analysis of lawyers engaging in different types of practice. See, e.g., GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 58-68 (1978) (noting a need to acknowledge different roles of lawyers); Stephen B. Burbank, State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform, 19 FORDHAM URB. L.J. 969, 975 (1992) (suggesting that we have "begun to acknowledge" the significance of different roles); Teresa S. Collett, And the Two Shall Become As One ... Until the Lawyers Are Done, 7 NOTRE DAME J.L. ETHICS & PUB. POLY 101, 141-43 (1993) (questioning the adequacy of the Model Rules' models of representation); Ted Schneyer, Professional Discipline in 2050: A Look Back, 60 FORDHAM L. REV. 125, 129-31 (1991) (predicting that future regulation will take a new approach to the role of "entity lawyers"); Stanley Sporkin, The Need for Separate Codes of Professional Conduct for the Various Specialties, 7 GEO. J. LEGAL ETHICS 149 (1993) (discussing the need for separate ethical rules in corporate and securities law); Fred C. Zacharias, Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?, 6 GEO. J. LEGAL ETHICS 903, 930 (1993) [hereinafter Zacharias, Fact and Fiction] (calling upon rulemakers to better acknowledge lawyers' differing roles); Fred C. Zacharias, The Restatement and Confidentiality, 46 OKLA. L. REV. 73, 85 (1993) [hereinafter Zacharias, The Restatement] (same); cf. Bruce A. Green, A Prosecutor's Communications with Defendants: What Are the Limits?, 24 CRIM. L. BULL. 283, 313-20 (1988) (arguing that prosecutors' ethical obligations should vary, depending upon the role the prosecutor plays).
143. See, e.g., MANN, supra note 56, at 3-4 (discussing representation in tax and securities fraud cases); The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform, 80 COLUM. L. REV. 1553 (George Cooper, ed., 1980) (discussing the lawyer's role in tax planning); Howell E. Jackson, Reflections on Kaye, Scholer: En-
tings do more to encourage clients to fulfill their "moral" or "societal" obligations?

The codes, again, send mixed signals. The same elements of zealouslyness and client orientation that govern litigation seem to apply in advice and transactional contexts. So long as lawyers themselves do not commit or participate in committing wrongful acts, the codes impose no direct obligation to avoid helping clients take advantage of law. On the other hand, a liberal interpretation of rules prohibiting "assisting unlawful conduct" would suggest that lawyers should refrain from much activity that helps clients circumvent civil or criminal legal requirements.

How will lawyers act if left to their own devices?

Listing Lawyers to Improve the Regulation of Financial Institutions, 66 S. CAL. L. REV. 1019, 1055-61 (1993) (discussing possible effects of the Kaye, Scholer case on lawyers' attitudes towards their role in representing clients before administrative agencies); Lawry, supra note 15, at 353 (discussing propriety of finding tax loopholes for clients); Pepper, supra note 20, at 627-33 (discussing a lawyer's duty to help a client who engages in pollution that violates regulatory requirements).

144. See, e.g., MODEL RULES Rule 3.3(a)(2) ("A lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."); id. Rule 8.4(b) ("It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer."); MODEL CODE DR 1-102(A)(3) ("A lawyer shall not . . . engage in illegal conduct involving moral turpitude.").

145. Arguably, providing legal assistance fits the terms of the rule, even though the legal assistance itself might be perfectly lawful. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987) (noting that "assisting" in Model Rule 3.3(a)(2) is "not limited to the criminal law concepts of aiding and abetting," but "rather . . . is intended to guide the conduct of the lawyer as an officer of the court"); cf. Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 512 (E.D. Mich. 1983) (extrapolating from the spirit of the codes to find a general duty of lawyer candor with respect to "significant" matters that would affect the decisions of the opposing party); Fellerman v. Bradley, 493 A.2d 1239, 1245 (N.J. 1985) (quoting In re Callan, 300 A.2d 868, 877 (N.J. Super. 1973)) (defining fraud for purposes of crime-fraud exception to privilege as including "confederating with clients to allow a court and counsel to labor under a misapprehension"). Most lawyers, however, reject such a broad interpretation of the term "assistance." See MANN, supra note 56, at 246-47 (discussing lawyers' narrow view of prohibitions against "assistance in illegal conduct").

146. Because lawyers hesitate to expose their conduct and client confidences to public view, concrete studies on this subject are rare. One available study of white-collar criminal defense lawyers shows that lawyers routinely avoid knowledge of ongoing criminal activity, in order to sidestep the quandary of whether to help the client, withdraw, or report the criminal conduct.) MANN, supra note 56, at 103.
Thurman Arnold's encapsulation of legal ethics—"[i]f it comes down to whether [he goes] to jail or [his] client does, [he'll] make sure it's the client"—a lawyer will demur when helping a client achieve wrongful ends might subject the lawyer to criminal or civil liability. In other circumstances, however, the lawyer has everything to gain from helping the client. Not only does the representation increase business, but the client becomes tied to the lawyer in the future because of the hold created by the client's realization that the lawyer is familiar with the client's questionable activities. In extreme situations, the lawyer may recognize a moral cost to representing the client in these activities. As a psychological counterbalance, however, a sense of loyalty and "team spirit" may encourage her to rationalize the validity of the client's ends.

D. Employing Marginal Tactics

Thus far, this Article only has considered the use of legal practices and tactics that are lawful and sometimes unquestionably appropriate. However, in the view of some observers, the so-called decline in legal professionalism has been hastened by lawyers' willingness to embrace tactics that themselves are improper—or at least on the margin of propriety. Such tactics

147. HAZARD, supra note 142, at 86 (quoting Thurman Arnold).
148. This attitude prompted the Office of Thrift Supervision (OTS) to focus on the bar in enforcing banking regulations. By seizing a law firm's assets in the Kaye, Scholer case, OTS held lawyers responsible for representations made to regulators on their clients' behalf and thereby deterred future misrepresentations by banking attorneys. For a description of the events leading up to the seizure, see Dennis E. Curtis, Old Knights and New Champions: Kaye, Scholer, the Office of Thrift Supervision, and the Pursuit of the Dollar, 26 S. CAL. L. REV. 985, 991-96 (1993) (discussing OTS charges against Kaye, Scholer); Joyce A. Hughes, Law Firm Kaye, Scholer, Lincoln S&L and the OTS, 7 NOTRE- DAME J.L. ETHICS & PUB. POL'Y 177 (1993); Charles R. Zubrzycki, Note, The Kaye, Scholer Case: Attorneys' Ethical Duties to Third Parties in Regulatory Situations, 6 GEO. J. LEGAL ETHICs 977 (1993) (outlining the charges and claims in Kaye, Scholer).
149. Cf. MANN, supra note 56, at 246 ("[D]efense attorneys have adopted a role in representing clients that excuses them from knowledge of the causal connection between what they say and what their clients do, where the clients' actions are not more than a reasonable possibility.").
150. Cf. Gilson, supra note 96, at 887-88 (noting the reality that lawyers sometimes have acted contrary to their apparent economic self-interest); Gordon, supra note 12, at 40 (recognizing instances where lawyers have sacrificed income).
151. See, e.g., Cook, supra note 10, at 969-80 (discussing "Rambo litigation's" nega-
include raising insupportable defenses and privileges, threatening or blackmailing witnesses or adversaries into cooperating, filing false claims to gain a negotiating advantage, and submitting technically accurate but misleading information in response to discovery requests and government filing requirements.\(^{152}\)

The codes forbid most of these tactics. However, the prohibitions are in most instances tempered by caveats that enable lawyers to justify ignoring the prohibitions. The rules against raising frivolous claims and arguments are qualified, so that if some nonfrivolous justification can be imagined the rules are not violated.\(^{153}\) Similarly, the rules against threatening third parties with lawsuits are limited in scope and offer easily-triggered exceptions.\(^{154}\) Lawyers committed to the model of partisanship

ductive effects on the legal system and society's view of legal professionalism); cf. ABA, A LAWYERS' CREED OF PROFESSIONALISM (1988) (nonbinding policy urging restraint in use of hardball tactics).

The propriety of some tactics provokes disagreement among lawyers, but may produce common ground when the lawyers actually think about the tactics. For example, John Kaplan, and others, defend the criminal defense lawyer's right to cross-examine and cast doubt on truthful prosecution witnesses as supporting the function of "checking" the government's proof. Kaplan, supra note 84, at 247; see also Fried, supra note 4, at 1086 (arguing that the system envisages skeptical examination even of truthful witnesses); Mitchell, supra note 84, at 298 (discussing the criminal defense lawyer's "screening" function); cf. ABA, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standard 4-7.6 (1991) (allowing defense lawyers to discredit truthful witnesses); Subin, supra note 97, at 128 (arguing that a lawyer should not discredit the testimony of a witness he knows to be truthful). However, even Kaplan expresses disapproval when lawyers carry this practice beyond the "checking function" by attributing moral delinquency to the witness. Kaplan, supra note 84, at 248-49; see also Lawry, supra note 15, at 344-45 (approving cross-examination of the substance of truthful witness's testimony, but disapproving cross-examination consisting of a personal attack on the witness); cf. Uviller, supra note 97, at 1076-82 (arguing in a variety of contexts that lawyers may present a false case but should not in any way express their own opinion or omit information "which if stated might reasonably alter the meaning or significance of the testimony").

152. A prime example of lawyers asserting unsupportable positions is the practice by lawyers subpoenaed to testify before a grand jury regarding unprivileged matters (e.g., fees received) of asserting that they are somehow immune from testifying. See Fred C. Zacharias, A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys, 76 MINN. L. REV. 917, 919-21 (1992) (discussing situations in which lawyer testimony is unprivileged) and authorities cited therein.

153. MODEL RULES Rule 3.1; MODEL CODE DR 7-102(A)(1)-(2).

154. The Model Code for example, prohibits lawyers from threatening to present criminal charges. MODEL CODE DR 7-105(A). But the prohibition is limited to situations in which the sole purpose of the threat is "to obtain an advantage in a civil
therefore can ordinarily interpret the codes to offer a choice between desisting from the tactics or finding that client needs justify the tactics.

To the extent that the prohibitive rules are enforced or extra-disciplinary sanctions can be invoked, lawyers have reason to obey the rules.\(^{155}\) However, as with the other practices discussed above, nothing in the general ethos of modern lawyering encourages them to desist from the practices. In the world of hardball lawyering, maximizing all activities that help clients serves lawyers' economic interests and psychologically is the most comfortable course.\(^ {156}\)

E. Conclusions

Consider these common statements by lawyers whose hardball tactics are questioned:

(1) "I was just representing my client."
(2) "I have a duty to be zealous on behalf of my client."
(3) "The codes require me to inform my client of all his options; the decisions are his."

Or these statements by lawyers whose decisions to assert

\(^{155}\) See Zacharias, supra note 6, at 251-53 (discussing the likely effects of unenforced code provisions). For example, FED. R. CIV. P. 11 imposes penalties upon lawyers for making bad faith arguments that might previously have been allowed because the lawyers could identify some nonfrivolous basis for the arguments. Judging from the outcry over Rule 11, lawyers are trying to abide by the rule's mandates. However, they do so for fear of punishment, rather than because their ethos has changed; the professional codes in most states maintain the conception that lawyers may make any argument for which some basis exists, even if the true motive may be harassment or delay. See MODEL RULES Rule 3.1 (authorizing all arguments with nonfrivolous components); MODEL CODE DR 7-102(A)(1)-(2) (forbidding claims that serve "merely to harass" and authorizing "unwarranted" claims supportable by some "good faith argument").

\(^{156}\) Because prosecutors do not have individual clients, economic incentives should not cause them to abdicate their discretion to "do justice." See MODEL RULES Rule 3.8 cmt. (describing prosecutors as "minister[s] of justice"); MODEL CODE EC 7-13 (requiring prosecutors to "seek justice"). However, in a previous article, I have noted that psychological and institutional incentives often encourage prosecutors to employ an exaggerated adversarial approach to litigation. Zacharias, supra note 76, at 107-09.
questionable claims or arguments or to delay litigation are challenged:

(4) "Because the interrogation might conceivably have led to relevant information, I had a duty to my client to make sure."

(5) "I must make all arguments that have any chance of winning."

(6) "My client has a right to make all possible arguments."

Or these standard responses to the claim that the lawyer has misled a jury or court:

(7) "It is my obligation to make the government (or adversary) prove its case."

(8) "There is no such thing as fact in the courtroom, only information, missing information, and inferences to be drawn from information. The lawyer's job is to put the best light on the information that is produced."

Each of these statements suggests that the lawyer had no discretion to act differently. Each suggests that the ethics of the profession—the codes—required her conduct. Many of the statements are true, as far as they go. Yet, as discussed, the codes in fact accord lawyers significant choice in selecting tactics, screening arguments, and presenting accurate versions of the facts. The frequency with which lawyers make the above assertions demonstrates that lawyers have come to use the model of client-oriented ethics as a shield, both for defending behavior and for avoiding introspection regarding moral issues.157

157. In his empirical study of white-collar criminal defense lawyers, Charles Mann quotes one lawyer's approach as follows:

It's my mission and obligation to defend the client, not to sit in moral, ethical, or legal judgment of him. I cannot join him in transgressing the law, but whatever he does of his own impetus... is a decision he has to make independent of what I do. I must inform him of the consequences and significance of his action but... [m]y role in the adversary system is to protect him.

MANN, supra note 56, at 121; see Green, supra note 85, at 710-11 (suggesting that in order to attract clients, some lawyers interpret the duty of zeal to require taking all lawful steps to advance their clients interests); Edwin H. Greenebaum, Attorneys' Problems in Making Ethical Decisions, 52 IND. L.J. 627, 630 (1977) ("The traditions
For purposes of analysis, let us assume that the lawyer making each of the above statements has acted only after making an objectively-reasoned decision to exercise her discretion in this way. What would one expect her to say?

Statements (1)-(3) might be formulated like this: "After weighing my obligations to advocate my client’s case zealously and the third-party interests, and after discussing the options with my client, we determined that the most appropriate course was to do X." Statements (4)-(6) might become: "The arguments we pursued represented legitimate and reasonable legal claims that, under the adversarial system, we felt needed to be pressed both to vindicate my client’s right to a full hearing and to give the court the benefit of a strong adversarial presentation of the merits." Statements (7)-(8) might be reformulated as follows: "We neither made false statements nor misrepresented the facts. The evidence presented supported our claim that the government [or our adversary] had failed to carry their burden of proof and we decided that it was important to point that out for the jury."

I do not suggest that there is any virtue simply in having lawyers put a better public face on what they have done. I present these formulations simply to demonstrate what lawyers would have to say to reflect their obligations honestly. Moreover, if lawyers truly were implementing the objectivity aspects of professional ethics, these formulations represent how lawyers would think about their obligations. The fact that one rarely hears these alternative statements—that lawyers more commonly insist that the codes mandate their actions—illustrates that lawyers are failing to take the codes’ grant of objective discretion adequately into account.

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of the profession do provide rationalizations for those who would abandon their own judgment to that of the group."; cf. Michael D. Bayles, Professionals, Clients, and Others, in PROFITS, supra note 11, at 65 (noting that typically, so long as a lawyer’s actions are legally permissible, the lawyer holds out her duty to her client as superseding other duties to third parties); Buchanan, supra note 28, at 567 ("Many lawyers excuse deceptive, hyperaggressive, and otherwise reprehensible behavior as doing their utmost for their client."); Fried, supra note 4, at 1087-89 (arguing that a lawyer may do anything within the bounds of the law to assist a client and still remain "moral"); Charles W. Wolfram, Client Perjury, 50 S. CAL. L. REV. 809, 839 (1977) (discussing lawyers’ use of confidentiality as a shield).
IV. APPROACHES TO REINTRODUCING OBJECTIVITY INTO PRACTICE

Thus far, this Article has demonstrated that lawyers have incentives to practice unfettered client orientation and that, partly for historical reasons, many lawyers prefer this emphasis to a routine in which they must evaluate moral and tactical issues objectively. That leaves the question of how the profession should react. In most instances, the codes already allow lawyers to act objectively. Sometimes the codes require it. If the pendulum, indeed, has swung from insufficient to excessive client orientation, how can the profession produce a new balance? The following Section suggests institutional changes that may help reintroduce objectivity into the lawyer's role.

Initially, though, consider the nature of ethics rules. Professional regulation addresses two sets of problems: controlling lawyers who may take advantage of clients and guiding lawyers in balancing client interests against third-party and societal interests. Addressing the first set of problems is relatively easy for code-drafters. They simply must do their best to identify how most people in society believe lawyers should act and reduce those preferences to rules. The second set of problems presents more of a quandary, because the interests in maintaining an efficient adversary system, achieving just results, and honoring client dignity and autonomy often conflict. Code-drafters recognize that reasonable people differ on the appropriate balance of interests, and so cannot write rules that reflect a consensus. The drafters have tended to rely on rules that illustrate conflict-

158. Cf. Terrell & Wildman, supra note 10, at 415 (noting that increasingly a lawyer's quality is measured by her ability to get things done for the client, rather than by her professionalism). I do not mean to suggest that all lawyers follow this approach, simply that the problem is sufficient to warrant regulatory attention. Indeed, some lawyers engage in problematic conduct at the other extreme of the spectrum; namely, manipulating clients into taking positions that the lawyers prefer, for personal or economic reasons. See generally Russel G. Pearce, Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses, 62 FORDHAM L. REV. 1253, 1306 n.361 (1994) (describing the problem of manipulation by lawyers and citing empirical evidence of such practices). Most professional responsibility experts would agree that lying to and manipulating clients falls outside any reasonable conception of the lawyer's role.

159. Zacharias, supra note 6, at 258.
ing values, call on lawyers to address those values internally, and grant lawyers discretion to make difficult choices on a case by case basis.\textsuperscript{160}

The development of the bar's current ethos demonstrates that one can always rely on economic and reputational incentives to affect the choices that lawyers make.\textsuperscript{161} The increasingly competitive marketplace for lawyers heightens the effect of economic concerns.\textsuperscript{162} If professional rulemakers nonetheless expect ethics codes to influence lawyers to engage in fair introspection, the

\textsuperscript{160} See id. at 257-65 (discussing the guidance function of ethics codes); cf. Greenebaum, supra note 157, at 631 (noting lawyers' difficulty in "knowing when they are being appropriately humble in giving deference to group norms and when they are merely avoiding responsibility or being personally prudential").

\textsuperscript{161} See, e.g., Carlin, supra note 141, at 66-71 (discussing empirical study showing that economic incentives of lawyers significantly affect their ethical conduct); cf. Gilson, supra note 96, at 889-93, 899 (arguing that clients do not always have the information or economic leverage that would cause lawyers to refrain from exercising objective judgment); Lisa G. Lerman, Lying to Clients, 138 U. Pa. L. Rev. 659, 665 (1990) (discussing an empirical study showing that self-interest often induces lawyers to lie even to their own clients, in clear violation of ethical standards).

\textsuperscript{162} Although law has always been a business, there is little doubt that competition has changed the industry. The bar has expanded, stable firm structures are a thing of the past, and job tenure within law firms has all but disappeared. See Ronald J. Gilson & Robert H. Mnookin, Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns, 41 Stan. L. Rev. 567, 586-93 (1989) (discussing changing career patterns of associates in law firms); Ronald J. Gilson & Robert H. Mnookin, Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits, 37 Stan. L. Rev. 313, 314-16 (1985) (discussing the changing economics of and increasing instability in law firms); cf. Robert W. Hillman, Law Firm Breakups (1990) (treatise devoted entirely to the law and legal practice relating to the breakup of law firms); Demetrios Dimitriou, The Individual Practitioner and Commercialism in the Profession: How Can the Individual Survive?, 45 S.C. L. Rev. 965 (1994) (relating changes in the economies of legal practice to lawyer and client perceptions of which practices by lawyers are appropriate).

If the changes in practice alone explain the decrease in lawyer objectivity, the focus of this Article may be misplaced. In other words, the greater the impact of economic incentives, the less likely it becomes that changes in the ethos of professionalism can counteract those incentives. See Gilson, supra note 96, at 900-03 (identifying the expansion of the role of in-house general counsel as the reason for the decrease in corporate lawyers' ability to exercise independent judgment). Among the solutions proposed in section IV of this Article, only entity liability could be expected to have a significant impact upon lawyer conduct. This Article assumes, however, that a combination of factors is at work. On that assumption, the norms that guide the bar (including both code requirements and conventions) remain important factors in controlling the conduct of the profession as a whole.
rules must counteract lawyers' instincts. That is not to say that ethics codes necessarily should forbid the conduct towards which economic and reputational incentives drive lawyers. Rather, the codes should seek mechanisms to force lawyers to separate their assessment of values from their personal interests. With that premise in mind, we can proceed to consider what changes in the ethics codes and what other avenues of professional regulation might effectively promote lawyer objectivity.

A. Clarifying Limits on Client Orientation

One of the defects in the prevailing regulation is that, although it allows lawyers to take a moral stand, it also allows lawyers to abdicate their discretion. For example, code provisions that state "lawyers need not press for every advantage" probably were intended to include the mandatory implications that (1) sometimes lawyers should not press for every advantage, and (2) in close situations, lawyers always should consider not pressing for every advantage. By selecting permissive terminology, the codes free lawyers to ignore the implications on the basis that they are secondary to obligations of zeal.

Before the profession can begin to deal with the problems of educating lawyers on exercising objectivity and assuring that attorney-client relationships remain cemented, it must confront the tension between the tradition of client-oriented "zeal" and objectivity. As long as lawyers can effortlessly adopt different views of appropriate advocacy, competition will force most lawyers to adopt conventions minimizing objectivity. The codes

163. Cf. Schneyer, supra note 7, at 1543-44 (arguing that "financial, psychological, and organizational pressures" account for most overzealous lawyering and that the codes are "designed to discourage such behavior").
164. Rules that allow lawyers to engage in particular conduct but require that the lawyers first take precautionary steps (e.g., put item in writing, obtain client consent) already encompass the goal of making lawyers consider the propriety of their conduct. See, e.g., MODEL RULES Rule 1.9 (allowing a lawyer to engage in representation involving potential conflicts of interests when a client consents).
166. See Shuchman, supra note 91, at 126 (discussing four economic "conditions" that must exist before lawyers would be willing to adopt informal conventions mini-
thus must identify which obligations, if any, conflict with and take precedence over client desires. The profession also needs to establish mechanisms by which the benefits of zealous advocacy can be maintained but through which lawyers can separate their moral decisionmaking from partisan practice. Finally, the profession must develop counterincentives to balance lawyers' natural inclinations to give the client whatever he desires.

The codes already include several principles that identify some duty to act objectively, although in practice these principles are obscured. Lawyers may not engage in illegal conduct. They should not assist clients in accomplishing illegal or fraudulent conduct. They are forbidden to lie to third parties or the court. Moreover, many codes include catch-all provisions forbidding lawyers to engage in conduct "involving dishonesty," to continue representation that is "materially limited . . . by the lawyer's own interests," or to pursue objectivating deceit.

167. See generally MANN, supra note 56, at 248 (arguing for more specificity in the rules limiting attorney zeal); Morgan, supra note 165, at 734-39 (arguing that current rules do not do enough to limit attorney zeal).

For example, both model codes recognize interests that may come into tension with the interests underlying attorney-client confidentiality. See MODEL RULES Rule 1.6(b) (identifying permissive exceptions to confidentiality rule); MODEL CODE DR 4-101(C) (identifying permissive exceptions). However, the purely permissive nature of the confidentiality exceptions fails to provide any guidance on how lawyers should resolve the tension. Cf. MODEL RULES Rule 3.3(b) (requiring disclosure of confidences when necessary to counteract client perjury).

168. In a recent article, Donald Langevoort applies research in the field of social cognition to the subject of lawyer participation in client fraud. Langevoort, supra note 4. Langevoort concludes that once a lawyer commits herself to representing a client, it becomes psychologically difficult for the lawyer to perceive red flags highlighting client misconduct. Id. at 102-03. Langevoort therefore analyzes institutional devices that may overcome some of these "cognitive biases." Id. at 113-14.

169. MODEL RULES Rule 8.4(b); MODEL CODE DR 1-102(A)(3).

170. MODEL RULES Rule 1.2(d); MODEL CODE DR 7-102(A)(7).

171. MODEL RULES Rules 3.3(a)(1), 4.1; MODEL CODE DR 7-102(A)(5).

172. See, e.g., MODEL RULES Rule 8.4(c) (A lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation"); MODEL CODE DR 1-102(A)(4) (same requirement); see also id. DR 1-102(A)(6) ("[A] lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law.").

173. MODEL RULES Rule 1.7(b); see also MODEL CODE EC 5-2 (providing that a lawyer shall not accept employment when personal interests or desires may affect the advice she will give).
tives that "the lawyer considers repugnant or imprudent." In light of the way lawyers have come to view these prohibitions, the principles deserve clarification.

Early in the Model Rules for example, one finds the call to client orientation: "a lawyer shall abide by a client's decisions concerning the objectives of representation." The primary limitations on lawyer conduct appear far later, in the withdrawal section and the penultimate, "misconduct" section of the Rules. If indeed there is a need to counteract lawyers' tendencies to minimize the duty to maintain objectivity, that duty should be introduced as a first principle together with the code's initial reference to client orientation.

More importantly, to avoid rationalizing behavior, ambiguity in the terms of the principles must be removed. The codes might inform lawyers at the outset that, although the codes include an emphasis on partisan advocacy of client interests, lawyers may not assume that the duty of zealous advocacy overrides other obligations. In prohibiting lawyers to "engage" in illegal or dishonest conduct, lawyers should be informed that dishonest conduct includes lawyering tactics; the mere fact that a lawyer conducts the activity on the client's behalf does not justify it. Similarly, code references to "assisting" clients in accomplishing illegal, dishonest, or morally repugnant objectives should be broadly defined. Throughout, the codes must cau-

175. Id. Rule 1.2(a).
176. See id. Rule 1.16(c) (allowing withdrawal when client's objectives are repugnant).
177. Id. Rule 8.4 (describing conduct in which lawyers may not engage).
178. See MANN, supra note 56, at 245-46, 248 (suggesting that, to the extent codes leave any ambiguity in how certain lawyers should be before considering themselves aware of client wrongdoing, lawyers will feel compelled to interpret the codes as justifying assistance to their clients); Subin, supra note 55, at 1135-36 (dismissing the claim that lawyers rarely can know when facts are truthful).
179. For example, the types of misrepresentation discussed in MANN, supra note 56, at 16-18.
180. See, e.g., Lawry, supra note 15, at 321 (noting that the prohibition on illegal conduct "is too often superficially understood only as a constraint on representational behavior, something to be gotten around if possible by guile or brute force"); cf. Joel S. Newman, Legal Advice Toward Illegal Ends, 28 U. RICH. L. REV. 287, 301-03 (1994) (relying on case law to argue that something more than mere advice must be present before a lawyer can be held to have given assistance to a client in breaking
tion lawyers against interpreting limitations on their behavior too narrowly or legalistically. Thus, for example, a prohibition on "false statements" should clearly encompass misrepresentations, intentionally misleading statements, fraud, and direct lies. Counterindications should be removed.

One cause of the bar's recent tendency to read ambiguity into code prohibitions is the tension between the bar's own vision of how the law should apply to the bar and the vision of courts and legislatures. A prime example is the dichotomy between Rule 11 of the Federal Rules of Civil Procedure, which prohibits pleadings made for any improper purpose, and the parallel ethical provisions that forbid making arguments and claims solely for an improper purpose. Although Rule 11 applies only in federal civil litigation and only with respect to pleadings, it is becoming the dominant vision. Perhaps it is time for ethics

the law).

181. E.g., MODEL RULES Rules 3.3(a)(1), 4.1; MODEL CODE DR 7-102(A)(5).

182. See W. William Hodes, Two Cheers for Lying (About Immaterial Matters), PROF. LAW., May 1994, at 1, 4 (arguing against strengthening Model Rule 3.3, but calling for broad interpretation of what constitutes a "material misrepresentation" under the rule); cf. Guernsey, supra note 102, at 103, 125 (arguing that practical difficulties inherent in requiring truthfulness militate in favor of a standard encouraging all parties to disregard anything lawyers say in negotiations).

183. As noted, lawyers' natural incentives cause them to seize upon such invitations to mislead as the comments to MODEL RULES Rule 4.1, which condone "puffing" and misrepresentations that comport with "convention."

184. Susan Koniak has provided examples of ethics regulation that demonstrate the bar's tendency to advocate a different view of lawyers' rights and obligations than that to which courts and legislatures adhere. See generally Susan P. Koniak, The Law Between the Bar and the State, 70 N.C. L. REV. 1389 (1992). Koniak suggests that the legal profession expects its view to trump, or govern, contra-indications in the substantive law. Id. at 1416-27.

185. Compare FED. R. CIV. P. 11(b) (1993) ("The signature of an attorney or party constitutes a certificate . . . that the pleading, motion, or other paper . . . is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.") with MODEL RULES Rule 3.1 (stating that a lawyer may make any "nonfrivolous" argument) and MODEL CODE DR 7-102(A)-(B) (stating that a lawyer may not take action serving "merely to harass or maliciously injure another," but may make any argument that "can be supported by a good faith argument").

186. Even state court litigators must consider Rule 11's mandates because state cases often are removed to federal court and the lawyers initially may not know where their cases will be filed. Zacharias, supra note 92, at 367-68; see also Judith A. McMorrow, Rule 11 and Federalizing Lawyer Ethics, 2 B.Y.U. L. REV. 959, 970
code drafters to align their standards with Rule 11 for all contexts.

Revising the codes' standards for advocacy would neither chill energetic lawyering nor eliminate slick lawyers' ability to make questionable arguments while hiding their improper purpose.\textsuperscript{187} As Ted Schneyer recently has pointed out, inherent practical and theoretical features of "professional self-regulation" limit the ability of ethics codes to influence behavior.\textsuperscript{188} However, modifying the codes' standards would recognize that only by framing rules to counteract lawyers' natural partisanship can the codes hope to encourage lawyers to exercise self-restraint. Moreover, harmonizing the codes with Rule 11 would make it easier for lawyers to explain, and clients to understand, the limits on proper advocacy. This, in turn, may reduce the pressures that clients place on lawyers to abdicate their discretion.

B. Codifying the Duties To Engage in Moral Discourse and Introspection

In addition to clarifying existing requirements of lawyer independence, the codes might make explicit several considerations underlying those provisions which allocate lawyer and client responsibility and which call for lawyer-client "communication."\textsuperscript{189} Even when codes give clients authority to insist on tactics that cause delay or injure third parties,\textsuperscript{190} the codes probably should instruct lawyers not to assume that clients always want the lawyers to use those tactics.\textsuperscript{191} Similarly, law-

\textsuperscript{187} Rule 11 itself does not appear to have significantly chilled viable claims. If it has such an effect, the primary reason is the Rule's self-enforcing nature; adversaries have an incentive to raise and litigate violations in order to obtain monetary compensation. See Melissa L. Nelken, \textit{Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions}, 41 HASTINGS L.J. 383, 394 (1990) (noting that the advisory committee's hope that the 1983 amendments to Rule 11 would not "chill an attorney's enthusiasm or creativity" is undermined by large fee shifting awards and the award of attorney fees that are available to successful Rule 11 litigants). In contrast, the main effect of a revised ethics standard would be to prevent lawyers from rationalizing improper arguments.


\textsuperscript{189} E.g., MODEL RULES Rule 1.4.

\textsuperscript{190} E.g., MODEL RULES Rule 1.4 cmt.; MODEL CODE EC 7-8.

\textsuperscript{191} William Simon notes that because lawyers usually assume clients wish to
yers should not be allowed to assume that clients wish to pursue the maximum economic result; some clients may desire an outcome that is fair to both parties over the best financial result that they can achieve.

If lawyers are to refrain from making assumptions about their clients' desire to press all advantages, ethics codes inevitably must place a premium on substantive communications between lawyers and their clients. Thomas Shaffer and Stephen Pepper have long advocated the importance of a "moral dialogue." Although commentators differ on the effects that such a dialogue can have, most agree that the dialogue should occur. Ethics codes typically require lawyers to keep clients informed, but are opaque regarding the subjects that lawyers and clients should discuss.

Shaffer and Pepper encourage the moral dialogue largely in the hope that clients, as a result, will volunteer to undertake moral positions in legal matters. I suggest a second, perhaps

maximize their chances of success, they counsel clients from this frame of reference and help create a self-fulfilling prophecy. Simon, supra note 24, at 53, 58; see also Freedman, Personal Responsibility, supra note 54, at 200 (cautioning that lawyers who "assume the worst regarding the client's desires" improperly preempt client autonomy).

192. Pepper, supra note 56, at 630-32; Shaffer, supra note 24, at 323-29; Thomas L. Shaffer, The Practice of Law as Moral Discourse, 55 Notre Dame Law. 231, 231 (1979) (stating that the "moral conversation" between a lawyer and a client is the beginning and end of a lawyer's professional life).

193. See Pepper, supra note 56, at 632 ("[C]lient receptivity to the [moral dialogue] approach will vary with context.").

194. See, e.g., Monroe H. Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469, 1478 (1966) (discussing a lawyer's obligation to remonstrate with a client who wishes to commit perjury); Lawry, supra note 15, at 353 (urging moral dialogue); Simon, supra note 24, at 132-33 (advocating dialogue, but assuming that it is anathema to traditional concepts of legal ethics); cf. Arthur Garwin et al., ABA Leadership Forum: Summit on the Profession, Prof. Law., Feb. 1994, at 13, 14 (noting that "[c]ommunication [with clients] is what seems most difficult for lawyers," but is the most common reason for complaints to the bar).

195. The Model Rules for example, simply require lawyers to keep clients informed of the "status of the matter" and to convey sufficient information that clients can make "informed decisions." MODEL RULES Rule 1.4(a)-(b).

196. Pepper, supra note 56, at 618 (maintaining that the choice of action must always be the client's); Shaffer, supra note 24, at 329-30. For purposes of the moral dialogue, one can probably divide the world into three types of clients: those who do not care about the effect of their lawyers' tactics on others; those who do care; and
equally important, ramification. By identifying subjects lawyers must discuss with clients, the codes would force lawyers to confront and elaborate on their own view of the moral issues.\textsuperscript{197} Having expressed a moral view, lawyers will find it psychologically more difficult to disregard the ethical issues and capitulate to a client’s demands. In other words, requiring lawyers to engage in the moral dialogue would help them separate the requirement of partisanship from their independent duties to give objective advice and to engage in moral decisionmaking.

What topics should the codes force lawyers to discuss with clients? Subject to several common-sense limitations,\textsuperscript{198} five general subject matters demand particular attention, because they embody the main contexts in which lawyers tend to abdicate their discretion. First, codes should require lawyers to discuss conduct by clients that may injure third parties. Second, lawyers should discuss conduct by clients that avoids, or is designed to avoid, legal obligations.\textsuperscript{199} Third, before assuming those who do not presently care, but might come to care after the effects of the alternatives are pointed out. Presumably, no amount of discussion will affect the decisions of the first category of clients, but dialogue may affect clients in the other two groups. The number of clients within each category is an empirical question about which there currently is little knowledge.

197. In discussing the relationship between lawyers and clients, Thomas Shaffer notes that “the way to avoid pretense in advocacy is to say what you mean and to mean both what you say and what you seem to mean in what you say and do.” \textit{Thomas L. Shaffer, The Legal Profession’s Rule Against Vouching for Clients: Advocacy and the “Manner That Is the Man Himself,” 7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 145, 169 (1993).}

198. Lawyers must be allowed some leeway in timing their disclosures to avoid emotional reactions from clients. Moreover, there may be occasions when a moral dialogue may be a flawed means of eliciting true client preferences about tactics; for example, when clients are upset or are in a vindictive or uncharacteristically solicitous state of mind. On these occasions, the lawyer should be able to postpone the dialogue or even make the tactical decision based on what she has previously learned about the client's wishes and orientation. Ideally, the lawyer will have discussed tactics in a general fashion early in the representation, at a time when the client was relatively free of judgment-clouding influences. \textit{See supra} notes 192-96 and accompanying text.

199. \textit{Cf. Thomas A. Dye, Creating a Partnership Between Lawyers and Business Managers for Ethical Action, in PROC. SIXTH ANN. CONF. ON ETHICS IN AM. 310 (Feb. 1995) (arguing that lawyers should, at the outset of each representation, encourage clients to accept their portion of responsibility for creating the problem giving rise to a legal dispute).}
that clients wish them to engage in all tactics that might help the chances of success, lawyers should discuss tactics that might injure third parties, delay the proceedings, divert the decisionmaker from the merits of the cause of action, or have little chance of success. Fourth, lawyers should discuss with clients what an objectively "fair" disposition of the case would be and encourage clients to agree to reach such a disposition. Finally, lawyers should be prepared to discuss with clients the lawyers' own moral inclinations and any obligations to third-party or societal interests that the lawyers believe should be honored.

Note what I do not suggest. The codes need not prescribe particular outcomes nor assume that lawyers can force the "most moral" decisions upon clients. In Shaffer's terms, lawyers and clients can only become better persons if they discuss moral issues as equals. Likewise, lawyers can only introduce a

200. This conversation of course should include types of zealous advocacy the codes themselves do not tolerate, including presenting false evidence, lying to the court, and participating in new wrongdoing. Lawyers perhaps should also discuss those aspects of the codes that permit lawyers to temper zealousness—pointing out, for example, that a lawyer might not "press for every advantage."

201. See, e.g., Shaffer, supra note 197, at 172-75 (suggesting that only by engaging in an honest, collaborative decisionmaking process can the lawyer and the client strive to become "good persons" in an "Aristotelian sense"); Shaffer, supra note 192, at 244-48 (discussing lawyers' roles in facilitating "moral conversions" of clients); see also Eberle, supra note 22, at 97-98 (discussing the importance of "cooperative venture" between lawyer and client in supporting the morality of each); Richard W. Painter, The Moral Interdependence of Corporate Lawyers and Their Clients, 67 So. Cal. L. Rev. 507, 513-18, 555-70 (1994) (debunking the notion that lawyers can impose their moral judgment on clients and arguing that lawyers operate as joint decisionmakers with the clients).

Shaffer notes one element that is essential to meaningful moral discourse: the client must respect the lawyer's advice. Shaffer, supra note 24, at 328-29. One method of inducing compliance with a lawyer's advice might be to give the lawyer a "hammer"—a means of threatening consequences if the client does not obey. Cf. Simon, supra note 6, at 1142 n.129 (arguing that allowing lawyers to disclose certain information would give lawyers leverage in convincing clients to act appropriately). That technique, however, resembles extortion more than dialogue. See Freedman, Ethical Ends, supra note 54, at 56-57 (criticizing the notion that lawyers should be able to "blackmail" clients into acting morally); Jamie G. Heller, Note, Legal Counseling in the Administrative State: How To Let the Client Decide, 103 Yale L.J. 2503, 2511, 2515-18 (1994) (discussing tension between models that require lawyers to let clients decide and models that expect lawyers to strong-arm clients into complying with legal requirements). As an alternative, Shaffer suggests that lawyers can
measure of objective moral reasoning into their practices if they confront the moral issues. By requiring lawyers to discuss the issues in a context in which it is psychologically costly to appear unconcerned with the issues, the codes can encourage lawyers to take the duty of objectivity more seriously.

Similarly, the codes might be more explicit in requiring lawyers to engage in introspection with respect to the employment of legal tactics that have negative impact on third parties or the system. Without undermining lawyer zeal, society reasonably can expect lawyers to consider whether they are obliged to use particular tactics, the relative harm to the client and third-party interests in foregoing use of the tactics, whether alternatives exist to accomplish the same end or to minimize the tactics' byproducts, how a moral layperson would approach the issue, and whether systemic interests require lawyers to act differently. Of course, one cannot predict the impact of code provisions that merely call upon lawyers to reflect. In large measure,
however, the codes already assume well-intentioned lawyers and rely upon their introspection, without identifying what form that introspection should take. Clarifying the interests that lawyers must take into account is one step toward giving meaning to the process of objective lawyer participation in moral decisionmaking.

C. Publicizing Limits on Client Orientation

Encouraging a dialogue on moral issues between lawyers and clients should help force lawyers to separate partisanship from moral decisionmaking. A necessary corollary is that clients must learn the difference as well. To the extent that clients understand the limits on client orientation, the pressures on lawyers to abandon objectivity will decrease. In contrast, absent bet-

or even with lawyers' moral sensibilities will not counter the economic pressures on lawyers to unduly favor their clients' interests over others).

Of course, there are small amendments that code drafters could adopt to make some code provisions more enforceable. For example, to the extent that lawyer violations of trial publicity rules concern the drafters, see supra note 125, the codes could require lawyers to keep file copies of all publicized statements and to submit them for random audits. Cf. MODEL RULES Rule 7.2(b) (requiring lawyers who advertise to keep a copy or recording of the advertisement along with a record of when and where it was used). At root, however, the main constraint on enforcement is the bars' limited resources, which changes in the rules themselves cannot affect.

205. See Zacharias, supra note 6, at 234; see also Reed E. Loder, Tighter Rules of Professional Conduct: Saltwater for Thirst?, 1 GEO. J. LEGAL ETHICS 311 (1987) (arguing for greater reliance on introspection-oriented rules).

206. See Shaffer, supra note 24, at 329-30 (arguing that once lawyers and clients become friends in the sense of knowing each other's limits, they will cease to ask each other to do what they cannot or will not do).

Sissela Bok suggests that one of the reasons professionals accommodate too much deception is that the professionals tend to decide the appropriateness of deception, both in individual cases and in the development of professional regulation, without the benefit of the public's input. In Bok's view:

[I]f the public were to enter this debate, it is much more likely that we should see the [central] concerns [about lying] come to the foreground: concerns for the consequences of a professional practice and on those engaging in it, their peers, the system of justice and society at large; concerns for the ways in which such practices spread, and for the added institutional damage which then results.

BOK, supra note 95, at 162. Bok concludes that public exposure of practices involving lying "would lead to a perception that there are limits to acceptable advocacy." Id. at 164; cf. Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 371, 392 (1992) [hereinafter Interim Report] (citing
ter communication, many clients are likely to assume that efforts by lawyers to introduce objectivity into the decisionmaking process reflect a lack of professionalism.

What flows from this analysis is that changes in the professional orientation need to be accompanied by publicity, to educate the public regarding the duty of objectivity. In some respects, attitudes towards the bar and the legal system can develop only over a long period of time. The press will attend only direct changes in the rules. 207 Fiction media, which have significant influence on lay attitudes and knowledge, 208 are influential only cumulatively.

Nonetheless, some shorter term mechanisms for educating the public are possible. The bar might undertake a media campaign and attempt to stimulate local (town hall-type) meetings focusing on lawyers' proper relationship with clients. Perhaps more importantly, some key pieces of information can be conveyed meaningfully to clients at the outset of every representation, including the prescribed limits on zealous advocacy and the essential duty of lawyers to exercise objective legal judgment. Clients expect partisanship, but studies have shown that they can accept limits that are defined in advance. 209 Once clients become aware of those limits, the lawyer's subsequent task of discussing particular tactics and issues with clients becomes less daunting for both participants in the dialogue. 210

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207. See generally Zacharias, supra note 73, at 374-75 n.106 (discussing authorities reflecting the media attention focused on the promulgation and adoption of the Model Rules).

208. See Zacharias, supra note 92, at 360-63 (discussing effect of national media and fictional reporting of lawyer activities on the public's perception of proper lawyer conduct and, more generally, the bar).

209. See, e.g., Zacharias, supra note 73, at 395 (empirical study suggesting that clients would not trust lawyers if broad exceptions to attorney-client confidentiality were adopted, but that clients could accept well-defined exceptions).

210. If the need to discuss tactics arises frequently, it can complicate representation and even increase the client's costs. When a lawyer knows her client is not concerned with negative third-party effects, requiring continued dialogue arguably is inefficient. However, requiring an initial discussion of tactics at least has the effect of informing the lawyer of the type of client with whom she is dealing. See supra note 196.
Interestingly, some jurisdictions already are moving in this direction. The New York Court of Appeals, for example, recently adopted a code requirement for matrimonial cases that lawyers present clients with a "client bill of rights and obligations" at the outset of each representation.\(^{211}\) Under the scenario envisioned by the New York court, lawyers must inform clients in writing of the contours of the contractual attorney-client relationship and of the clients' obligations to be truthful and cooperative.\(^{212}\) One could easily expand this procedure more generally to include disclosure of a broader range of information, such as the partisanship a client can expect from his lawyer, the potential limits of that partisanship, and the client's own role in producing systematically appropriate outcomes.\(^{213}\) This novel, and potentially controversial, approach forces both lawyers and clients to consider appropriate conduct before the heat of the adversarial battle skews their perceptions. As a corollary, the bill of rights requirement invites lawyers to exercise their discretionary authority—already guaranteed by most codes—to define and limit the objectives of the representation in advance in order\(^{214}\) to accord with the lawyers' sense of fair play.

\(^{211}\) See Statement of Client's Rights and Responsibilities, 22 NYCRR 1400.D (effective Nov. 1, 1993), reprinted in Stephen Gillers & Roy D. Simon, Jr., Regulation of Lawyers: Statutes and Standards 49-50 (1994); cf. Pye, supra note 80, at 950 ("the lawyer should lay out the ground rules that will govern his representation at his first conference with the [client]"). New York's requirement was adopted upon the recommendation of a study commission charged with evaluating "lawyer conduct in matrimonial actions." Jeffery S. Sunshine, Caveat Practitioner Enter the New Matrimonial Rules, 211 N.Y. L.J., Apr. 5, 1994, at 1 (reporting the adoption of the bill of rights requirement). The New York Court of Appeals has since appointed a new committee to study extending the bill of rights approach to all types of practice. See Gary Spencer, Kaye Plans Jury System Reform; Panel Will Launch 'Innovative' Study, 210 N.Y. L.J., Aug. 26, 1993, at 1 (describing appointment of committee and Chief Judge Kaye's expectation that the reforms "fostering communication... can be applied to the corporate bar as well as those who represent individuals.").\(^{212}\)

\(^{213}\) Gillers & Simon, supra note 211, at 50.

\(^{214}\) In the aftermath of the Kaye, Scholer case, some firms are expanding their "letters of engagement" to clients to define the firms' lawyers' limited obligations and responsibilities. See Brian W. Smith & M. Lindsay Childress, Avoiding Lawyer Liability in the Wake of Kaye, Scholer, 8 St. John's J. Legal Comment 385, 395-98 (1993) (discussing uses of engagement letters).

\(^{214}\) See, e.g., Model Rules Rule 1.2(c) ("A lawyer may limit the objectives of the representation if the client consents after consultation.").
One significant consequence of the bill of rights approach deserves mention. Lawyers' initial communication with clients often determines the ethical dilemmas that the lawyers later will confront. Consider, for example, New York's suggestion that lawyers should inform clients that the clients must tell them "the truth." For purposes of maximizing advocacy, that advice may be counterproductive, because it limits the strategies the lawyer may employ. Moreover, if the client complies by giving the lawyer truthful information that the lawyer can (or must) disclose under confidentiality or privilege exceptions, the lawyer must confront the conflict between personal and societal interests in disclosure and systemic and client interests in maintaining secrecy. Resolving the conflict may strain the attorney-client relationship.

On the other hand, suppose that the lawyer does not encourage the client to be truthful. In some types of representation, the lawyer's reliance on the client's false statements ultimately may subject the lawyer to personal liability. Moreover, when

215. At a minimum, the lawyer will not be able to pursue claims or defenses that would require testimony by the defendant that differs from what the client told the lawyer. See MODEL RULES Rule 3.3(a)(4) (requiring lawyers to remedy client perjury by disclosing confidential information if necessary).

216. Such items may include information regarding certain future crimes, fraud upon the court, or the source of fee payments into which a grand jury may inquire. See MODEL RULES Rule 1.6(b) (detailing permissive confidentiality exceptions); id. Rule 3.3(b) (noting mandatory confidentiality exception in some instances of client perjury); MODEL CODE DR 4-101(C) (listing confidentiality exceptions); Doe v. United States (In re Shargel), 742 F.2d 61, 64 (2d Cir. 1984) (upholding grand jury's inquiry into fees paid to lawyer); In re Slaughter, 694 F.2d 1258, 1260 (11th Cir. 1982) (holding fee information unprivileged).

217. It is precisely to avoid confronting such a conflict that criminal defense lawyers often prefer not to know all the facts that a client may be willing to tell them. MANN, supra note 56, at 103.

218. Of course, advising a client to withhold information may be tactically suicidal, because the lawyer risks being surprised later by the information. However, the fear of surprise is not always present. See generally id. at 103 (study of white-collar criminal defense attorneys suggesting that lawyers often believe not receiving information from their clients is helpful for the client). In this discussion, I assume that the lawyer has made a reasonable calculus of the options and determined that she would rather not know everything.

219. In the Kaye, Scholer case, for example, the government held accountable securities lawyers who negligently accepted their client's version of the facts and misrepresented the client's status on government reporting forms. See supra note 148.
the lawyer subsequently learns of the client's falsehoods, the lawyer must deal with difficult ethical issues, including how far she will go to protect the client, whether she must withdraw from the representation, and whether her withdrawal should be accompanied by other actions that minimize the damage to third parties.

This example illustrates how requiring lawyers to discuss lawyer/client rights and obligations forces lawyers to think about what they are willing to do on behalf of clients in a setting in which the lawyers can consider their role objectively. It is also fair to clients; one of the New York Court of Appeals' primary goals in requiring the bill of rights is to assure respect for client dignity and autonomy by educating and informing clients. With that autonomy comes the responsibility to recognize that lawyers cannot be expected to respond to all situations without exercising independent moral judgment.

D. Enforcing the Requirements of Communication and Objectivity

I have discussed elsewhere the tension between codes that prescribe ideal conduct and the dangers of maintaining unenforced, or unenforceable, rules. When lawyers' personal and economic incentives run contrary to the rules, enforcement becomes particularly important to avoid rationalization of improp-

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220. The lawyer's options may include disclosing the client's misrepresentations, withdrawing (noisily or quietly), or continuing to represent the client as if nothing has happened.

221. See MODEL RULES Rule 1.16(a) (discussing mandatory withdrawal situations); MODEL CODE DR 2-110(B)(2) (requiring withdrawal if continued representation would violate the code).

222. See MODEL RULES Rule 1.6 cmt. (allowing "noisy" withdrawal when lawyers' services are used to perpetrate wrongful conduct).

223. Judith Kaye, Chief Judge of the New York Court of Appeals that adopted the bill of rights, has characterized "the essence of the lawyer-client reforms" as "better informing and better communicating with the client." Spencer, supra note 211, at 1; cf. Donna Greene, Westchester Q&A: Justice Sondra Miller; In Search of Fairness in Divorce Cases, N.Y. TIMES, Mar. 14, 1993, § 13WC, at 3 (member of study commission explaining that a client aware of fees as they progress has more control over the decision of when the legal costs are not worth the return).

224. See generally Zacharias, supra note 6, at 251-54, 262-63 (discussing the correlation between a professional rule's specificity and enforceability).
er conduct by the bar.

A requirement of introspection, by definition, is difficult to enforce. Disciplinary authorities cannot know what lawyers "have thought." Upon questioning, lawyers can rationalize most conduct after the fact.

Not so, however, with respect to the requirement that lawyers convey the potential limits of partisanship to clients at the start of representation and to the requirement that they engage in moral dialogue with clients once questionable conduct arises. These requirements call for verifiable action by lawyers—to at least discuss the matters with clients. When questions later arise, courts and disciplinary authorities can establish that the lawyer has, or has not, complied by reviewing the lawyers' memorialization of the conversations or by questioning the client. If lawyers are required to convey some of the information to clients in writing, as in New York's client bill of rights proposal, proving the conveyance (or nonconveyance) becomes an easier matter.

Consider, for a moment, a situation in which a lawyer arguably has failed to act objectively: the lawyer allegedly pursued intrusive discovery for the sole purpose of intimidating a plaintiff and the plaintiff has filed a complaint with the bar. Under the current regulatory scheme, the lawyer only needs to identify a nonfrivolous, tactical reason for the deposition. My proposals would require more. If, as I have suggested, the codes are harmonized with Federal Rule 11, the lawyer would need to demonstrate the absence of improper motivation. Even if the advocacy rules remain unchanged, however, the lawyer would

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225. See GILLERS & SIMON, supra note 211, at 49-50.
226. Under the New York requirements, clients are expected to sign the bill of rights to acknowledge that they have received, read, and discussed them. Like all consent requirements, the bill of rights procedure creates the risk that the review and discussion of clients' rights will be pro forma, that a client will sign without understanding the provisions. Thus, the mere fact that a client has signed the instrument probably should not, in and of itself, be sufficient to prove conveyance of the information. However, for our purposes, it is important to note that the mere writing of the instrument and the possibility that the lawyer may have to discuss it will force the lawyer to give some thought to the moral issues the instrument raises.
227. See generally MINTZ, supra note 133, at 194-95 (describing allegedly intimidating tactics in Dalkon Shield class action).
need to document that she has considered the moral issues, discussed the limits of advocacy with her client, and discussed the particular deposition and deposition strategy with the client, including the appropriateness of harassing or intimidating the plaintiff.

Would the bar’s inquiry into these matters unduly interfere with attorney-client confidentiality and the attorney-client privilege? As a technical matter, the self-defense exception to the privilege would exonerate the lawyer’s cooperation with the investigating authorities. More significantly, the inquiry probably would not undermine the client’s expectation of secrecy, for several reasons. First, the substance of the conversations often would not need to be disclosed; in some situations, information that the conversations took place will be sufficient. Second, any information would be disclosed in confidential proceedings and therefore could not be used against the client. Third, because the focus of the investigation clearly would be the attorney, the client need not fear that he himself is a target.

Nevertheless, a regime in which lawyers’ conversations with their clients are investigated would introduce a new element of uncertainty into clients’ expectations of secrecy. A similar phenomenon occurred with the adoption of Rule 11, which created issues of lawyers’ “reasonable inquiry” into facts before filing pleadings and of the lawyers’ motives in filing. To the extent

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228. See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 116 cmt.(b) (Tentative Draft No. 3, 1990) (noting that lawyers may disclose confidential information to protect themselves with respect to disciplinary inquiries and proceedings); cf: MODEL RULES Rule 1.6(b)(2) (allowing a lawyer to disclose confidences when necessary “to respond to allegations in any proceeding concerning the lawyer’s representation of the client”); MODEL CODE DR 4-101(C)(4) (allowing disclosure to defend the lawyer “against an accusation of wrongful conduct”).

229. See Herb Jaffe, Recommendation 7 of the ABA Commission on Evaluation of Disciplinary Enforcement: The Classic Lawyer v. Client Confrontation, 22 SETON HALL L. REV. 935, 938 (1992) (noting that more than 30 states follow a procedure prohibiting public disclosure of bar disciplinary proceedings at least until after a finding of probable cause that the complaint has merit); see also MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, Rule 16 cmt. (1992); Editorial, Open the Process, NAT’L L.J., Apr. 25, 1994, at A16 (citing ABA rejection of model rule changes, thereby reaffirming existing policy calling for open proceedings only after a probable cause determination).

230. Under Rule 11, a lawyer must certify that her pleadings are well grounded in fact, based on beliefs “formed after an inquiry reasonable under the circumstances.”
that lawyers must justify their pleadings in a Rule 11 hearing, they may be required to disclose information clients conveyed to them and their conversations with clients about the merits. Unlike in the disciplinary context, these disclosures may take place in open court and become available for use by the client’s adversary.

What both my proposal and the Rule 11 example reflect, per-

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231. For example, if the lawyer relied in part on information that the client conveyed to her, she must reveal that information in order to respond to the allegation that she had no factual basis for filing a claim. See Robert G. Drummond, Rule 11 Sanctions, 48 Mont. L. Rev. 119, 131 (1987) (discussing situations in which a court or opponent argues that the attorney or client has violated the factual investigation requirement of Rule 11 and demands evidence of a reasonable factual investigation). Similarly, the “reasonableness” of a lawyer’s reliance on the client’s information (and therefore the reasonableness of her “inquiry”) depends upon the nature of the client, his relationship to the lawyer, and the nature of the discussions between them. See, e.g., Calloway v. Marvel Entertainment Group, 854 F.2d 1452 (2d Cir. 1988) (requiring separate representation for party and counsel defending against Rule 11 motion); Paine Webber, Inc. v. Can Am Fin. Group, Ltd., 121 F.R.D. 324 (N.D. Ill. 1988) (involving attorney’s attempt to shift blame for Rule 11 violation by telling the court that his client had lied to him), aff’d, 885 F.2d 873 (7th Cir. 1989); see also Karen S. Beck, Rule 11 and Its Effect on Attorney Client Relations, 65 S. Cal. L. Rev. 875, 892 (1992) (finding that in cases in which the court sanctions both an attorney and client for Rule 11 violations, the attorney and client may each seek to blame the other for the improper conduct).


Of course, the problem could be alleviated by hearing confidential or privileged information in camera. However, to the extent that the adversary is a party to the Rule 11 motion and seeks compensation for damages, he is entitled to cross-examine. Cf. Fed. R. Civ. P. 11(c)(2)(A) (1994) (monetary awards are not available to an adversary claiming a frivolous legal argument or to the parties who have settled or dismissed the action before the court moves on its own initiative to impose sanctions). In camera review of confidential information, even in exceptional situations, has never seemed like a satisfactory option to proponents of strong confidentiality principles. Compare Note, Attorney Client Confidentiality: A New Approach, 4 Hofstra L. Rev. 685 (1976) (urging in camera review procedure for difficult confidentiality issues) with Freedman, supra note 9, at 106 (approving ethics rule authorizing lawyers to refuse court orders that require disclosure of confidential information).
haps, is that clients too must accept the need to enforce some nonpartisan, objective actions by lawyers. The intrusion on confidential communications is limited and the confidentiality exception easily explained to clients. The process of explanation—which should occur in advance of any likelihood of disclosure\textsuperscript{233}—itself serves the function of educating clients on the limits of the lawyer's role. The availability of enforceable constraints on lawyers, including the client's adversary, should contribute to a better client understanding and willingness to accept the importance of objective, professional conduct.

As the same time, these proposals, though inconsistent with uncontrolled partisanship, do not contradict the principles of client dignity and autonomy which Monroe Freedman has fought so hard to establish. Elsewhere, I have expressed the view that client "dignity" is respected most when clients are treated as individuals who can understand moral limitations on attorney conduct and are informed of those limitations.\textsuperscript{234} Informing clients of potential limits on zealous representation, so that clients can make their own decisions regarding how to act within the attorney-client relationship, enhances client autonomy.\textsuperscript{235} Lawyers with the deepest respect for client autonomy should be the most forthcoming in identifying regulatory and moral constraints on their behavior for the clients. Autonomous clients may continue to pursue repugnant objectives, but they are not entitled to a lawyer's assistance in this pursuit.

\textsuperscript{233} See Lee A. Pizzimenti, The Lawyer's Duty To Warn Clients About Limits on Confidentiality, 39 CATH. U. L. REV. 441, 471-89 (1990) (discussing need for lawyers to describe confidentiality fully); Zacharias, supra note 152, at 931-32, 956 (discussing the importance of accurate communication of confidentiality); cf Zacharias, supra note 73, at 382 (illustrating the failure of many lawyers to inform their clients about confidentiality).

\textsuperscript{234} Zacharias, supra note 73, at 386-88; cf Burke, supra note 93, at 9 (arguing that clients' "knowledge of the professional and public responsibilities of lawyers, when coupled with the knowledge that the particular lawyer conforms his personal and professional conduct to those responsibilities enhances the mutual trust of the attorney-client relationship").

\textsuperscript{235} For example, if exceptions to confidentiality exist, a client can only be autonomous if informed of the exceptions, so that he can decide whether he should give the information to the attorney. Zacharias, supra note 73, at 387; accord Pizzimenti, supra note 233, at 471; see also Lerman, supra note 99, at 675-744 (analyzing the effect on clients of absence of candor by lawyers).
E. Entity Discipline

One implication of the economic incentives discussed above is that lawyers practicing in a group, such as a law firm, become subject to peer pressure to engage in profit-maximizing conduct.\footnote{The following discussion of entity responsibility focuses on law firms. However, the concept applies equally to other institutional lawyering contexts in which colleagues affect lawyers' decisionmaking. These contexts may include prosecutorial and defender organizations, corporate counsel's offices, and public interest organizations.}\footnote{Greenebaum, supra note 157, at 633.} Lawyers realize that refraining from questionable acts on a client's behalf may result in the client hiring another lawyer who will perform the "dirty work."\footnote{See, e.g., CARLIN, supra note 141, at 116 ("The office colleague group affects lawyers' ethical behavior ... [b]y an informal process of seeking and giving support for violation among peers in newer offices ... the constraint of the normative climate in older peer-group offices ... [and] formal organizational controls in hierarchically structured offices."); Greenebaum, supra note 157, at 632 (discussing the effect of "group myths and unstated assumptions" on lawyers practicing in a group context); see also Interim Report, supra note 206, at 392 ("The ever watchful, reporting computers push firm members to compete on hours and fees to the detriment of service and responsibility."); Gordon, supra note 12, at 35 ("Only when firms are relatively comfortably entrenched in their markets (and often not even then) will the more profit-oriented partners, who consider independence a luxury, be likely to tolerate the influence of colleagues with developed political agendas."); cf. Interim Report, supra note 206, at 298 ("[senior partners] forget to emphasize civility to their employees, because civility doesn't generate fees or increase profits.").} Firm pressure to retain clients occurs without reference to the merits of a firm member's conduct in individual cases; she is judged on her total contribution to the firm coffers. Traditionally, firms treat each member's ethical conduct as her own business, with the firm only concerned with the bottom line.\footnote{239. This difficulty arises because litigation often is conducted on a "team" basis, because authority for different aspects of representation is diffused, and because individual firm members' conduct may be influenced, or even directed, by members.}

One response to institutional pressures to circumvent objective ethical decisionmaking may be the development of entity responsibility for some violations of the professional codes. A few commentators recently have proposed entity responsibility for separate, practical reasons: in the complex world of modern practice, it is becoming less realistic to identify individual lawyers as responsible for, or capable of remedying, ethical violations in major litigation.\footnote{238. See, e.g., CARLIN, supra note 141, at 116 ("The office colleague group affects lawyers' ethical behavior ... [b]y an informal process of seeking and giving support for violation among peers in newer offices ... the constraint of the normative climate in older peer-group offices ... [and] formal organizational controls in hierarchically structured offices."); Greenebaum, supra note 157, at 632 (discussing the effect of "group myths and unstated assumptions" on lawyers practicing in a group context); see also Interim Report, supra note 206, at 392 ("The ever watchful, reporting computers push firm members to compete on hours and fees to the detriment of service and responsibility."); Gordon, supra note 12, at 35 ("Only when firms are relatively comfortably entrenched in their markets (and often not even then) will the more profit-oriented partners, who consider independence a luxury, be likely to tolerate the influence of colleagues with developed political agendas."); cf. Interim Report, supra note 206, at 298 ("[senior partners] forget to emphasize civility to their employees, because civility doesn't generate fees or increase profits.").} This Article's analysis of profession-
alism, however, suggests two additional reasons for an institutional approach to professional discipline. First, it may counteract the institutional pressures upon firm members to maximize revenues at all costs, by placing partners other than the member-in-charge at risk. Second, it may provoke entity "introspection," by encouraging firms to institute internal mechanisms for supervising members' conduct (or for responding to members' concerns).  

At a minimum, firm members would need to discuss their colleagues' ethical dilemmas as if the dilemmas were their own. This process not only would commit the lawyer in charge of a case to verbalize her thinking in a context where unthinking responses are embarrassing, but also would provide input from other lawyers in the same predicament.

The design of entity responsibility is a complicated subject deserving of a separate article. Not all professional rules are readily applied against an institution. Expecting a firm to higher in the firm hierarchy. See, e.g., Ted Schneyer, Professional Discipline for Law Firms?, 77 CORNELL L. REV. 1 (1991) (analyzing entity responsibility); Schneyer, supra note 142, at 129 (suggesting that special regulation of large law firms may need to be instituted); Mary Twitchell, The Ethical Dilemmas of Lawyers on Teams, 72 MINN. L. REV. 697, 698-708 (1988) (discussing the effect of working as a team of lawyers within a firm); Milton R. Wessel, Institutional Responsibility: Professionalism and Ethics, 60 NEB. L. REV. 504, 511-13 (1981) (discussing law firm responsibility to clients and society); Zacharias, supra note 92, at 386.

240. A New York bar committee recently proposed not only entity responsibility, but also a rule making partners "responsible for supervision of each other's work as well as the work of the associates, and every lawyer's and non-lawyer's work should be supervised to some degree." Comm. on Professional Responsibility, Discipline of Law Firms, 48 REC. ASS'N B. CITY N.Y. 628, 638 (1993) [hereinafter Discipline of Law Firms]; see also Anthony E. Davis, Professional Discipline of Law Firms—The Emperor Needs New Clothes, PROF. LAW. Nov. 1994, at 1 (discussing the New York proposal). As discussed below, I question whether this blanket rule adequately accounts for the realities of everyday practice. See infra note 243. However, law firm responsibility would require firms to consider management steps to address professional responsibility issues, just as the development of conflict of interest rules and disqualification motions has forced firms to establish mechanisms to screen conflicts prior to each representation.

241. Lawyers intimately involved in legal projects tend to have psychological difficulty perceiving ethical dilemmas. See Langevoort, supra note 4, at 102-03, 105. Involving lawyers who are less invested in the project may help counteract their myopia. See id. at 105, 113-14 (discussing advantages of rotating lawyers in major cases).

242. Some categories of professional rules, such as the limitations on advertising and prohibitions against referral fees and conflicts of interests, are clearly equally
supervise all decisions made by its members also may be unrealistic.\textsuperscript{243} Perhaps most importantly, entity responsibility means little unless accompanied by changes in the tools of discipline, because disciplinary authorities are unlikely to impose draconian sanctions (such as suspension or disbarment) on entire firms.\textsuperscript{244} The very concept of firm liability probably assumes the availability of authority to impose fines, an authority which itself requires careful definition.\textsuperscript{245}

For purposes of this Article, it suffices to note the role that entity responsibility can play in counteracting institutional and relational pressures upon lawyers to avoid objective decisionmaking. As bar associations begin to address entity responsibility,\textsuperscript{246} its potential for provoking intra-firm discussions of ethical issues should not be overlooked.\textsuperscript{247}

243. The codes already impose some responsibility upon lawyers to supervise others in their firm. See, e.g., MODEL RULES Rules 5.1-5.2 (defining responsibilities of supervisory and subordinate attorneys); Irwin D. Miller, Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties, 70 NOTRE DAME L. REV. 259, 274-304 (1994) (discussing and proposing more enforcement of rules imposing supervisory duties on law firm partners). Some formulations of entity responsibility envision full-scale supervision of all partners' activities. To the extent that these proposals envision joint responsibility for all partners' legal work, they duplicate unnecessarily and inevitably increase clients' costs. See Langevoort, supra note 4, at 113-14 (discussing prohibitive expense of rotating lawyers involved in a case in order to prevent ethical breaches). The very principle of objectivity assumes that individual lawyers can be trusted to make some reasonable ethical decisions.

244. See Discipline of Law Firms, supra note 240, at 635 ("[A] firm cannot be disbarred, and we find it difficult to conceive of a situation in which an entire firm as an entity should be suspended from the practice of law.").

245. Arguably the functions of discipline includeremedying client harm, deterring similar misconduct by the firm in the future, and deterring other firms. Each of these functions would call for radically different levels of fining. Thus, the grant of fining authority to a disciplinary agency should be accompanied by guidelines that identify the approach the agency should take in imposing monetary sanctions. Cf. Miller, supra note 243, at 315 (discussing the need for, and potential uses of, flexible authority to fine entities).

246. See, e.g., Discipline of Law Firms, supra note 240.

247. Intra-firm discussions of this type may be particularly enlightening for older practitioners, who were educated before the adoption of the Model Code and Model Rules and before law schools began to teach, or require, professional responsibility
F. Training the Bar

The custom of nearly absolute client orientation has developed over a long period of time, in response to historical developments and the failings of prevailing legal ethics that Monroe Freedmen highlighted. A change in that custom can only be produced over a similar period, with a catalyst that counteracts the lessons the bar has learned. In other words, the bar needs a re-education—starting in law schools, but also for the practicing bar that is responsible for mentoring and transferring a professional ethos to new lawyers.

Susan Koniak has illustrated how the bar often attempts to use professional regulation to establish its own “vision” of law, to argue that standard moral and legal principles do not apply equally to the profession. Recent developments suggest that other actors in the system do not simply acquiesce. The Kaye, Scholer case, for example, has made lawyers take special note of the applicability of criminal and regulatory requirements to them. Judicial enforcement of Rule 11 challenges the
profession's dominant vision of advocacy. The federal government's increasing practice of subpoenaing attorneys and seizing attorneys' fees has forced lawyers to question their traditional methods of representing clients.

These developments suggest that the time is ripe to begin a process of debate and renewed discussion of lawyers' proper role. Academia has done its part, drawing attention to the oversimplification of the bar's dominant vision and its anomalies. Because

Claim Privilege as Agents of Their Clients, OTS' Chief Counsel Argues, BANKING ATT'Y (BNA), May 25, 1992, at 5; OTS Chief Counsel Defends Action Against Kaye Scholer, 8 LAWS. MAN. PROF. CONDUCT (ABA/BNA) 77 (1992) (OTS counsel describing OTS position). The large settlement OTS extracted from the Kaye, Scholer firm has forced all lawyers representing clients in regulated industries to reconsider their role. See Zacharias, supra note 92, at 368-69 (discussing effect of Kaye, Scholer on lawyers' vision of their role); cf. Kirk A. Swanson, Debate Continues on Ethics After Kaye, Scholer Accord, 8 LAWS. MAN. PROF. CONDUCT (ABA/BNA) 109 (1992) (debating OTS position); ABA, OTS Square Off on Lawyer Liability, 8 LAWS. MAN. PROF. CONDUCT (ABA/BNA) 264 (1992) (same). One point the Kaye, Scholer settlement brings home is that compliance with ethical codes does not immunize lawyers from other sanctions for their behavior, including criminal and civil liability. Legal commentators have highlighted this reality, but practicing lawyers often overlook, or forget, it. See Zacharias, supra note 6, at 251-55 (discussing relationship between ethics codes and extra-code constraints).

253. See Zacharias, supra note 92, at 367-68 (discussing the tension between Rule 11 and traditional professional rules regarding advocacy and illustrating how implementation of Rule 11 has influenced lawyers' views of their own roles).

254. Lawyers who involve themselves in client activities or receive information that is potentially unprivileged now face a realistic possibility of being subpoenaed. This possibility means both that lawyers must be more cautious when putting themselves in that position and that they must explain the possibility of being subpoenaed (and its potential effect on the attorney-client relationship) to clients. In addition, the possibility may make some criminal defense attorneys hesitate to accept cases in which the likelihood of being subpoenaed is high. See generally Zacharias, supra note 152, at 920-22, 931-35 (discussing attorney subpoenas and their effect on the representation of clients).

255. See, e.g., Kathleen F. Brickey, Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel, 72 VA. L. REV. 493, 495-97 (1986) (arguing the unconstitutionality of fee seizures, in part, because of their effect on the willingness of defense attorneys to accept cases); Morgan Cloud, Forfeiting Defense Attorneys' Fees: Applying an Institution Role Model Theory to Define Individual Constitutional Rights, 1987 Wis. L. REV. 1 (arguing that defendants' right to counsel should be determined with a view to the defense bar's willingness to accept cases when faced with the possibility of fee seizure); William J. Genego, The New Adversary, 54 BROOK. L. REV. 781, 815-19 (empirical study suggesting that the threat of seizure of attorney fees has caused criminal defense lawyers to cease representing clients in particular categories of cases) and authorities cited id. at 784 n.6.
the vision is being challenged in practice, in a way that targets lawyers' pocketbooks, as in *Kaye, Scholer*, lawyers have little choice but to listen and engage the issues.\(^{257}\) The ongoing project to restate the "law governing lawyers"\(^{258}\) is one aspect of the education process, because it will spur lawyers to recognize the many constraints on their partisanship that the codes and the traditional "vision" of the bar have not acknowledged. At a minimum, the project will demonstrate that criminal law,\(^{259}\) malpractice, and evidence principles,\(^{260}\) among others, undermine the continued viability of partisanship without objective deliberation.

In the aftermath of *Kaye, Scholer*, law firms and insurers are seeking strategies for reconciling their responsibilities with traditional client-oriented advocacy.\(^{261}\) It is therefore an ap-

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256. In *Kaye, Scholer*, the government claimed that the law firm in question was liable for all $275 million of damage caused by its client's misrepresentations, froze all the assets of the law firm, and thereby forced the firm to settle for $41 million. *See In re Fishbein, OTS AP-92-19* (Dep't Treasury 1992), *cited in Curtis, supra* note 148, at 988, 1000; Office of Thrift Supervision, *OTS, Kaye, Scholer Agree to Settle All Charges*, OTS NEWS 92-95, Mar. 8, 1992. Other types of governmental action against lawyers, including seeking forfeiture of attorneys' fees under federal statutes and seeking to disqualify defense lawyers by calling them as witnesses, may have similar financial ramifications for the lawyers' practices. *See* discussion and authorities cited *supra* notes 255-56.

257. This reality is highlighted by the unprecedented attention—in writings, symposia, and CLE programs—that is being focused on the effects on traditional practice of *Kaye, Scholer*, seizures of attorneys' fees, and subpoenas directed to attorneys.


259. Examples include securities regulation and laws directed at conspiracies and aiding and abetting.

260. Perhaps the most significant evidentiary determinant of lawyer behavior is the attorney-client privilege. *Compare* CAL. BUS. & PROF. CODE § 6068(e) (West 1994) (requiring a lawyer "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client") *with* CAL. EVID. CODE § 956.5 (West 1994) (classifying as unprivileged "[information] necessary to prevent the client from committing a criminal act that . . . is likely to result in death or substantial bodily harm"). *See* Zacharias, *supra* note 86, at 369-73 (discussing relationship between attorney-client privilege and attorney-client confidentiality rules).

propriate time to ask lawyers to question their own assumptions. The process of introducing initiatives into the codes that support the concept of professional objectivity and of developing continuing legal education programs that confront the bar's oversimplified vision go hand in hand.262 Both are necessary stimuli for a debate that must precede a change in custom in the practice of law.

CONCLUSION

This Article has attempted to view professionalism from a new perspective. Contrary to the view that client-oriented legal ethics codes deprive lawyers of the discretion to act morally, it suggests that the codes leave ample room for objective decisionmaking and objective conduct. Over time, however, personal and economic incentives have led lawyers to misinterpret the spirit of the codes. Lost is the notion that professionalism includes a component of objectivity in the practice of law.

The codes can be strengthened, to counteract lawyers' tendency to surrender their independence. But the root of the problem lies not in the codes, but in the ethos of the guild.263 Most ethicists recognize that moral behavior is, by definition, voluntary.264 Although the codes may provide guidelines and encour-

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262 Because casebooks and professional responsibility "readers" have already identified many of the ethical scenarios with which lawyers must deal and have collated resources discussing these scenarios, development of courses and programs should not be difficult. The available casebooks are to numerous too list. In addition, several commentators recently have produced "readers" that also identify the core scenarios that lawyers need to consider. See, e.g., MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS (1990); HOWARD LESNICK, BEING A LAWYER (1992); JAMES E. MOLITERNO & JOHN M. LEVY, ETHICS OF THE LAWYER'S WORK (1993).

263 Cf. Lawry, supra note 15, at 363 (arguing that reform of ethics codes "is a secondary challenge to the task of getting the central idea of lawyering straight to begin with").

264 See, e.g., Eberle, supra note 22, at 108-09 (depicting lawyer as "autonomous")
age lawyers to exercise objective decisionmaking, any change in
the prevailing ethos must come from lawyers themselves. Only
through reeducation of both lawyers and clients regarding the
meaning of professionalism can the profession regain a more
balanced view of its proper role.

moral agent); Postema, supra note 2, at 287 (arguing that lawyers cannot avoid
responsibility for actions by referring to the system, without considering morality);
Richards, supra note 14, at 360 (analyzing lawyers' moral developments).