Chapter 1

Lawyers, Role, and Law

A. Lawyers and Role

Problems

1-1. Should Martyn & Fox file a claim on behalf of a client after the statute of limitations has expired? What if we are fairly sure the opposing party will not be represented?

1-2. During negotiations, a lawyer for the buyer agrees on behalf of his client to pay an extra $50,000 because, the lawyer observes, "the land is zoned for ten lots." Martyn & Fox, representing the seller, knows that the lawyer is mistaken. Should Martyn & Fox close the deal without correcting the mistake?

1-3. Should Martyn & Fox advise its client to sign an agreement in a divorce case that settles property division and child support when the opposing lawyer mistakenly believes that alimony can be negotiated later, but we know that the law will bar such a claim? What if the opposing lawyer is a best friend? Has not handled many divorces?

1-4. Should Martyn & Fox tell a client the chances of her getting caught doing something illegal, for example, deducting the cost of a child's wedding as a business expense? How about the chances of getting caught withholding a document in response to a legitimate request for production of documents?

Consider: Model Rules Preamble and Scope
Restatement of the Law Governing Lawyers § 1

Monroe H. Freedman & Abbe Smith

Understanding Lawyers' Ethics

pp. 8, 45, 46–47, 54, 62–63, 68, 69, 70–71, 72–74 (4th ed., LexisNexis 2010)

. . . In expressing the distinctive feature of ethics in the legal profession, we would identify the client not as "this other person, over whom I have power," but as "this other person whom I have the power to help." In this view, the

central concern of lawyers' ethics is not how my client "can be made as good as possible."[29] Rather, it is how far I can ethically go—or how far I should be required to go—to achieve for my clients full and equal rights under law.

Shaffer thinks of lawyers' ethics as being rooted in moral philosophy, while we think of lawyers' ethics as being rooted in the moral values that are expressed in the Bill of Rights. . . .

Can you be a good lawyer and a good person at the same time? The question implies that serving your clients competently and zealously will require you to violate your personal morality in at least some instances. At the heart of that issue is whether it is the lawyer or the client who should make the moral decisions that come up in the course of the representation. As it is frequently put: Is the lawyer just a "hired gun," or must the lawyer "obey his own conscience, not that of his client?" . . .

In an influential article,[6] [Professor Richard] Wasserstrom recalls John Dean's list of those implicated in the Watergate cover-up. Dean placed an asterisk next to the names of each of the lawyers on the list, because he had been struck by the fact that so many were lawyers. Wasserstrom concludes that the involvement of lawyers in Watergate was "natural, if not unavoidable," . . . [the] "likely if not inevitable consequence of their legal acculturation." Indeed, on the basis of Wasserstrom's analysis, the only matter is why so many of those on John Dean's list were *not* lawyers. What could possibly have corrupted the nonlawyers to such a degree as to have led them into what Wasserstrom sees as the uniquely amoral and immoral world of the lawyers? "For at best," Wasserstrom asserts, "the lawyer's world is a simplified moral world; often it is an amoral one; and more than occasionally perhaps, an overtly immoral one."

Wasserstrom considers "role-differentiated behavior" to be the root of the problem. As he says, the "nature of role-differentiated behavior . . . often makes it both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts—and especially various moral considerations—that would otherwise be relevant if not decisive." Illustrative of how Wasserstrom thinks lawyers should make moral considerations relevant is his suggestion that a lawyer should refuse to advise a wealthy client of a tax loophole provided by the legislature for only a few wealthy taxpayers. If that case were to be generalized, it would mean that the legal profession can properly regard itself as an oligarchy, whose duty is to nullify decisions made by the people's duly elected representatives. . . .

Nevertheless, Wasserstrom suggests that lawyers should "see themselves less as subject to role-differentiated behavior and more as subject to the demands of *the* moral point of view."

But is it really that simple? Is there a single point of view that can be identified as "the" moral one that everyone accepts? . . .

29. *See* Thomas Shaffer, *Legal Ethics and the Good Client*, 36 Cath. U. L. Rev. 319, 320 (1987).
6. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 ABA Human Rights 1 (1975).

In day-to-day practice, the most common instances of amoral or immoral conduct by lawyers are those occasions in which lawyers preempt their clients' moral judgments. That occurs in two ways. Most often lawyers assume that the client wants her to maximize his material or tactical position in every way that is legally permissible, regardless of non-legal considerations. That is, lawyers tend to assume the worst regarding the client's desires, and act accordingly. Less frequently, a lawyer will decide that a particular course of conduct is morally preferable, even though not required legally, and will follow that course on the client's behalf without consultation. In either event, the lawyer fails in her responsibility to maximize the client's autonomy by providing the client with the fullest advice and counsel, legal and moral, so that the client can make the most informed choice possible. . . .

One of the essential values of a just society is respect for the dignity of each member of that society. Essential to each individual's dignity is the free exercise of individual autonomy. Toward that end, each person is entitled to know his rights with respect to society and other individuals and to decide whether to assert of those rights through the due processes of law.

The lawyer, by virtue of her training and skills, has a monopoly over access to the legal system and knowledge about the law. Consequently, the lawyer's advice and assistance are often indispensable to the effective exercise of individual autonomy.

The attorney acts both professionally and morally in assisting clients to maximize their autonomy, by counseling clients candidly and fully regarding the clients' legal rights and moral responsibilities as the lawyer perceives them, and by assisting clients to carry out their lawful decisions. The attorney acts unprofessionally and immorally when she deprives clients of autonomy, by denying them information regarding their legal rights, by otherwise preempting their moral decisions, or by depriving them of the ability to carry out their lawful decisions. . . .

Closely related to the concept of client autonomy is the lawyer's obligation to give "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of [the lawyer's] utmost learning and ability."[1] This ethic of zeal is a "traditional aspiration" that was already established in Abraham Lincoln's day, and zealousness continues today to be "*the* fundamental principle of the law of lawyering," and "the dominant standard of lawyerly excellence."

Client autonomy refers to the client's right to decide what her own interests are. Zeal refers to the dedication with which the lawyer furthers the client's interests. The ethic of zeal is, therefore, pervasive in lawyers' professional responsibilities, because it informs all of the lawyer's other ethical obligations with "entire devotion to the interest of the client." . . .

The obligation of "entire devotion to the interest of the client [and] warm zeal in the maintenance and defense of his rights" is not limited to the role

1. ABA Canons of Prof. Ethics 15 (1908).

of the lawyer as advocate in the courtroom. . . . It is important to remember, however, that any lawyer who counsels a client, negotiates on a client's behalf, or drafts a legal document for a client must do so with an actual or potential adversary in mind. When a contract is negotiated, there is a party on the other side. A contract, a will, or a form submitted to a government agency may well be read at some later date with an adversary's eye, and could become the subject of litigation. The advice given to a client and acted upon today may strengthen or weaken the client's position in contentious negotiations or in litigation next year. In short, it is not just the advocate in the courtroom who functions in an adversary system, and it is not just the client currently in litigation who may both require and be entitled to "warm zeal in the maintenance and defense of his rights." . . .

We want to emphasize, however, [that] the lawyer's decision to accept or to reject a client is a moral decision for which the lawyer can properly be held morally accountable. Indeed, there are few decisions a lawyer makes that are more significantly moral than whether she will dedicate her intellect, training, and skills to a particular client or cause. . . .

One of the most important considerations in deciding 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. . . .

The proper solution to the lawyer's moral objections to using such tactics, however, is not for the lawyer to take the case and then to deny the client his rights; rather, the lawyer should refuse to take the case. . . .

[A]ny decision to turn down legal business for moral reasons has to be balanced against the effect that decision might have on one's ability to earn a living. To recognize that there are moral concerns on both sides of the issue serves to emphasize that the choice can be an extremely difficult one. . . .

Turning down clients on moral grounds (as distinguished from suggesting moral considerations to a client) can be costly and therefore can require considerable courage. However, the decision of whether to represent a client is the point at which the lawyer has the most scope for exercising autonomy. Once you have committed yourself to serve as your client's zealous representative, your ability to act on conscientious grounds is, and should be, significantly limited.

Deborah L. Rhode

In the Interests of Justice: Reforming the Legal Profession

pp. 49–79 (Oxford University Press 2000)

The Advocate's Role in the Adversary System

My first legal case was almost my last. It brought home Dostoevski's definition of an advocate as "a conscience for hire." And it made me wonder about putting mine on the market.

The insight came when I was interning at the Washington, D.C., public defender's office after my first year in law school. Two of the office's juvenile

clients had stomped an elderly "wino" to death, just for the fun of it. They confessed to my supervising attorney and to the arresting officer; indeed, they appeared somewhat proud of their accomplishment. However, the police committed a number of constitutional and procedural violations in obtaining the confession and other inculpating evidence. My supervisor was able to get the case dismissed on what the public would consider a "technicality." He also was proud of his accomplishment. The clients were jubilant and unrepentant. I had no doubt that the office would see them again. Nor did I doubt that I was utterly unsuited to be a criminal defense lawyer. I wasn't sure I was ready to be a lawyer at all.

Now, with the benefit of a quarter-century's hindsight, I think both my supervisor and I were right. He was providing an essential and ethically defensible safeguard for constitutional values. And I was right to feel morally troubled by the consequences. I had assisted a process that sent the wrong messages to guilty clients: some lives are cheap; a gifted lawyer can get you off.

This is one of the "hard cases" in legal ethics. Its moral tensions arise from deeply rooted conflicts in America's commitments to both individual rights and social responsibilities. This conflict plays out in many law-related contexts, and legal ethics is no exception. When lawyers straddle these cultural contradictions, the public both demands and condemns their divided loyalties. Defense of disempowered clients and unpopular causes earns lawyers their greatest respect but also their sharpest criticism. The clash between lawyers' responsibilities as officers of the court and advocates of client interests creates the most fundamental dilemmas of legal ethics. All too often, the bar has resolved this conflict by permitting overrepresentation of those who can afford it and underrepresentation of everyone else. The result is to privilege the profession's interests at the expense of the public's. . . .

The Premises of Partisanship

The standard ethical justifications for the advocate's role rest on two major premises. The first assumption, drawing on utilitarian reasoning, is that an adversarial clash between opposing advocates is the best way of discovering truth. The second assumption, based on individual rights, is that morally neutral partisanship is the most effective means of protecting human freedom and dignity. Both claims unravel at several key points.

The truth-based rationale for the advocate's role assumes that the "right" result is most likely to occur through competitive presentations of relevant law and facts. As a report by the Joint Conference of the American Bar Association and the Association of American Law Schools emphasized, only when a decisionmaker "has had the benefit of intelligent and vigorous advocacy on both sides" can society have confidence in the decision. This faith in partisan process is part of a broader worldview that underpins America's basic social and economic institutions. Robert Kutak, chair of the ABA commission that drafted the Model Rules of Professional Conduct, observed that our commitment to the advocate's role in an adversarial framework reflects "the same deep-seated values we place on competition" in other contexts.

A second defense of neutral partisanship involves the protection of rights and the relationships necessary to safeguard those rights. Here again, the priority we give to personal liberties is rooted in more general cultural commitments. In a highly legalistic society, preservation of personal dignity and autonomy requires preservation of access to law. . . . The legal profession has no special claim to righteousness and no public accountability for their view of justice. By what right should they "play God" by foreclosing legal assistance or imposing "their own views about the path of virtue upon their clients"? . . .

And if advocates were held morally accountable for their clients' conduct, less legal representation would be available for those most vulnerable to popular prejudice and governmental repression. Our history provides ample illustrations of the social and economic penalties directed at attorneys with unpopular clients. It was difficult enough to find lawyers for accused communists in the McCarthy era and for political activists in the early southern civil rights campaign. Those difficulties would have been far greater without the principle that legal representation is not an endorsement of client conduct.

These rights-based justifications of neutral partisanship assume special force in criminal cases. Individuals whose lives, liberty, and reputation are at risk deserve an advocate without competing loyalties to the state. Ensuring effective representation serves not only to avoid unjust outcomes but also to affirm community values and to express our respect for individual rights. Guilt or innocence should be determined in open court with due process of law, not in the privacy of an attorney's office. The consequences of an alternative model are readily apparent in many totalitarian countries. Where defense lawyers' role is to "serve justice," rather than their clients, what passes for "justice" does not commend itself for export. Often the roles of counsel for the defendant and the state are functionally identical and the price is paid in innocent lives. A case in point involves China's celebrated prosecution of the Gang of Four following the Cultural Revolution of the 1960s. The attorney appointed to defend Mao Tse Tung's widow chose not to honor his client's request to assert her innocence or to conduct any investigations, present any witnesses, or challenge the government's case. According to the lawyer, such advocacy was unnecessary because "the police and the prosecutors worked on the case a very long time and the evidence they found which wasn't true they threw away."

This country has had similar experiences when the crime has been especially heinous or the accused has been a member of a particularly unpopular group. To take only the most obvious example, for most of this nation's history, southern blacks accused of an offense against a white victim stood little chance of anything approximating zealous advocacy or a fair trial. Despite substantial progress, racial and ethnic bias in legal proceedings remains common, as most Americans and virtually every bar task force agree. The risk of abuse is significant in other contexts as well. Perjury, fabrication of evidence, and suppression of exculpatory material by law enforcement officials remain pervasive problems. Such abuses were present in some two-thirds of the sixty-odd cases involving

defendants facing the death penalty who recently have been exonerated by DNA evidence. . . .

Although these rationales for zealous advocacy have considerable force, they fall short of justifying current partisanship principles. A threshold weakness is the bar's overreliance on criminal defense as an all-purpose paradigm for the lawyer's role. Only a small amount of legal work involves either criminal proceedings or civil matters that raise similar concerns of individual freedom and governmental power. An advocacy role designed to ensure the presumption of innocence and deter prosecutorial abuse is not necessarily transferable to other legal landscapes. Bar rhetoric that casts the lawyer as-a-"champion against a hostile world" seems out of touch with most daily practice. The vast majority of legal work assists corporate and wealthy individual clients in a system that is scarcely hostile to their interests. When a Wall Street firm representing a Fortune 500 corporation squares off against understaffed regulators or a victim of unsafe practices, the balance of power is not what bar metaphors imply.

A similar problem arises with traditional truth-based justifications for neutral partisanship. Their underlying premise, that accurate results will emerge from competitive partisan presentations before disinterested tribunals, depends on factual assumptions that seldom hold in daily practice. Most legal representation never receives oversight from an impartial decision maker. Many disputes never reach the point of formal legal complaint, and of those that do, over 90 percent settle before trial. Moreover, even cases that end up in court seldom resemble the bar's idealized model of adversarial processes. That model presupposes adversaries with roughly equal incentives, resources, capabilities, and access to relevant information. But those conditions are more the exception than the rule in a society that tolerates vast disparities in wealth, high litigation costs, and grossly inadequate access to legal assistance. As a majority of surveyed judges agreed, a mismatch in attorneys' skills can distort outcomes; a mismatch in client resources compounds the problem. In law, as in life, the haves generally come out ahead. . . .

For similar reasons, the bar's traditional rights-based justifications offer inadequate support for prevailing adversarial practices. Such justifications implicitly assume that clients are entitled to assistance in whatever the law permits. This assumption confuses legal and moral rights. Some conduct that is socially indefensible may remain lawful because adequate prohibitions appear unenforceable or because decision-making bodies are too uninformed or compromised by special interests to impose effective regulation. An ethic of undivided client loyalty in these contexts has encouraged lawyers' assistance in some of the most socially costly enterprises in recent memory, the distribution of asbestos and Dalkon Shields, the suppression of health information about cigarettes, and the financially irresponsible ventures of savings and loan associations. . . .

Autonomy does not have intrinsic value; its importance derives from the values it fosters, such as individual initiative and responsibility. If a particular client objective does little to promote those values, or does so only at much greater cost to third parties, then the ethical justification for zealous advocacy is less convincing. . . .

Professional Interests and Partisan Practices

Whatever their inadequacies in serving the public interest, prevailing adversarial practices have been reasonably effective in serving professional interests. They permit all the justice that money can buy or a client who can afford it, and they impose few responsibilities on those who cannot. . . .

The Price of Partisanship

Yet these financial and psychological comforts come at a price. The avoidance of ethical responsibility is ultimately corrosive for lawyers, clients, and the legal framework on which they depend. For many practitioners, the neutral partisan role undermines the very commitments that led them to become lawyers. . . . The submersion of self into a role too often leaves the advocate alienated from his own moral convictions. When professional action becomes detached from ordinary moral experience, the lawyer's ethical sensitivity erodes. The agnosticism that neutral partisanship encourages can readily spill over into other areas of life and undercut a lawyer's sense of moral identity. . . .

Neither lawyers' nor clients' long-term interests are served by eroding the institutional frameworks on which an effective rule of law depends. Taken to its logical extreme, a professional role that gives primary allegiance to client concerns can undermine the legal order. Yale law professor Robert Gordon gives an example: "[T]ake any simple case of compliance counseling; suppose the legal rule is clear, yet the chance of detecting violations low, the penalties small in relation to the gains from noncompliance, or the terrorizing of regulators into settlement by a deluge of paper predictably easy. The mass of lawyers who advise and then assist with noncompliance in such a situation could, in the vigorous pursuit of their clients' interests, effectively nullify the laws." . . .

The bar has similar responsibilities concerning core cultural values. Norms like good faith, honesty, and fair dealing are essential for efficient markets and effective regulatory systems. These values depend on some shared restraint in the pursuit of short-term client interests. Legal processes present frequent opportunities for obstruction, obfuscation, and overreaching. An advocacy role that imposes few practical constraints on such behavior erodes expectations of trust and cooperation. These expectations are common goods on which clients as a group ultimately depend. In the short term, free riders can profit by violating norms that others respect. But these values cannot survive if deviance becomes a routine and acceptable part of the advocate's repertoire. Over the long run, a single-minded pursuit of clients' individual self-interests is likely to prove self-defeating for clients as a group. . . .

An Alternative Framework

An alternative framework for the advocate's role . . . would require lawyers to accept personal responsibility for the moral consequences of their professional actions. Attorneys should make decisions as advocates in the same way that morally reflective individuals make any ethical decision. Lawyers' conduct should be justifiable under consistent, disinterested, and generalizable principles. These

moral principles can, of course, recognize the distinctive needs of lawyers' occupational role. . . .

[U]nlike the bar's prevailing approach, this alternative framework would require lawyers to assess their obligations in light of all the societal interests at issue in particular practice contexts. . . . Respect for law is a fundamental value, particularly among those sworn to uphold it. Adherence to generally accepted rules also serves as a check against the decision maker's own bias or self-interest. . . .

Most ethical dilemmas arise in areas where the governing standards already leave significant room for discretion. Individual attorneys can decide whether to accept or withdraw from representation and whether to pursue certain tactics. In resolving such questions, lawyers need to consider the social context of their choices. They cannot simply rely on some idealized model of adversarial and legislative processes. Rather, lawyers must assess their action against a realistic backdrop, in which wealth, power, and information are unequally distributed, not all interests are adequately represented, and most matters will never reach a neutral tribunal. The less confidence that attorneys have in the justice system's capacity to deliver justice in a particular case, the greater their own responsibility to attempt some corrective. . . .

[T]he [position] . . . most compatible with the contextual ethical framework proposed here, seeks ways of advancing justice without violating formal prohibitions. Lawyers taking this position may pursue a result that is morally but not substantively justified as long as they refrain from illegal conduct such as knowing presentation of perjury or preparation of fraudulent documents. . . .

. . . [T]he aim of this alternative framework is for lawyers to make the merits matter and to assess them from a moral as well as a legal vantage. Not all poor clients would be entitled to unqualified advocacy. But neither would factors like poverty be irrelevant if they affect the justice of a particular claim. Of course, in a profession as large and diverse as the American bar, different lawyers will make different judgments about what is in fact just. Although such judgments should be defensible under accepted ethical principles, their application will necessarily reflect individuals' own experiences and commitments. . . . But the framework proposed here does not demand that lawyers reach the same results in hard cases. It demands rather that lawyers recognize that such cases *are* hard and that they call for contextual moral judgments. . . .

☐ Lawyers' Roles: *The Client-Lawyer Relationship*

Close your eyes and try to imagine yourself as a lawyer meeting a prospective client for the first time. First, how do you envision your client? Will you be representing an individual? An organization? A government? Second, how do you decide whether to undertake this representation? Will you consider the nature of the matter? The client? Whether and how much the client can pay? The effect of this legal representation upon society as a whole? Third, assuming you decide to handle the matter, what will you do for the client? Do you imagine

yourself as a legal technician who will execute the client's instructions? A guardian of the rule of law whose job it is to explain the legal realities of the situation to the client? How much will you interact with your client? Finally, imagine the place where this meeting occurs and what it conveys about the answers to these questions.

In this series of notes entitled "Lawyer's Roles," we will examine these questions, focusing on the way that lawyers articulate their own sense of role in relation both to clients and the legal system. Professors Freedman, Smith, and Rhode all believe that the lawyer's personal sense of morality, as well as the lawyer professional codes, should foster a distinct model of the client–lawyer relationship.[1]

Professors Freedman and Smith endorse what has been labeled the "dominant," "standard," or "adversary" ethic. This view emphasizes that lawyers have fiduciary duties to represent clients zealously, motivated by and focused on the client's values and goals. Legal rights exist to protect human autonomy, which is essential to human dignity.[2] Lawyers do the right thing by serving what is essentially human in others. Justice is defined in terms of the legal rights granted to citizens. The legal system protects and reinforces the individual decisions that people are best able to make for themselves, rather than any competing version of social welfare or outcome.

To a philosopher, this view is "relentlessly deontological," that is, focused on the duties of lawyers in relation to clients, rather than on any particular outcome those relationships create.[3] The lawyer's morality depends primarily on her role as an advocate, which in turn requires two primary virtues. The lawyer must be simultaneously neutral (because her client's interests should prevail) and partisan (to promote those interests). Once this occurs, the lawyer should not be held accountable for the client's goals or conduct. Amoral advocacy becomes the guiding norm of the adversary ethic.[4]

Commentators have characterized this view in a number of colorful ways.[5] A lawyer who adopts some form of the dominant or adversarial ethic has been labeled "client-centered," as well as called an "amoral instrument," "hired gun," "plumber," "puppet," or "prostitute." This lawyer strongly advocates client interests but in doing so can overidentify with clients and lose the independent judgment necessary to provide proper legal advice.

Professor Rhode criticizes the neutral partisanship this role seems to require. She opts instead for a public-interest ethic that would hold lawyers

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1. *See also* Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law,* 24 Geo. J. Legal Ethics 137 (2011) (emphasizing the need for self-reflection over an entire career and empirical research on the impact of law firm culture on lawyer behavior).

2. *E.g.,* David Luban, *Legal Ethics and Human Dignity* (Cambridge U. Press 2007).

3. Timothy P. Terrell, *Turmoil at the Normative Core of Lawyering: Uncomfortable Lessons from the "Metaethics" of Legal Ethics,* 49 Emory L.J. 87 (2000); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities,* 1986 Am. Bar Found. Research J. 613.

4. *See* David Luban, *Lawyers and Justice: An Ethical Study* at xx (Princeton U. Press 1988).

5. *See* James E. Moliterno, *Ethics of the Lawyer's Work* 129-130 (2d ed., West 2003); Symposium, *Client Counseling and Moral Responsibility,* 30 Pepp. L. Rev. 591 (2003).

morally accountable for the consequences of their actions. She agrees with Professors Freedman and Smith that deontological or rights-based justifications have special force in criminal cases, where individuals can be overwhelmed by governmental power. But she questions why lawyers should apply the same ethic to powerful interests like wealthy individuals and large corporations. She also defines justice in terms of distributive fairness rather than individual rights, meaning that lawyers should consider the social harm they help clients foist on unrepresented persons or interests.

A philosopher might label Professor Rhode's view teleological or utilitarian; that is, focused on the ultimate goal or consequences of individual client-lawyer relationships. According to this view, lawyers cannot rely on their social role alone to escape moral accountability;[6] rather, they should assess the consequences of each legal representation to determine whether it served some larger conception of the public interest. This lawyer ultimately will need to accept personal moral responsibility for distributive fairness, or "justice in the long run."[7]

Commentators note that this view can represent another extreme, and have labeled it in equally colorful ways as "directive," "traditional," "authoritarian," "moralist," or "parentalist." Expert lawyers, familiar with the legal system, might presume they know what is best and act as authorities in all aspects of the relationship. These lawyers can underidentify with clients and can assume a judgelike perspective, ignoring fiduciary duties that demand advice, obedience to client instructions, and zealous advocacy.

Lawyers as Instruments

Instrumental lawyers tend to focus on providing individual client representation and adversarial advocacy. Some pride themselves in representing almost any client who seeks their assistance, on the theory that every point of view deserves legal representation. Others, like Professors Freedman and Smith, emphasize that lawyers should exercise moral judgment about which clients to represent.[8]

Once they agree to take on a representation, instrumental lawyers rightly recognize fiduciary duties of control, competence, communication, confidentiality, and conflict of interest resolution to clients.[9] But their preference for client autonomy might tempt them to suppress their own moral judgment and cede all authority to the client in the process. Single-minded loyalty to a client then becomes transformed into a narrow-minded, unquestioning devotion to that client's will. The client's value system controls the representation, and the lawyer escapes any moral accountability for either the outcome or the means employed.

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6. Arthur Isak Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* 257-259 (Princeton U. Press 1999).

7. *See* William H. Simon, *The Practice of Justice; A Theory of Lawyers' Ethics* 53-76 (Harvard U. Press 1998).

8. Monroe H. Freedman, *A Critique of Philosophizing About Lawyers' Ethics*, 25 Geo. J. Legal Ethics 91 (2012).

9. David A. Binder, Paul B. Bergman, Susan C. Price, & Paul R. Tremblay, *Lawyers as Counselors: A Client-Centered Approach* 9-11 (2d ed. West 2004).

Lawyers who prefer an instrumental view of their role see only one limit to client advocacy: the bounds of the law and the legal system itself. Yet these legal bounds might be unclear to an instrumental lawyer because law itself could be viewed as a malleable means to pursue the client's desires. If the legal system exists to promote individual welfare, then law can be envisioned primarily as a process that provides clients with a means to challenge or take advantage of the existing order.[10]

Instrumental lawyers view the social fabric as relatively strong, capable of withstanding most challenges to the existing limits or bounds of the law or other majoritarian interests. At the same time, however, focusing primarily or exclusively on client interests might cause them to lose opportunities to explain a legal or moral boundary to clients or to discover a client's true intention. Worse, these lawyers can become blind to a clear legal limit that could subject the client and the lawyer to severe sanctions. The result could be serious harm to others as well as to the client and the lawyer.

Professor Wasserstrom warns that assuming such role-differentiated behavior also can transform a lawyer's entire personality. Lawyers who see their role in instrumental terms might be unrelenting and unwilling to compromise, even when the client seeks settlement. Lawyers who live an amoral professional life might be tempted to assume an amoral personal existence as well. Such lawyers also could incorporate those qualities deemed essential to accomplishing their task, such as competitive, aggressive, ruthless, and pragmatic behavior rather than cooperative, accommodating, compassionate, and principled action.[11]

Lawyers as Directors

Directive lawyers tend to focus on their roles as officers of the legal system and members of a profession. They are generally accustomed to relying on their own judgment and tend to lean on their own personal values in deciding which clients to represent and how to represent them.

Once they agree to take on a representation, directive lawyers nod to basic fiduciary duties, but primarily regard themselves as legal experts capable of determining how to handle the matter with little client consultation. Their preference for legal solutions might tempt them to underidentify with clients, who they see as lacking the lawyer's experience and judgment or as too emotionally close to the matter to consider the short- and long-term consequences of their decisions. The lawyer's legal expertise then can transform into a moral judgment about the proper outcome for a client. Here, the lawyer cedes little authority to the client, and the lawyer's values can control the representation.

Lawyers who believe they know more than their clients also might find it relatively easy to impose limits on client advocacy. The lawyer's own view of the law and its limits can be seen as an objective datum not subject to argument or

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10. Of course, this statement vastly oversimplifies the complexity of various philosophies of law, which may shape any lawyer's practice. *See* Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 Am. U. L. Rev. 1 (1999).

11. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Hum. Rights 1 (1975).

modification. Directive lawyers might envision the legal system as a means to promote social order and stability, and the law as the categorization of principles, rules, and procedures that shape client expectations.[12] Those who define their role as conciliatory, for example, might pressure a client to settle or compromise when the client wishes to vindicate an important right. They are apt to see law as necessary to preserve a relatively thin social fabric that easily could unravel without constant tending by lawyers.

But focusing on morally preferred legal outcomes could prevent a directive lawyer from seizing an opportunity to challenge a legal rule or apply it in a different context. More extreme is the tendency of some directive lawyers to limit client advocacy by imposing their own social agenda on the client's matter. Even worse, knowing what is best might be confused with preferring a lawyer's own personal agenda (often a monetary goal) over the client's interests. The client then becomes an object to be used to pursue the lawyer's goals, rather than a subject who deserves individual respect. If this occurs, lawyers who believe they know best can become blind to basic fiduciary duty, which requires them to consult and obey client instructions.

Like instrumental lawyers, directive lawyers can assume personality characteristics that permeate the lawyer's life. Directive lawyers might be judgmental, controlling, even patronizing and overbearing in their professional and personal life. They also might be impatient and have trouble listening to others. Such lawyers also could share the pragmatism of instrumental lawyers, but they often will prefer tangible legal standards to individual facts or emotional feelings that are less clearly articulated.

Lawyers as Collaborators

Most lawyers intuitively steer clear of extreme instrumental or directive behavior. They heed both fiduciary duty and the limits or bounds of the law.[13] Such a lawyer can be characterized as a "collaborator,"[14] "translator,"[15] "wise counselor,"[16] teacher,"[17] "statesman,"[18] or "friend."[19] Collaborative lawyers see the professional role

12. Professor Wetlaufer attributes this view to those who have faith in the fairness and legitimacy of the existing social order, including legal formalists, natural law proponents, and positivists, as well as the legal process and law and economics schools of thought in this group. Wetlaufer, *supra* note 10, at 61-63, 72.

13. W. Bradley Wendel, *Lawyers and Fidelity to Law* 2-7 (Cambridge U. Press 2010).

14. Robert F. Cochran, Jr., John M. A. DiPippa, & Martha M. Peteres, *The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling* (2d ed., Lexis-Nexis 2006).

15. Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse,* 77 Cornell L. Rev. 1298 (1992).

16. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference of the American Bar Association and the Association of American Law School,* 44 ABA J. 1159, 1161 (1958).

17. William F. May, *Beleaguered Rulers: The Public Obligation of the Professional* (Westminster John Knox Press 2001).

18. Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard U. Press 1993).

19. Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers, Clients, and Moral Responsibility* 44-54 (West 1994); Stephen R. Morris, *The Lawyer as Friend: An Aristotelian Inquiry,* 26 J. Legal Prof. 55 (2002). *But see* Charles H. Fried, *The Lawyer as Friend,* 85 Yale L.J. 1060 (1976).

as an opportunity rather than a problem,[20] creating enough professional distance to offer objective advice, while fostering a relationship that enables the client to articulate the ends and means of the representation. Clients are seen as best able to make decisions for themselves, but they need the expertise and perspective of lawyers to consider fully both their own interests and the effect of their decisions on others.

Philosophically, this model of the client-lawyer relationship acknowledges both a deontological and a utilitarian view, but also can rely on a virtue ethic[21] or a relational ethic of care.[22] Collaborative lawyers adopt a deontological viewpoint because they respect and see it as their duty to promote the individual autonomy of each client. Collaborative lawyers also care about the utilitarian legal and nonlegal consequences of a client representation, both for the client and those whom the client might affect. Beyond professional duties and client rights, many collaborative lawyers also exhibit character traits such as empathy and compassion to discern the client's full scope of interests. In deciding how to proceed, this means that the lawyer weighs heavily the significant obligation to favor the client's interests, as articulated by the client.

To enable clients to articulate their interests, collaborative lawyers believe that they should work with clients in the representation, pay attention to context, but neither dominate nor be dominated by a client's values. The relationship itself is participatory,[23] deliberative, or collaborative. At the same time, collaborative lawyers care about integrating personal and professional morality, which could lead them to question, or even challenge, the goals of the representation as well as the client's values. Lawyer and client might even be characterized as friends who "wrestle with and resolve the moral issues" in the representation.[24] Individual clients should be respected as subjects, not treated as objects, although entity clients might be more objectified.

Lawyers as collaborators recognize the law itself as more than formless process, but less than categorical command. They understand that many legal norms are definitive and can dictate some of the representation. At the same time, they appreciate the fact that applicable legal norms might conflict and that law must be applied to individual circumstances.[25] Overall, they view law as deeply embedded with moral norms that address some of the most significant

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20. William H. Simon, *Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives,* 23 Geo. J. Legal Ethics 987 (2010).

21. Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton U. Press 2008); Christine Parker & Adrian Evans, *Inside Lawyers' Ethics* (Cambridge U. Press 2007); Fred C. Zacharias, *Integrity Ethics,* 22 Geo. J. Legal Ethics 541 (2009).

22. *See* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney* 75 UMKC Law Rev. 965 (2007); Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers,* 81 Geo. L.J. 2665 (1993).

23. Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* (Russell Sage Foundation 1974).

24. Shaffer & Cochran, *supra* note 19, at 42-54.

25. *E.g.,* Alexander A. Guerrero, *Lawyers, Context, and Legitimacy: A New Theory of Legal Ethics,* 25 Geo. J. Legal Ethics 107 (2012).

issues in human existence. They understand and value the contribution of these norms to the social welfare, but remain willing to challenge existing majoritarian interests when those interests do not respect the individual rights of a client. In short, collaborative lawyers seek to act as translators of the moral norms of the law to their clients, as well as translators of their client's moral interests back to the legal system.[26]

Collaborative lawyers believe that they assume joint moral accountability with their clients for the representation. They feel free to express their own moral and legal judgment, but remain subject to the client's final determination of which interests to pursue, within the limits of the law. They attempt to steer clear of directive thinking by focusing on fiduciary duties to their clients, and they try to avoid instrumental thinking by being aware of the limits or bounds of the law. They listen to clients but also refuse to exclude their own personal values from a client's representation.

In practice, individual lawyers can fall anywhere on a spectrum between instrumental and directive behavior. Many lawyers borrow from all three models to assess their role obligations. As you study the materials in this book, consider how the lawyers involved characterized their roles. If a lawyer ended up in trouble, think about whether that lawyer's view of his role contributed to the problem. As you assess what the lawyers in these cases and materials did well or poorly, you will begin to formulate your own tentative concept of the kind of role and relationships you want to establish with your clients.

B. Lawyers and Law

As we examine the law governing lawyers, we will encounter two very interesting dimensions. First, this is a typical law school class, which examines a great variety of substantive law. Second, the "ethics" in legal ethics indicates that both this course and the law governing lawyers address moral questions and afford room for moral discretion.

The Law Governing Lawyers: *Sources of Law*

In this series of notes entitled "The Law Governing Lawyers," we consider the substantive standards, remedies, and sanctions embedded in the various strands of law that, taken as a whole, constitute the law governing lawyers. Professional responsibility or legal ethics is the study of what is required for a lawyer to provide a professional service to another. The law governing lawyers regulates this relationship and creates obligations to the legal system that act as limits on a lawyer's conduct on behalf of a client. The law governing lawyers also provides for a variety of remedies when lawyers violate professional norms.

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26. *See* Lawyer's Roles: *Zealous Representation Within the Bounds of the Law, infra* p. 297