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Three Dichotomies in Lawyers' Ethics (With Particular Attention to the Corporation as Client)

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Three Dichotomies in Lawyers' Ethics (With Particular Attention to the Corporation as Client)

PROFESSOR STEPHEN L. PEPPER*

ABSTRACT

Three foundational conceptual dichotomies underlie questions of lawyers' professional ethics. Commonly unnoticed and unarticulated, they affect our perception and resolution of questions at all levels: from large scale theory and policy, through the framing of particular rules or principles, and down to consideration of specific situations and conduct. In this article Professor Pepper identifies and explores each of these three in turn. In addition the article specifically considers how each dichotomy might affect our understanding and possible resolution of fundamental questions in the ethics of representing corporations.

The first dichotomy considers the question of what is the risk for which professional ethics is the remedy. The traditionally understood situation creating the need for a "profession" is that of a relatively weak and in need patient, client or customer interacting with a relatively powerful, knowledgeable professional trained and able to assist with aspects of life considered particularly important or necessary. That is, a vulnerable patient or client in need, and a professional there to assist, but also well-situated to exploit. Professional obligations and ethics are designed to mandate service and prevent exploitation. In lawyers' professional ethics over the last several decades the predominant concern has been a quite different vision: a powerful client assisted by a knowledgeable sophisticated professional in a project or conduct that may cause unjustifiable damage or harm to third parties or society. Often the paradigmatic client in this image is a large corporation. In this alternative vision, it is not the client who is vulnerable and at risk, but third parties and society as a whole. The third dichotomy turns not to the underlying risk, but to the remedy. Should lawyers' professional ethics consist primarily of rules, as it does now? Or would it be more useful and effective to turn to individual lawyer's character, practical wisdom,

* Professor of Law, University of Denver Sturm College of Law. Thanks for helpful comments and suggestions to Rebecca Aviel, Alan Chen, Mitt Regan, Dana Remus, Eli Wald, and Brad Wendel; and to participants at the International Legal Ethics Conference V, Banff, Canada, July 2012, session on "Individual, Corporation—Is There a Difference in the Fundamental Ethical Obligations Depending Upon the Nature of the Client;" participants at the University of Denver, Sturm College of Law work in progress session, November 2013; and participants at the 32nd Legal Ethics Institute, Washington and Lee University, March 2010, where parts of this paper were presented as the keynote address. © 2015, Stephen Pepper.

and discretion as the basis for ethical decision-making? The second dichotomy, developed less fully here than the other two, focuses on the foundational orientation of lawyers ethical obligations. Is it to the individual client? Or is it to some larger community interest. A final section of the article applies the three dichotomies to several exemplary situations of ethical difficulty in lawyer practice, illustrating how the dichotomies make a difference and how keeping them in mind can be helpful in analysis and choice.

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INTRODUCTION

Three usually unexpressed, and too often unnoticed, conceptual dichotomies underlie our perception and understanding of lawyers' ethics. First, the existence of a special body of professional ethics and professional regulation presupposes some special need or risk. Criminal and civil law are apparently insufficient. Ordinary day-to-day morality and ordinary ethics, likewise, are not considered to be enough. What is the risk entailed by the notion of a profession that is special; who needs protection, and from what? Two quite different possible answers to this question provide the first of the three dichotomies examined in this article: one can understand the risk as primarily to a vulnerable client from a powerful professional; or, to the contrary, from a powerful client-lawyer combination toward vulnerable others. Second, what is the foundational orientation of lawyers? Are lawyers serving primarily their particular clients, and those clients' preferences, choices and autonomy? Or is the primary allegiance of lawyers to some community or collective goal or interest distinct from the particular goals or interests of the client? The third dichotomy concerns not the substance of the risk, or the primary orientation, but the appropriate means of responding to that risk or that fundamental obligation. Should professional ethics be implemented primarily through rules? Or, should we rely on character and the discretion of lawyers to make a thought out, all things considered, decision?

Each of these three presents a fundamental difference in how we perceive and address issues of lawyers' ethics. Each affects our understanding and analysis on multiple levels, from (1) determining the appropriate or requisite conduct in a particular situation, to (2) framing a specific rule or approach for a particular category of situations, to (3) more general or abstract theory or policy. A person's inclinations in regard to the dichotomies affects the conclusions that person will reach on each of those levels of analysis, yet those inclinations and assumptions are frequently unexamined and unarticulated. One's position on each of the dichotomies tends to structure the approach and outcome without the issues and choice having been explicitly addressed or possibly even noticed. This article is an effort to ameliorate that problem.

Part I addresses the question of what is the risk in the work of lawyers, or the function of lawyers, for which professional ethics is the answer. The concluding section focuses on the particular problem of the corporation as client. Part II then asks the related and possibly consequent question of what is the foundational

orientation or allegiance of the lawyer? Is it to the individual client? Or is it to some larger community interest? Again, the concluding section focuses on the corporation. Part III turns to the means or method for addressing the obligations and possible problems of the professional ethics of lawyers. Should lawyers' ethics guide and confine the conduct of lawyers primarily through rules? Or should it function primarily through reliance on the knowledge, judgment and character of lawyers? If the latter were the guide, ethical decisions would be made on a situation-by-situation basis under the discretion of each lawyer. Toward the end of each discussion possibilities for bridging the dichotomy are considered (and with such bridges each dichotomy may come to look more like a spectrum or continuum). At several points after its introduction, in Parts I and II, the special problem of the corporation as client is revisited and possible solutions suggested. Illustrating the usefulness of keeping the dichotomies in view, Part IV applies them to several exemplary situations of ethical difficulty in actual lawyer practice. For readers finding it difficult to envision the consequences of these distinctions, turning ahead to Part IV may be useful in making the discussion more concrete. Some commonalities across the dichotomies and connections among them are then developed in the concluding section, Part V.

I. THE PRIMARY RISK: LAWYER OR CLIENT?

Is the purpose of lawyers' ethics to protect the client from the lawyer, or the lawyer from the client? Who is more likely to exploit whom? In the day-to-day working lives of most lawyers, from what direction does the moral risk come? *Pause for a moment before reading further and consider: when you imagine a lawyer and a client, what kind of client do you have in mind?* Seriously, take a moment to think about this.

What kind of lawyer are you thinking of, and what sort of task is that lawyer performing? Who is strong; who is vulnerable? Who is primarily in charge? This initial assumption or image—usually unnoticed and inexplicit—is likely to have a powerful effect on one's approach to the ethics of lawyering, from the theoretical to the very specific. Are you imagining an individual as the client, relatively unsophisticated and not knowledgeable about law and legal mechanisms and processes? Or are you imagining the client as a relatively large corporate entity, acting through relatively sophisticated and knowledgeable corporate management? The traditional understanding in the professions generally assumes a knowledgeable, dominant professional and a far less knowledgeable and weaker client. The purpose of professional ethics is protection of that consumer (client or patient) from the powerful professional. Within lawyers' ethics a counter-image has come to dominate: a powerful client using the lawyer's assistance to harm third parties or more general social interests. We shall consider each in turn.

A. THE BASIC TRADITIONAL PROFESSIONAL PARADIGM

Two primary factors distinguish “professions” from other trades or means of making a living. First, the service provided is of particular importance, sometimes a matter of necessity. Health care, legal assistance, architectural or engineering services provide typical examples. Second, to be competent and trustworthy to provide the necessary services, the professional must have mastered extensive specialized knowledge, training, skills and experience. With what we think of as the “learned professions,” this usually entails years of higher education combined with some form of extensive on the job training or apprenticeship as requisite preparation. The traditional understanding of the professional relationship is that of a vulnerable lay person in need of help with something particularly important to the individual or to society in general (often to both); and a substantially more knowledgeable and powerful professional in a position both to provide that help and to exploit that vulnerability.¹

The paradigmatic example or image is that of the sick patient: a person anxious about what’s wrong and dependent upon a physician to help with something very important—their health. If a person has a bad ache in the abdomen, should she be concerned about an ulcer, a heart attack, appendicitis? Or is it just indigestion? Typical examples for the legal profession would be a married couple wanting wills, a small businessperson in need of a contract, an accident victim in need of compensation and assistance, or an employee (or employer) concerned about wage and hour requirements or workplace discrimination. If you want to direct what will happen to your property upon death, is it adequate to just jot a note down and leave it in your safe deposit box at the bank; or is something more elaborate required? And what is that something more, and how do you go about doing it? Is my employer paying me what is required, or cutting corners on the law? The patient or client is in need and without the background or expertise to evaluate the quality or adequacy of the service to be provided; and the professional is sometimes in a position to exploit that need for his or her own benefit rather than for the benefit of the client or patient. If the surgeon recommends surgery, is it because you are in need of it, with serious risks if you do not have it; or is it because the surgeon makes substantially more money from surgery than with an alternate treatment? Or consider an example from a prominent lawyers’ ethics course book:

Novak . . . has agreed to represent a plaintiff in a personal injury suit for a . . . contingent fee of one-third of the amount recovered. The other side has offered, before Novak begins work, to pay his client \$15,000. Based on what he

1. For in-depth explorations of the concept and practice of professionalism, see generally ELLIOT FREIDSON, *PROFESSIONALISM REBORN: THEORY, PROPHECY, AND POLICY* (1994); ELLIOT FREIDSON, *PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE* (1986); WILBERT MOORE, *THE PROFESSIONS: ROLES AND RULES* (1970).

knows about the case, Novak believes the actual damages that a jury would award would be more like \$60,000, but it would take him about 200 hours of work to recover that amount, and, of course, the client might not recover anything at all. Novak has concluded that is best to recommend to the client that he accept the \$15,000 immediately so that Novak can pocket a \$5,000 fee with little effort and go on to the next case.²

If the lawyer provides this recommendation without fully informing the client of the reasons and the alternative which might well serve the client better (\$45,000 dollars later rather than \$10,000 now), the lawyer will have exploited the client's vulnerability and lack of understanding to serve his own interest, not the client's—a paradigm of the risks presented by the professional relationship.

In sum, (1) the client or patient often has a strong need for something he cannot understand or evaluate effectively; (2) the professional is making a living from that need; and, as a result, (3) is in a position to exploit the client or patient's vulnerability for personal profit. This vulnerability on the part of the person in need generates the notion of special obligations and ethics beyond the ordinary norms and regulations of the market. Ordinary economic incentives, market structures and rules (profit maximization and caveat emptor, for example) are thought to be inadequate in these special situations due to (1) the disparity of knowledge and power and (2) the particular importance of the needed service. Thus, the consumer is thought to be particularly vulnerable in regard to something important. This is the risk. The remedy is the notion of professional obligation. We decide that those who provide services in these situations must be "professionals," and that means one denominated a "professional" has special obligations and status beyond and above the market.³ Despite the fact that the professional is making a living from the need of the client or patient, she must put that person's interests above her own. Even if the surgeon makes money from surgery, surgery ought not be recommended if it is not the best treatment. Even if settling the lawsuit would mean a quick, easy contingent fee, the plaintiff's lawyer may not recommend it if the client is likely to come out substantially better by the long, hard efforts of the lawyer's work in discovery and trial

2. THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* 100 (10th ed. 2008).

3. Justice Sandra Day O'Connor presented a summary of this justification in her dissent in *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466 (1988). In brief:

Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand that clients bargain for their services in the same arms-length manner that may be appropriate when buying an automobile or choosing a dry cleaner. Like physicians, lawyers are subjected to heightened ethical demands on their conduct towards those they serve. These demands are needed because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialized knowledge that these professionals possess.

Id. at 489–90.

preparation. Or, conversely, if the litigator is working on an hourly fee basis she ought not discourage an early, reasonable settlement because she prefers the larger fee to be earned through extensive discovery and trial preparation. A large part of professional regulation is a set of ethical prescriptions designed to prevent the professional from exploiting the vulnerability of their customer.⁴ Limits are placed on the ways professionals are allowed to maximize profit over and above the limits imposed by civil and criminal law.

There is, of course, a great deal of skepticism among sociologists, economists, and legal scholars as to the reality of this mechanism.⁵ Professionals are privileged to create a limited entry monopoly for the provision of an essential service that consumers are not well equipped to evaluate. This appears on the surface to be more an engine of exploitation than a means to limit it, and the rhetoric and reality of professionalism can be seen as a façade to disguise that arguable reality.⁶ To some extent this more jaundiced view is certainly accurate for at the least some segment of each profession. Some lawyers, doctors, engineers and architects are solely motivated to maximize financial return, with professional obligations and status as just window dressing. But it is also true that the more positive view is descriptively accurate for some segment of each profession. We might denominate the more skeptical view as the “scam” understanding of professionalism, and the more traditional as the “consumer protection” understanding.⁷ It is a difficult and unanswered empirical question as to which view is the more accurate in the aggregate, and the answer probably varies from profession to profession. It also may well be true that for most professionals each is a part of their work reality; sometimes one more dominant in his or her behavior and self-conception, sometimes the other.

4. See *infra* notes 8, 27–31, 34 for some of the legal profession’s rules.

5. See, e.g., Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 3 (1998) (“[C]onfidentiality benefits lawyers because it increases the demand for legal services”); Thomas D. Morgan, *Calling Law a “Profession” Only Confuses Thinking About the Challenges Lawyers Face*, 9 U. ST. THOMAS L. J. 542, 547–50 (2012) (“[L]awyers have used professionalism rhetoric in the past to defend practices that outside observers could easily see served the interest of lawyers but not the interest of the public or the interest of justice.”); THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 57–66 (2010); Russell G. Pearce, *The Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1231–32 (1995) (“[T]he widespread perception is that law practice is a business. This perception so fundamentally undermines the Business-Profession dichotomy that it has provoked a professional crisis.”).

6. Trade groups frequently lobby for the state to designate and regulate them as “professionals,” thus limiting entry and competition. See, e.g., Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890–1910: A Legal and Social Study*, 53 CALIF. L. REV. 487, 497–503 (1965); Walter Gelhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 10–19 (1985).

7. These two alternatives can also be usefully thought of as the internal and external perspectives on professionalism. The sociologists and economists are observing the professions as interested, objective outsiders; those structuring, administering, and practicing in the professions are seeing them from the inside, as participants.

It is clear, however, that on at least two important levels we function on the basis of the more positive, idealistic, consumer protection view and not on the more skeptical understanding. First, we institutionalize the professions with formal quasi-governmental bodies of governance: we license professionals, limiting those who can practice and setting standards for admission; and, to at least some limited extent, we provide professional discipline—including the possibilities of suspension or loss of the license—under articulated rules of professional conduct. Thus, the polity acts as if it takes the professional model seriously and believes it reflects the reality of professional conduct and self-understanding. Conversely, this also indicates that as a society we do not believe that the “scam” view put forward by many sociologists and economists reflects the true state of professionalism, but rather that it is a risk to be prevented by the institutionalization of the profession. Second, and perhaps more important, large segments of the population—including the more well-educated and well-off—take the implications of professionalism and professional licensure and regulation seriously: they go to doctors and lawyers, architects and engineers, and trust them with their lives and projects because they are licensed and formally identified as doctors and lawyers, architects and engineers, not because they know substantially more about their qualifications or performance. Even in the internet age many do little or no independent checking or research, and would often find little that would be helpful or understandable even if they did.⁸ Frequently, reliance may be placed primarily on a referral from a friend, colleague, or other professional (the family practitioner who refers to the otolaryngologist, for example), but the stamp of professional licensure and identity probably remains quite significant in the level of reliance, trust, and lack of separate investigation of qualifications and record. Thus, the dominant common understanding of professionalism remains the traditional model.

B. A DIFFERENT CONCERN AND A DIFFERENT RISK

With regard to lawyers’ ethics, over the last thirty-five years a counter-vision has come to be influential and perhaps dominant. Some empirical work on lawyers and their clients suggests that the model drawn from the nature of the professional relationship sketched above is in error, and that frequently the situation is a relatively weak and economically dependent lawyer serving a stronger and more dominant client.⁹ Certainly it is true that more lawyers provide service to relatively large organizations than to individuals or small businesses

8. Ethics rules limit the information lawyers can disseminate about themselves. *See* MODEL RULES OF PROF’L CONDUCT R. 7.1–7.3 (2010) [hereinafter MODEL RULES]. Limitations also restrict the extent to which lawyers can identify the specialty areas in which they practice and have expertise. *See* MODEL RULES R. 7.4.

9. *See, e.g.,* ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 231–43 (1988) (“Recent scholarship questions the very foundations of [the large law firm’s] power, arguing . . . that the large law firm is the captive of its clients . . .”).

and organizations.¹⁰ Under the counter-vision, the powerful lawyer/client combination presents a risk to weaker and more vulnerable third parties or to aggregate social interests. The image called up is that of the client as a large corporation with a lot of legal business, sophisticated and demanding management, and a corporate profit ethic instead of a humane conscience; juxtaposed against a lawyer in a much smaller economic unit (albeit perhaps a large, profitable law firm), dependent upon that client for a substantial portion of his or her livelihood in a market for legal services growing more and more competitive.¹¹ Lawyers assisting Lehman Brothers in end of the quarter transactions to hide debt on quarterly reports¹² or those assisting Enron in structuring and creating the off the books partnerships to present misleading financial statements,¹³ would be recent paradigm examples. The concern is what is thought of as relatively common conduct, such as assisting a client in formal compliance with water pollution regulations, or with securities financial reporting requirements, while the actual effect of the conduct is substantive violation of the those water pollution or securities requirements (that is, facilitating actual water pollution combined with formal or window-dressing legal compliance; facilitating misleading financial statements combined with at least arguable formal legal compliance).¹⁴ The risk envisioned is lawyer and client allied in wrongdoing, with the lawyer adding a veneer of arguable legal compliance to the conduct; that is, adding the power of the law to the already substantial financial and political power of the large corporate actor or of a powerful individual actor.¹⁵ This is a

10. See JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 42, 46–47 (2005).

11. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 48–54 (1994); MILTON C. REGAN JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 31–39 (2004).

12. See Floyd Norris, *Demystifying the Lehman Shell Game*, N.Y. TIMES, Apr. 2, 2010, at B1, available at <http://www.nytimes.com/2010/04/02/business/02norris.html>; Michael J. de la Merced & Andrew Ross Sorkin, *Report Details How Lehman Hid Its Woes*, N.Y. TIMES, Mar. 12, 2010, at A1, available at <http://www.nytimes.com/2010/03/12/business/12lehman.html>.

13. For a full description of the Enron debacle, see generally ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (Nancy Rapoport & Bala G. Dharan eds. 2004).

14. See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 26 (1988).

Here is a simple, nonexhaustive array of the types of advice a lawyer can give in the context of compliance counseling. The lawyer might advise that: a) The plan in its current form is prohibited; b) The plan is clearly prohibited, but the risk of detection is slight or, if significant, expected profits will still exceed the likely penalties; c) Same as (b) except that the lawyer advises that there is a non-negligible risk of getting caught and being exposed to later liabilities, so that prudence dictates forbearance; d) The form of the plan is clearly prohibited, but can be cosmetically recast in another form that will accomplish its essential purposes; e) The substance of the plan is clearly prohibited, but can be made legal if altered in some substantive particulars; f) The plan contravenes the regulation's basic purposes, but it technically complies with the regulations, and is legal

Id. An imagined situation involving water pollution is explored *infra* Part IV. C.

15. For a recent example from the academic literature, see Brad Wendel's discussion of abusive deposition tactics. See W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 24–26 (2010) [hereinafter WENDEL, *FIDELITY*] (based on the description of the Dalkon Shield products liability litigation in DEBORAH L. RHODE, *PROFESSIONAL*

quite different risk than the traditional model. Instead of a vulnerable client who needs to be protected, we have a powerful client threatening harm to third parties enabled by the lawyer's traditional professional obligation and loyalty. The problem from this perspective is to construct a professional ethic or a set of professional rules to protect third parties from lawyer enabled client wrongdoing.

There is an alternative understanding of this second risk. Some lawyers perceive professional ethics as designed to protect lawyers themselves. The rules provide a mandatory basis for refusing to assist in wrongful client conduct, thus insulating the lawyers from being drawn or co-opted into wrongdoing. The lawyer can genuinely say, "I can't structure the transaction that way for you because the ethics rules forbid it." "That would amount to a lie, and I can't do that." "We have to reveal that or I will be in violation of the ethics rules." Professional ethics from this perspective protects primarily the lawyers and only derivatively potentially victimized third parties or social interests.

C. THE CORPORATION AS CLIENT: THE PROBLEM OF AMORAL ETHICS SQUARED AND THE MISMATCH WITH THE TRADITIONALLY UNDERSTOOD RISK

Large corporations are generally far more powerful and wealthy than most individual clients and most small business or small organization clients. It usually does not seem descriptively accurate to see them as vulnerable in relation to their lawyers. The vulnerability would seem to go the other way: even very large, multi-city or multinational law firms are small in relation to many of their major corporate clients and the law firms are economically dependent on them.¹⁶ This dependence is even more pointedly true for individual partners and associates within these firms in relation to their particular major clients.¹⁷ These lawyers are economically vulnerable to a choice by such clients to sever the relationship or lower the amount of services purchased. Not only would this reduce income for the firm, it would substantially undermine these lawyers' relative position and influence within the firm. In-house lawyers working in the corporations are not just vulnerable to but also clearly dependent upon the client. They are employees with very limited short-term mobility and just the one client.¹⁸

A second aspect of the corporate situation also suggests the client as the source of moral risk rather than the party in need of protection. Corporations do not have

RESPONSIBILITY: ETHICS BY THE PERVERSIVE METHOD 669 (1994)). For an early example, see David Luban's choice of a former CIA director's extortionate use of confidential governmental information to avoid criminal prosecution as the opening example in his initial examination of lawyers' ethics. David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 83, 85 (David Luban ed., 1983).

16. NELSON, *supra* note 9.

17. See REGAN, *supra* note 11, at 37–38.

18. See Sung Hui Kim, *The Ethics of In-House Practice*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 197–220 (Leslie Levin & Lynn Mather, eds., 2012) and references therein.

the range and complexity of motivations, emotions, and restraints on conduct (including moral and social) that individuals have. Both by law and pursuant to the intentions of the shareholders and management (and also by general social and political understanding), the primary goal of a for-profit corporation is shareholder value or profit¹⁹—a quite impoverished and limited universe of values compared with that of most natural persons. Lawyers often presume that their individual clients seek the most material well-being (money or its equivalents) or the most freedom, thus allowing the lawyers to function in a simplified moral universe. But as I have developed previously, this is a serious error in ethical perception.²⁰ It is confusing means with ends. Most of us do not value only or primarily material welfare and maximum freedom. Were that the case, we would not marry or have children, both choices which ordinarily limit material resources and freedom quite distinctly. For corporations, however, the assumption is not an error. Corporations may marry (merge), or create or acquire subsidiaries, but they do so only with the intent of maximizing shareholder value or return. For individuals, social relationships are commonly a significant source of moral anchoring, guidance and restraint²¹—friends, spouses and colleagues interact, counsel and, to some extent, judge. Corporations don't have friends and spouses. They do have relationships and connections—as do the persons who comprise management—but all of that takes place within the context of the limited understanding of the purpose and role of the corporation.²²

Corporate managers are charged with this limited range of goals. They are to pursue primarily and fundamentally shareholder value and profit, while the rest of the full panoply of other human goals and considerations are at best secondary, if not altogether absent.²³ They thus function under a limited, or role specific,

19. For a discussion of the shareholder primacy theory, see *infra* note 23.

20. Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181, 188–89 (1999) [hereinafter Pepper, *Ethics in the Gap*]; see also Katharine R. Kruse, *The Promise of Client-Centered Professional Norms*, 12 NEV. L.J. 341, 345–46 (2012); Katharine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 122–26 (2010) [hereinafter Kruse, *Cardboard Client*].

21. David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 11 AM. B. FOUND. RES. J. 637, 641–42 (1986); Stephen Pepper, *A Rejoinder to Professors Kaufman and Luban*, 11 AM. B. FOUND. RES. J. 657, 664–65 (1986).

22. See, e.g., David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 872–73 (1998) (describing the “stakeholder theory,” where a corporation has an ethical obligation to consider the interests of stakeholders beyond shareholders, such as employees, customers, and the local community, in making decisions for the corporation).

23. Milton C. Regan, *Corporate Speech and Civic Virtue*, in *DEBATING DEMOCRACY'S DISCONTENT* 289, 294 (Anita L. Allen & Milton C. Regan, eds., 1998) and sources cited therein. If the primary motivation is something different, the directors or management may well be involved in what the law categorizes as a waste of corporate assets, which may, if sufficiently clear, rise to the level of being legally actionable. See *id.* (discussing the “well known case” *Dodge v. Ford Motor Company*); see also *In re Walt Disney Co. Derivative Litig.* 906 A.2d 27, 74 (Del. 2006) (“A claim of corporate waste will arise only in the rare ‘unconscionable case where directors irrationally squander or give away corporate assets.’”). This corporate focus on maximizing shareholder wealth stems from the theory of shareholder primacy. See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 735–38 (2005); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP.

ethic or set of ethics. This is similar to lawyers, who have long been thought to function under a particular role specific morality. The frequently described “standard conception” sets out that the lawyer must serve the client’s interests as the client sees them, and that so long as the conduct on behalf of the client is not unlawful, a lawyer is not to limit that conduct on the basis of moral considerations aside from the law.²⁴ Further, under this view, the lawyer is not to be judged or evaluated from the perspective of ordinary morality, but rather from the perspective of advancing the client’s goals “within the bounds of the law.”²⁵ Putting the two roles together raises the problem of professional (arguably amoral) ethics *squared*: (a) For the corporate executive, professional ethics put the primary value and role obligation on increasing shareholder value or profit; (b) For the lawyer the primary value and role obligation is providing access to law and facilitating use of the law and its devices in servicing the client’s goals. In each case ordinary morality and values are discounted or trumped by the delimited values and obligations of role specific morality. Professional ethics is a limited, special purpose ethics. Putting the limited roles and goals of the business executive and the lawyer together in service to a very large and powerful non-human entity—the typical major corporation—is a frightening notion. It is not an articulated part of the professional role of either the executive or the lawyer to consider ordinary human decency, simple right and wrong, straightforward morality and ethics. Management ordinarily consults with lawyers; usually there is a high-ranking general counsel with an office or division staffed by numerous lawyers. But management does not ordinarily consult with or have the services of an ethicist or moral counselor. The problematic and not uncommon situation is when lawful conduct facilitative of the corporation’s overall goal of maximizing shareholder value is morally wrong in relation to third parties or aggregate social interests.²⁶ Whose job is it to bring up this problem? Whose job is it to weigh the various factors of the situation and reach a resolution? This is a basic contemporary problem of corporate legal practice: the current ethic of deferring to client interests and choice when combined with the reality of a

L. 277, 280–91 (1998); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33. For a more nuanced view of shareholder primacy, see Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); Lynn Stout, *THE SHAREHOLDER VALUE MYTH* (2012).

24. David Luban, *Misplaced Fidelity*, 90 TEX. L. REV. 673, 673–76 (2012) (reviewing WENDEL, *FIDELITY*, *supra* note 15) (tracing the origin of the phrase “standard conception” of a lawyer’s role).

25. WENDEL, *FIDELITY*, *supra* note 15, at 6, 29; *see also* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 671 (1978); Murray L. Schwartz, *The Zeal of the Civil Advocate*, 8 AM. B. FOUND. RES. J. 543, 544, 554 (1983). Following Schwartz, the three principles comprising the conception are usually set out as “partisanship, [moral] neutrality and nonaccountability.” Luban, *supra* note 24, at 673–74.

26. This becomes more problematic if the category of conduct the lawyer is willing to facilitate is stretched to include that which is “arguably” lawful. *See* WENDEL, *FIDELITY*, *supra* note 15, at 32–33; DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 159 (2007).

powerful corporate client without a humane sensibility or conscience may make it particularly likely that lawyers will assist in morally dubious or wrongful conduct by corporate clients.

D. THE CURRENT RULES

The traditional theoretical underpinning of professionalism is clearly the client vulnerability model. The rules governing the legal profession reflect and embody this understanding, with client protective provisions extensive and dominant and third party protective provisions quite limited. This is perhaps clearest in the remarkably detailed and multiple conflict of interest provisions designed to ensure that the lawyer will not be tempted by her own interests or those of third parties to exploit the client's vulnerability.²⁷ The fundamental and primary rules are also client protective, beginning with competence and moving through communication (with the client, of course), confidentiality (of client related information) and fees (elaborate and restricting the amount and kinds of fees that can be charged far more extensively than ordinary market limits and regulation).²⁸ Parts of other important rules also protect the client, for example the multifaceted rule on organizations as clients.²⁹ There are rules designed to protect third parties, but they are fewer and far more limited. Perhaps the most pointed and significant is the prohibition on assisting client fraud or criminal conduct.³⁰ In this category one also finds requirements for limited truthfulness and fairness to third parties.³¹

E. WHAT TO DO ABOUT ADDRESSING TWO SUCH DIFFERENT RISKS

1. RULES

How might we address the problem of two different general categories of clients, the vulnerable on one hand, and the powerful and dominant on the other? Perhaps the most obvious place to start would be the rules. One option would be

27. MODEL RULES OF PROF'L CONDUCT Rs. 1.7–1.12 (2003) [hereinafter 2003 MODEL RULES]. These rules were clearly designed with individual clients in mind, and work very awkwardly with large organizations as clients and large multi-office law firms as lawyers. See, e.g., Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality Requirement and the Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 258–63 (2007). The rules are more extensive and explicit than the conflict of interest provisions for any other profession.

28. 2003 MODEL RULES R. 1.1 (Competence); 2003 MODEL RULES R. 1.3 (Diligence); 2003 MODEL RULES R. 1.4 (Communication); 2003 MODEL RULES R. 1.5 (Fees).

29. 2003 MODEL RULES R. 1.13.

30. 2003 MODEL RULES R. 1.2(d). Note how limited this provision is. Assisting breach of contract or tortious conduct by the client is not prohibited; facilitating a client's unjustifiable harmful conduct toward third parties is not prohibited.

31. 2003 MODEL RULES Rs. 3.3, 4.1 (Candor Toward the Tribunal and Truthfulness to Others); 2003 MODEL RULES Rs. 4.2, 4.3 (Communication with Non-Clients).

to create two entirely distinct sets of rules. One set would be for the traditionally assumed relatively vulnerable individual as client, and would track most of the current rules. A second set would be designed for powerful, relatively non-vulnerable clients (paradigmatically large corporations) and would aim more at restraining the powerful lawyer-client combination rather than protecting the client from the lawyer. The rules for confidentiality for example, might be quite different. For individuals, we might keep the very broad and inclusive confidentiality obligations we have now. For corporations we might well choose to frame more extensive exceptions.³² A sub-set of common rules would probably appear in both codes, perhaps in identical form, for example the rule prohibiting assistance in crime or fraud. But, might we frame an additional provision for corporations, prohibiting lawyer facilitation of tortious corporate conduct threatening serious injury to third parties?³³ No such provision currently exists.

An alternative, somewhat similar option, would be to have only one set of rules, as we do now, but to restructure them to formally recognize and attempt to remedy the two quite different kinds of risks. A significant segment of the rules would be conceptualized—as now—around protecting the client from exploitation by the lawyer. But another significant segment would be framed around the concern of the risk of powerful clients making use of lawyer enabled access to the law to harm third parties. For example, conflict of interest rules and confidentiality rules have traditionally protected the client. The most recent amendments to the confidentiality rules, however, have reflected concern about harm to third parties, not exploitation or victimization of clients.³⁴

Underlying both of these options would be a change in the theoretical conception of the role of the lawyer. This might take the form of essentially two different theories of professionalism and professional obligation: one protective of the client in relation to the lawyer, the other protective of third parties in relation to the client-lawyer combination. In the alternative, along the lines of the options mentioned immediately above, we might attempt to form a single theory

32. Some have argued that confidentiality obligations in relation to corporate clients are both unnecessary and counterproductive. See, e.g., Fischel, *supra* note 5, at 28–32 (1998); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE 67, 111 (2000); William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 652–53 (2003) [hereinafter Simon, *Who Needs the Bar*]; William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 281–282 (1998).

33. See Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1559–1564, 1576–1580 (1995) [hereinafter Pepper, *Counseling at the Limits*] for discussion of similar possibilities. Or, going further, the possibility of prohibiting lawyer assistance to intentional breach of contract that threatens serious injury to third parties. See generally Robert Cooter & Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 CALIF. L. REV. 1432 (1985) (providing a general background of the concept of efficient breach); Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982) (providing an early criticism of the doctrine); Avery Katz, *Virtue Ethics and Efficient Breach*, 45 SUFFOLK U. L. REV. 777 (2012) (providing a recent canvas of theory and the continued controversy).

34. 2003 MODEL RULES R. 1.6(b)(2)–(3).

that could encompass both risks. Another option might be to leave the rules essentially as they are, but to structure a theoretical perspective taking account of both risks and assisting lawyers to recognize both and deal with each as presented by the particular occasion.

2. THE CORPORATION AS CLIENT AND AS RISK—FOUR POSSIBILITIES

If the paradigm of the client-lawyer combination as the primary risk is the large corporation, perhaps part of the remedy (that is, the aim and content of lawyers' ethics) ought to be a separate articulated approach to serving corporate clients. Four possibilities for structuring an ethics for corporate lawyering will be briefly surveyed. It should be noted that it does not seem that they are mutually exclusive. A blend or conjunction of two or more might be the most effective and practical.

a. Like a Real Person

The current generally accepted approach is to treat the corporation as if it were a real person. That is the dominant model provided by corporate law—the corporation as an artificial imaginary person, recently reinforced by the Supreme Court's controversial *Citizen's United* decision.³⁵ Under this approach, the difficulty is to figure out *how* to treat the corporation as a person. Current Model Rule 1.13(a) provides the master answer: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." It is simply a question of corporate law and authority: figure out who has authority to decide for the corporation in regard to the particular work and treat those real persons as one treats a client. The remainder of Rule 1.13, "Organization as Client," is for the most part a series of provisions addressed to possible conflicts of interest and abuse of authority issues within the organization.

Wrongdoing by the corporation, to the extent it is addressed at all, is transmuted in Rule 1.13(b) from a problem of wrongdoing by a powerful corporation into a question of authority within the corporation: if certain convoluted requirements are met, "the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization . . ." Unlike Rule 1.2(d), the trigger in 1.13(b) is not crime or fraud by the client, and the concern does not seem to be harm to third parties. Rather, the concern appears to be only harm to the corporation, with the triggering wrongful conduct articulated as "a violation of a legal obligation *to the organization*, or a violation of law that reasonably *might be imputed to the organization* and that is likely to result in *substantial injury to the organization* . . ." A set of ethics conceived and designed

35. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

to protect vulnerable individual persons is transferred to a quite different kind of entity, with the substantial risks presented by that kind of client left unaddressed and apparently unnoticed.

On the other side of this argument, supporting an ethic of treating corporate clients as if they were persons, is the simple fact that both ownership and management are composed of real persons. The foundational role of lawyers is to provide access to law,³⁶ and one of the primary and most powerful legal mechanisms of the contemporary world is the corporate form of enterprise.³⁷ This legal device is intended to be generally available and useful, both for the facilitation and the limitation of conduct, and it would thus seem as ethically appropriate (or requisite) for lawyers to provide legal assistance to the aggregate persons comprising ownership and management³⁸ as it is to provide access to the law of divorce or of home ownership transactions for individuals. That corporations are made up of and are instrumental to actual persons does not necessarily answer our question, however. The fact that these real persons are part of a very large, complex, and powerful law-created entity may suggest that a significantly different ethic, set of ethics, or set of rules ought to be framed to address the situation of the corporation.

b. The Lawyer as Counselor or Conscience

Part of the lawyer's ethical obligation could be to engage in dialogue with the client on those occasions when lawful (or arguably lawful) corporate conduct appears to involve moral wrongdoing (or arguable wrongdoing) in relation to third parties or aggregate social concerns. The obligation would be to raise with the client the issue of possible wrongdoing in ordinary moral or social terms despite the fact that the conduct appears to (1) serve corporate interests and (2) be within the law. Rule 2.1 permits the lawyer to raise such issues, but it is not required under our current understanding of lawyers' ethics.³⁹ The idea here would be to *require* such dialogue in the case of corporate clients.⁴⁰ An effort

36. See WENDEL, *FIDELITY*, *supra* note 15, at 52–53; Stephen Pepper, *The Lawyer's Amoral Ethical Role*, AM. B. FOUND. RES. J. 613, 617 (1986). The argument based on the value of client autonomy (and Luban's dignity argument) seems far less persuasive when the client is a corporation. See LUBAN, *supra* note 26, at 65–68. Unless, that is, one can just assume the corporation's "autonomy" is directly derivative from the individuals who compose it. But that is a quite dubious assumption. See *infra* note 51.

37. It is perhaps secondary only to the mechanism of contract.

38. Management perhaps derivatively from ownership, but that question moves us into the conflict of interest complexities of providing legal services to corporate clients.

39. 2003 MODEL RULES R. 2.1 states that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

40. I have raised this possibility previously. See, e.g., Pepper, *Ethics in the Gap*, *supra* note 20, at 192–96; Pepper, *Counseling at the Limits*, *supra* note 33, at 1576–80; see also THOMAS L. SHAFFER & ROBERT F. COCHRAN, *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 59 (2d ed. 2009); Heller, *infra* note 126; Bruce A.

could also be made to incorporate into the role of corporate management a similar ethical obligation to take note of and consider ordinary moral consequences and issues in addition to the primary role specified goals of shareholder value and profit. There is, however, currently no formal or enforced code or statement of management ethics that could be supplemented with such an obligation.⁴¹ If part of the problem is that the ordinary moral perspective is not part of the defined role expectations of either profession, one possible remedy is to redefine one or both roles to incorporate that obligation. It is not obvious that this possible obligation should be restricted only to organizational or powerful clients and not also to individual clients,⁴² and we will therefore return to it in Parts III. E. 4. and V., below, considering possible bridges across the three dichotomies.

c. The Lawyer as Gatekeeper

Over the last ten to twenty years one response to highly publicized cases of corporate wrongdoing has been to suggest a significantly amplified role for corporate legal counsel.⁴³ The traditional role is that of instrument for access to and usage of the law, as long as that usage is itself lawful and facilitates otherwise lawful conduct. One possibility for a supplemented understanding of ethics for corporate lawyers is to focus on and elaborate that caveat concerning conduct “within the law.” The lawyer under this understanding not only provides access to the law but also limits it: the lawyer functions as facilitator but also as “gatekeeper,” limiting the corporation’s access to or usage of law when that conduct is in some substantial way wrongful or unlawful.⁴⁴ The lawyer becomes,

Green & Russell G. Pearce, *Public Service Must Begin At Home: The Lawyer As Civics Teacher In Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1219–24, 1235–36 (2009).

41. In this sense business management is clearly not a traditional profession: no license or admission is required to practice; no agreed upon or established code of ethics is enforced. See RAKESH KHURANA, FROM HIGHER AIMS TO HIRED HANDS: THE SOCIAL TRANSFORMATION OF AMERICAN BUSINESS SCHOOLS AND THE UNFULFILLED PROMISE OF MANAGEMENT AS A PROFESSION 361–68 (2007). To those who have been engaged with the ethics of law or medicine, Khurana’s faith in the reality and positive effects of formal professionalism can seem rather naive.

42. There is more concern with lawyer overreaching or domination with individual clients. See Pepper, *Ethics in the Gap*, *supra* note 20, at 192–93.

43. Much of the earlier published material directly addressed the financial reporting scandals of the late 1990s and early 2000s, with a particular focus on Enron. See, e.g., Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics and Enron*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 625, 625–630 (Nancy B. Rappaport & Bala G. Dharan eds., 2004) (considering the often-overlooked role played by lawyers in the financial reporting scandals, particularly Enron); Michelle DeStefano Beardslee, *Taking the Business Out of Work Product*, 79 FORDHAM L. REV. 1869, 1883–87 (2011) (examining the debate about an increased role for corporate legal counsel); John C. Coffee, Jr., *Understanding Enron: “It’s About the Gatekeepers, Stupid,”* 57 BUS. LAW. 1403 (2002) (examining how the Enron fraud was facilitated by auditors, analysts, and lawyers—those professionals who might be considered well-situated to prevent corporate wrongdoing, rather than facilitating it as they did).

44. This idea has been the subject of a substantial amount of scholarly debate and analysis. For a more in-depth examination of this “gatekeeper” concept, see generally JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 625–630 (2006); Beardslee, *supra* note 43 at 1883–87; John C.

to some extent, a supplemental law enforcement mechanism. Beyond just providing counsel, conversation, and noting possible problems, as in the second possibility immediately above, this role suggests that sometimes the lawyer would close the gate and deny access to or use of the law. And this in turn suggests that the term “gatekeeper” may be a euphemism for police officer or regulator. Enforcement of a requirement for such a role for corporate lawyers entails significant and not yet clarified questions.⁴⁵ This is a quite substantial and fundamental alteration in the traditionally understood role of the private lawyer, but one that can seem plausible and attractive. We will return to it in more detail in our consideration of the second fundamental dichotomy,⁴⁶ but first, two possible problems can be briefly noted.

First, trust has traditionally been understood as a primary part of the professional relationship. The professional is providing assistance in relation to a particularly important or intimate aspect of the client/patient/customer’s life, and the service is particularly technical and beyond the understanding of the person in need. So there is no alternative to trust. The client/patient must first trust the professional in order to convey the facts of the situation—facts that will not infrequently be awkward, embarrassing or damaging.⁴⁷ Then the client/patient must trust the professional’s knowledge, judgment and skill to provide the needed assistance. The gatekeeper role is not one that immediately calls to mind a relationship of trust—to some extent, quite the contrary. One is trying to get through the gate, but the gatekeeper is there to decide whether or not one is sufficiently worthy to pass—seemingly an adversary or obstacle as much as a facilitator.⁴⁸ Unless, that is, the trust is in the paternal form: the gatekeeper knows better than I do whether or not I really ought to take my journey in this direction,

Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1305–07 (2003); Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 73–76 (2010); Reinier Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 53–61 (1986). As is evident from this work, the notion of the lawyer as “gatekeeper” has been most prevalent in relation to lawyers for corporations, particularly in regard to securities filings and transactions.

45. There is very little case law dealing with Model Rule 1.13(b) and (c). In fact, the Annotated Rules contain only two reported cases of discipline for enforcement of Rule 1.13(b) and no cases under Rule 1.13(c). See ANNOTATED MODEL RULES OF PROF’L CONDUCT 221–23 (2011).

46. See *infra* Section II. B.

47. Stephen L. Pepper, *Why Confidentiality*, 23 LAW & SOC. INQUIRY 331 (1998).

48. The troll under the bridge, of course, is one stock cultural image of a not so friendly or helpful gatekeeper. It is therefore not surprising that support for this concept is far from uniform among scholars or in the wider legal community. In fact, many have argued strongly that such a fundamental alteration of the role of the private lawyer is incompatible with a lawyer’s other ethical duties. For an explanation of the controversy, see Beardslee, *supra* note 43, at 1883–85. In the wake of the financial reporting scandals, a Congressional effort to pass the Sarbanes-Oxley Act (which included a move in the direction of this “gatekeeper” role) was strongly opposed, most notably by the American Bar Association (“ABA”). Rhode & Paton, *supra* note 43, at 642–646. It is frequently argued that many in the legal community believe that “casting lawyers in the role of ethical gatekeepers will discourage the trust and candor from clients that is essential to effective representation. The result will be less compliance counseling, not more.” Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1330 (2006) (explaining the contention before arguing that this concern is ill-founded).

and I will trust her decisions because she has the requisite professional expertise and the delegated authority. With the adoption of such a role we would be, apparently, deciding to delegate such authority to individual private sector lawyers. Diluting the element of trust might, however, be quite appropriate. The need for trust is generated by the vulnerability of the client, and our premise here with powerful corporate clients is that they are *not* vulnerable in relation to their lawyers; rather we are all vulnerable to the harm they can do with the assistance of lawyers. Thus, there is the possible utility of the more independent “gatekeeper” lawyer role. Corporate managers, the argument has been made, require legal counsel; they don’t have an alternative. So a role with less trust and more prophylaxis may well be, in this particular context, a net gain rather than a loss.

Second, the gatekeeper role seems somewhat implausible given the reality of the power dynamic between lawyer and client.⁴⁹ An in-house lawyer is an employee, both financially dependent on management and with a role conception of service to the entity and being a member of the “team.” Both the incentive structure and the psychological realities suggest that it will be difficult for most lawyers to be genuinely active, alert, independent and willing keepers of the gate. Outside lawyers seem even less plausible as genuine gatekeepers given the transformation over the last forty years in: (1) the competition among firms for the business of large corporations, (2) the mobility from one firm to another corporations have come to welcome, and (3) the fragmentation of firm usage, with corporate clients coming to use multiple firms rather than just one, or a very limited number. All of this combines to weaken the position of the outside lawyer or firm and make it much less likely that there will be a stable, long term relationship with any individual firm or lawyer which would support the kind of independence, trust, and knowledge requisite to an effective and stable gatekeeping role.⁵⁰

Interestingly, the basic model at the foundation of traditional professional ethics is intended to remedy just such a dynamic: the temptation on the part of the relatively powerful professional to exploit the vulnerability and need of the individual patient/client/customer. If an internalized and weakly enforced professional ethic works to protect individual patients and clients in the basic model, it would seem to have at least the potential to work for a corporate gatekeeper model of lawyer ethics, creating an internalized professional disci-

49. For an examination of these dynamics, see Sung Hui Kim, *Gatekeepers Inside Out*, 21 *GEO. J. LEGAL ETHICS* 411 (2007), and Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 *IND. L.J.* (forthcoming 2015) (manuscript at 19–24, 35–37) (on file with author).

50. This would seem to be the basic justification for the creation of the “certified public” accountant: to prevent accountants from serving the interests of their clients over that of those who rely on their audits in transacting with those clients. The relatively recent effort to separate the auditing function from consulting and other services serves the same purpose.

pline to resist the pull of the surrounding incentive and power structures. It does seem, however, that the ethical dynamic of helping clients reach their goals may be fundamentally different than a dynamic of restraining them.

d. Professional Obligation as Rebuttable Presumption

If the premises that sustain the vulnerability justification for professional ethics are substantially weakened in the ordinary situation of a lawyer serving a large corporation, is it possible that the applicability of the rules and standards derived from those premises could be limited to reflect that? It would seem possible to conclude that, given the weakness of the underlying justification, client protective rules and standards ought to be defeasible in the case of the corporation as client.⁵¹ The idea would be that the applicability of rules intended as protective of the client would be rebuttable dependent upon the particular circumstances. For example, where lawyer-facilitated corporate conduct threatened serious, arguably unjustifiable, harm to third parties (or had already effectuated such harm), the applicability of a relevant client protective rule—such as confidentiality—might be rebutted. Both the reasons to allow such flexibility, and the considerable difficulties of making such an approach practicable, will be considered in Parts III. E. 2, IV. C. 4, and V. below.

II. THE LAWYER'S PRIMARY ETHICAL ALLEGIANCE: CLIENT AUTONOMY OR SOME LARGER COMMUNITY ORIENTATION

As noted above in Part I, the dominant understanding of the lawyer's obligation is that it is directed primarily to the client. The lawyer's function is seen as providing access to the law and that which the law can facilitate and effectuate for the client's benefit. The profession as a whole provides access to the law in the aggregate; but each lawyer does so one client at a time. Ethical Consideration 7-1 states in part:

The duty of a lawyer, *both to his client and the legal system*, is to represent *his client* zealously within the bounds of the law, . . . In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; *to seek any lawful objective through*

51.

Interpretation of legal structures as founded on the ideal of individual autonomy alone cannot in general adequately account for the legal protection of organizational interests. Such legal theories lead, therefore, to one of two untenable positions. One is the prevailing position that ignores the existence and distinctive nature of organizations, and applies the body of law derived from the individual autonomy across the board, to individuals and organization alike

MEIR DAN-COHEN, *RIGHTS, PERSONS, AND ORGANIZATIONS—A LEGAL THEORY FOR BUREAUCRATIC SOCIETY* (1986).

legally permissible means; and to present for adjudication any lawful claim, issue, or defense.⁵²

The lawyer is thus to assist and effectuate the client's use of the law in service to the client's goals and interests, as determined by the client.⁵³ The utility of this client-primary orientation is usually understood in a kind of "invisible hand" manner: each client's self-interested access to the assistance of the law will be a good thing (when considered in the aggregate with the similar access of others) if the laws have been well chosen, well designed and well implemented. Thus, for example, the regimes of contract law and corporation law allow for large scale, complicated co-operation over time (including, among other benefits, the long-term relatively reliable aggregation of capital and long-term reliance on the commitments of others in both large and small scale projects).⁵⁴ The individual lawyer is to serve his or her clients (or client) in access to and use of the law. In the aggregate, that will serve the community or the common good, and the lawyer therefore need not be concerned that in serving specific clients and their lawful

52. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1980) [hereinafter MODEL CODE] (emphasis added). Ethical Considerations 7-1 through 7-10 provide a coherent vision and guide for a client centered professional ethic. See MODEL CODE EC 7-1-7-10. The Ethical Considerations were not binding rules; they "constitute[d] a body of principles upon which the lawyer [could] rely for guidance in many specific situations." MODEL CODE Prelim. Statement. The ABA's replacement, the *Model Rules of Professional Conduct*, initially adopted in 1983, in some ways retreat from that guide. The opening paragraph of the Preamble to those rules says only that a "lawyer . . . is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." 2003 MODEL RULES pmb. ¶ 1. The ninth paragraph of the Preamble then says: "Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living." 2003 MODEL RULES pmb. ¶ 9. It notes that in relation to such problems "many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules." 2003 MODEL RULES pmb. ¶ 9. It provides no reference to such "principles," however, and no such principles are stated elsewhere in the rules. At the level of coherent vision or overall guide, the *Model Rules* thus can appear less client centered than ECs 7-1 through 7-10. At the level of mandatory rules, however, the *Model Rules* are, in fact, *more* client centered. Rule 1.2(a) gives binding authority to the client to determine the "objectives of representation," requires consultation by the lawyer concerning the "means" of reaching those objectives, and gives the client control over certain specific means related decisions. 2003 MODEL RULES R. 1.2(a). Rule 1.4 requires a great deal of communication and consultation with the client. 2003 MODEL RULES R. 1.4. The parallel provisions in ECs 7-7 through 7-9, though more nuanced and elaborate, were not binding rules. MODEL CODE EC 7-7-7-9. In addition Rule 1.5 gives the client greater protection in regard to fees. See 2003 MODEL RULES R. 1.5.

53. Stephen Gillers has recently summarized the individual lawyer's obligation as:

[T]o work diligently to achieve a client's goals within the bounds of the law and professional conduct rules. No more, no less . . . Are they willing to work injustice? That may be an uncomfortable question, but it is not a hard one. Lawyers are agents of their clients before the law and their clients' fiduciaries. They are not agents of the justice system or of justice.

Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 368 (2013).

54. Brad Wendel's view emphasizes the coordination function of the law as a "second order" set of values underlying the lawyer's ethical role. See WENDEL, FIDELITY, *supra* note 15, at 18, 21-22, 86-121.

goals and interests the consequences might be harmful to third parties or some larger community interests.

This dominant understanding is far from universal in the profession, however, and has been subject to critique and suggestions for alternative approaches for at least several decades. Referring to the common understanding as the “The Adversary System Excuse,” David Luban argues that when ordinary moral values (including third party or community interests) are strong and contrary to the client’s interests, goals, or means, the lawyer should defer to those (in his view stronger and therefore more legitimate) values and should not facilitate the client’s contrary access to or use of the law.⁵⁵ William Simon has argued that the lawyer’s primary allegiance should be to “legal justice” (that is, the law as properly and flexibly interpreted in light of both its purposes and the particular context of application) rather than to the particular client and his, her, or its interests.⁵⁶ The second dichotomy can be seen as a division in these two possible directions: allegiance primarily to the interests and autonomy of the individual client or, alternatively, primarily to some larger community obligation or interest.⁵⁷

This division can also be seen and understood in a more specific way. In my early exploration of a client-centered, role specific understanding of the underlying ethical obligations of lawyers, the values of autonomy and equality were linked to access to law as a justification for lawyers facilitating “amoral” access to law—that is, on occasion assisting lawful but morally wrongful conduct by clients.⁵⁸ This was a moral justification for the dominant understanding of

55. David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* (David Luban ed., 1984).

56. William H. Simon, *Ethical Discretion in Lawyering*, 101 *HARV. L. REV.* 1083, 1083 (1988) [hereinafter Simon, *Ethical Discretion*]; see also Luban, *supra* note 55, at 113, 117–18 (“The position I want to press is roughly that a social institution that can receive only a pragmatic justification is not capable of providing institutional excuses for immoral acts . . . The adversary system possesses only the slightest moral force, and thus appealing to it can excuse only the slightest moral wrongs. Anything else that is morally wrong for a nonlawyer to do on behalf of another person is morally wrong for a lawyer to do as well.”); LUBAN, *supra* note 26, at 63; Stephen Pepper, *Integrating Morality and Law in Legal Practice: A Reply to Professor Simon*, 23 *GEO. J. LEGAL ETHICS* 1011, 1013–1020 (2010) [hereinafter Pepper, *Integrating Morality*] (responding to Professor Simon’s mistake of law example); William H. Simon, *Role Differentiation and Lawyers’ Ethics: A Critique of Some Academic Perspectives*, 23 *GEO. J. LEGAL ETHICS* 987, 988–89, 989–1001 (2010) [hereinafter Simon, *Role Differentiation*] (using a hypothetical of a contributory negligence/comparative negligence statute, the “mistake of law” example, to illustrate lawyers’ various allegiances); Simon, *Ethical Discretion*, *supra* at 1091–1096 (discussing “relative merit” and “internal merit” as criteria guiding lawyers’ conduct).

57. The second dichotomy is thus, to some extent, a correlate of the first: is the client at risk and needing special allegiance? Or is some larger community at risk, and in need of special protection? The orientation of the second dichotomy focuses on the primary allegiance of the lawyer rather than on risks or vulnerability—although the one might be thought to derive from the other.

58. See Stephen Pepper, *The Lawyer’s Amoral Ethical Role: a Defense, a Problem, and Some Possibilities*, 1986 *AM. B. FOUND. RES. J.* 613 (1986).

lawyers' ethics.⁵⁹ The usage of the term or concept of "autonomy" called up for some readers and commentators a vision of clients as disconnected and separate; the notion of autonomy for clients was seen as contrary to connection and community for clients. It is this dichotomy—ethical orientation primarily toward the client and the client's autonomy, or primarily toward the obligations and connections of community—that I want to briefly explore here. We will then turn, once again, to focus the corporation as client, this time in the context of this conceptual divide.

A. AUTONOMY AS DISCONNECTION OR AUTONOMY AS CHOICE?

The concept of "autonomy" suggests the client as individual and self-governing, and this view can appear to see the individual as unconnected to and separate from others. One of the first insights developed by the communitarian movement and a foundation of the postmodern understanding, however, is that the individual is in fact not separate; the individual is constituted by her connections with others. Biologically and socially, individuals are created by families and the larger communities and cultures in which those families exist. We are dependent on others for our very existence initially and for the quality and substance of our lives throughout.⁶⁰ Yet we experience ourselves as individuals making individual choices, choices which sometimes connect us to others, and sometimes separate us. Looked at from the other side, community does not ordinarily mean (and need not mean) domination of individual or group constituents. Community can be, and very often is, facilitative of the flourishing—and relative independence—of its constituent individuals and groups.

Law can be seen as mediating this need for both connection and separation.⁶¹ We need some degree of separation from and protection from others, yet we also need connection to, cooperation with, and protection by others. Protecting separation and independence while also facilitating connection and cooperation is a constant dynamic in the lives of individuals, societies, and the various groups within society. The highly complicated mass of laws and legal structures is how

59. Because it is based on the value of access to law, it is also an institutional or political justification. See Stephen Pepper, *The Lawyer Knows More Than the Law*, 90 TEX. L. REV. 691, 706–07 (2012) [hereinafter Pepper, *More Than the Law*] (reviewing WENDEL, *FIDELITY*, *supra* note 15).

60. See Stephen Pepper, *Autonomy, Community and Lawyers' Ethics*, 19 CAP. U. L. REV. 939, 940–42 (1990) and sources cited there.

61. This mediation between the need for connection and separation was coined "the fundamental contradiction" by Duncan Kennedy. Duncan M. Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211–212 ("Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it."); see also Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L. J. 1063, 1108 ("This Madisonian tension—between majority and minority, legislature and court—is just a partial image of the essential and irreconcilable tension between self and other, between self and *self*:").

we create the uneasy formal mechanisms and compromises by which we try to balance both needs. Lawyers in turn mediate and facilitate the use of and the application of this complicated welter that is the law and the structures built and that can be built with it. Thus, lawyers serve both: separation and individualism, connection and community. With this foundation there are two observations to help guide us in understanding this dichotomy (or tension) and to help guide the lawyer.

1) There could clearly be a continuum of primacy of orientation to either the individual or some larger community. When the client is an individual person, the autonomy and choices of that client are usually considered primary. When the client is itself a group or community—the family or part of a family, a government unit, civic or business associations of various kinds—that communal entity or group becomes the primary allegiance of the lawyer. In that case, the lawyer has the added difficulties of determining who speaks for the group and what rights and interests of the constituent members must be respected and in what ways must that respect be manifest. Such considerations and problems are the grist for the mill of conflict of interest rules and analyses.⁶² But with both the individual client and the group or community client, this still leaves unresolved the question of the extent to which there is a predominant obligation on the part of the lawyer to some *larger* community, including the polity or government or society in general. That is the underlying question of this second dichotomy: in which direction is the lawyer's primary allegiance?

2) When the client is an individual it is important for the lawyer to remember the extent to which individuals are constituted by and connected to their various communities and groups. While the lawyer may be primarily obligated to assist the client in reaching her goals and interests as she understands them—that is, to serve her autonomy—it is often useful to remind the client of her connections and allegiances (and perhaps to remind her of the ways in which she may be constituted by them, the ways in which they are part of her and important to her). Commonly, in serving the client's autonomy the lawyer is also, explicitly or implicitly, serving the client in her connections to various groups and communities.

We choose to get married and consider it a commitment of serious dimension which significantly limits our range of permissible options and actions . . . Many of us think of ourselves as Italian or Jewish or Mormon in a way that has consequences for conduct . . . Or we buy a house assuming that we will maintain it in a way that will consume resources of time and money, thereby significantly restraining our future conduct . . . Often restraints and limits of this sort are a large part of what we mean by community and

62. Conflict of interest is usually the largest section of the required "ethics" or "professional responsibility" course in law schools; the bulk of litigated cases in the field concern conflicts, as do the greatest number of the rules. Similarly law firm ethics counsel or committees focus most of their concern on conflict of interest concerns.

connection. And it is in this sense that community and connection enhance autonomy rather than impinge upon it. Connection and community are part of what we all want, they are part of both who we *are* and of what we *choose*, and the combination is what we usually mean when we speak of “autonomy” . . . [T]he lawyer serves and honors the client’s autonomy by serving and honoring these restraints.⁶³

Thus, the client often wants to be connected and the lawyer functions to facilitate that connection. And often the client wants to be both, *connected* and *protected*, and managing that balance is often part of the lawyer’s job.⁶⁴ Likewise, when representing a group, organization or community, it is best for the lawyer to take care to remind those who speak for or have authority for the entity of the importance of the constituent members of the group, and of the group’s obligations to and necessary respect for those constituents.

On both sides of the continuum it is therefore important for the lawyer to remember—and to remind the client about—the other end of the continuum. This may include reminding the client of the value of following the law even on occasions when there seems to be little sense or value in doing so.⁶⁵ A staple of the lawyer-client counseling relationship should be keeping the dynamic of connection and separation in mind and assisting the client in being concerned with both sides. One side or the other may be the focus of the particular issue or task, but keeping both sides in view is usually helpful, often essential.

B. THE CORPORATION

The corporation is fundamentally different. It is literally a creation of the larger community and its laws; an artificial entity made possible by the laws of incorporation. Then, in each instance, it is a creation of a smaller community—a group of persons (or possibly other corporations)—created (“incorporated”) for some particular purpose: an abstract, imagined entity brought into being for the particular purposes of the incorporators. The corporation is instrumental in its essence, a means for natural persons to reach various ends.⁶⁶ The respect or allegiance due to the corporation—to its autonomy in using the law—could therefore be seen as less than, or at the least fundamentally different from, that

63. Pepper, *supra* note 60, at 945 (citation omitted). This section of that article further develops the understanding that “the opposite of autonomy is not connection, relation or community. The opposite of autonomy is unselected or unaccepted restraint: domination and oppression by others.” *Id.*

64. A common example: in creating or joining a corporation or other business entity as entrepreneur, financier, or employee, the client wants both, and manifests both a desire for connection and cooperation and for protection.

65. See Jamie Heller, *Legal Counseling in the Administrative State: How to Let the Client Decide*, 103 YALE L.J. 2503, 2509 (1994); *infra* Part IV.C.

66. For a comprehensive look at the topic in relation to legal representation, see generally MILTON C. REGAN, JR. & JEFFREY D. BAUMAN, *LEGAL ETHICS AND CORPORATE PRACTICE* (2005).

due to natural persons.⁶⁷ The autonomy or dignity⁶⁸ requisite to an individual is of fundamental moral and political value. Whether corporations have “autonomy” or “dignity” in the sense that individuals do—or the extent to which they ought to—are difficult questions. That difficulty could be seen as relevant to a lawyer’s obligation to the corporate entity as a client.⁶⁹ Given that the corporation is not a real person, but rather an instrumental creation—first of the polity and then of the various constituents (incorporators, directors, officers, employees)—it would seem that the lawyer’s obligation to the corporation (and the autonomy, respect, or allegiance it is due) could be, and perhaps ought to be, significantly lessened or altered. The respect due to the “autonomy” of the corporation would seem to be derivative from the respect due the persons constituting the corporation. Limits put upon the allegiance of a lawyer for a corporation—either by rules or by more general ethical understandings—would then be part of the expectations of the persons constituting and using the corporate entity.⁷⁰

Under this view we could structure an understanding—or rules—by which the lawyer’s allegiance to the corporation—what the lawyer can do for the corporation—is more limited than what the lawyer can do in serving an

67. Consider the Kantian imperative: treat persons only as ends, not as means. Immanuel Kant, *Groundwork of the Metaphysics of Morals*, in PRACTICAL PHILOSOPHY 80 (Mary J. Gregor ed. and trans., 1996) (1785). A corporation, however, is in its nature only a set of means. From this perspective, treating it as an end seems a confusion. Cf. n.51, *supra*. This is similar to a broader common confusion: money (or material well-being) and freedom from restraint are, for the most part, means not ends. We want them because they are instrumental to obtaining other things we want more.

68. See, e.g., LUBAN, *supra* note 26, at 67–95.

69. See, e.g., Susan Carle, *Power as a Factor in Lawyers’ Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 144–45 (2006); Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 1005 (2000) (“[P]art of the unified appearance of the legal system across these different spheres comes from a failure to attend closely enough to the misapplication to economic entities of ideas rooted in conceptions of justice for members of a democracy.”). This would appear to be a related insight to that of Meir Dan-Cohen quoted at *supra* note 51.

70. This proposition should not depend on one’s conclusion concerning different ways of understanding the fundamental nature or obligations of corporations. As Donald Langevoort puts it:

The easier question, for me, is whether the corporation has the right or freedom to act as anything other than a wealth-generator for its stakeholders (which to most corporations means its shareholders). This is certainly one of the great debates in corporate theory, with Milton Friedman as the canonical citation that it does not, and Frank Easterbrook and Dan Fischel as evangelists for the view that the profit-maximizing constraint extends even to compliance with the law.

Today, however, this debate has largely run out of steam. To those who believe that natural persons have moral obligations of any sort, it is difficult to accept that these obligations could be deflected by the consensual act of investment in a legal entity and delegation to professional managers. The more sophisticated view—that organizations take on characteristics separate and distinct from its stakeholders—lends itself naturally to a moral theory of distinct corporate rights and responsibilities.

Donald C. Langevoort, *Someplace Between Philosophy and Economics: Legitimacy and Good Corporate Lawyering*, 75 FORDHAM L. REV. 1615, 1618–19 (2006) (citations omitted). Some of those distinct rights and responsibilities could relate to limits on the lawyers obligation to a corporate client that differ from those due to an individual person or group of persons.

individual. Such a limitation could be included in our understanding of what a corporation is, how it is permitted to accomplish its objectives, and in the articulation of the rules for creating a corporation. In this way, the lawyer might be obligated toward serving the larger community when serving the corporation in a way she is not when serving an individual.⁷¹ The commonly accepted understanding of the degree of allegiance owed by a lawyer is quite extreme. As long as the goal of the client and the means used to reach it are within the bounds of the law, the lawyer may facilitate conduct that is harmful to innocent third parties or harmful to the larger community interest.⁷² We could require that a lawyer serving a corporation take such harm into account in determining what conduct in service to the corporation's interests is acceptable. Such an approach might be considered appropriate not just because of the artificial and derivative nature of corporations, but also because of the vastly greater power and wealth that can be acquired by a corporation in relation to that possible for individuals. As discussed above, corporations are problematic because of both this vastly greater power and because of the role-specific morality of those responsible for their conduct and management.⁷³ How one would draft such guidance, how one would conceive of and articulate such a limit, would present very difficult problems. But such problems would seem surmountable.⁷⁴ One limited requirement might be to simply require the lawyer to bring such harms and risks to the attention of the corporate decision makers and discuss them and alternatives in light of the special nature, power, risks and obligations of the corporate entity.⁷⁵

III. RULES OR DISCRETION, CHARACTER AND JUDGMENT

The professional relationship involves some risk, some potential wrongdoing, that calls up the necessity for some special structure in response—the mechanism and obligations of professionalism—in addition to the ordinary requirements of customary practices and of the civil and criminal law. Quite different conceptions of that primary risk are the focus of the first dichotomy explored above in Part I.

71. See *infra* Part IV. A., and C. for illustrations of situations where this might be appropriate. Part IV. C. 2. sketches the possibility of a heightened obligation on corporations to comply with the law and a consequent possible ethical obligation on lawyers in regard to advising corporate clients.

72. See Gillers, *supra* note 53, at 368–369.

73. See discussion *supra* Part I.C.

74. See *infra* part III. E. 3. See, e.g., Gordon, *supra* note 14, at 25–30; William H. Simon, *Organizational Representation and the Frontiers of Gatekeeping*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1069 (2011); William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453 (2006–2007); William H. Simon, *Introduction: The Post-Enron Identity Crisis of the Business Lawyer*, 74 FORDHAM L. REV. 947 (2005–2006); Robert W. Gordon, *Corporate Law Practice as Public Calling*, 49 MD. L. REV. 255, 284–88 (1990). See generally Donald C. Langevoort, *Someplace Between Philosophy and Economics: Legitimacy and Good Corporate Lawyering*, 75 FORDHAM L. REV. 1615 (2006); Donald C. Langevoort, *Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture and Ethics of Financial Risk-Taking*, 96 CORNELL L. REV. 1209 (2011).

75. For further discussion of the possibility of such counseling with clients, see *infra* Parts III.E.4. and IV.

The second dichotomy is concerned with the question of the primary ethical orientation of the lawyer. The third dichotomy focuses not on different conceptions of the risk but on the remedy. What is the best approach for structuring the obligations of professionalism and professional ethics to create a prophylaxis for that risk? Or to effectuate that primary obligation? What tools do we create for the profession or professionals to prevent or remedy the potential wrongful conduct we anticipate? There are many ways to cut or conceptualize this particular pie, but I want to focus here on a quite fundamental difference that usually lays under the surface, or is considered explicitly only as a matter of applying the particular approach that has already been assumed or chosen. Do we want lawyers primarily following rules as their guides for ethical professional behavior? Or would it be preferable for lawyers to make ethical choices in reliance on their character, virtues, and skills of moral discernment and deliberation, aside from the following of a rule?⁷⁶

On the surface it appears that rules dominate both the discourse and the practice of lawyers' ethics. A very large number of interrelated rules have been drafted and adopted,⁷⁷ and an administrative regime of multiple employees and some substantial financing operates in every state to enforce those rules on practicing lawyers. Academic writing on lawyers' ethics also focuses primarily upon the rules: what they should contain, how they are best interpreted or understood, how lawyers' understand them or are guided by them, how and if they are enforced, and so on. But it is possible that this focus on rules may be misleading. When lawyers are engaged in the actual work of practicing law and interacting with clients and others, it is probable that they relatively rarely consult the rules or think in terms of the rules.⁷⁸ In regard to actual conduct and reflection, it may well be that it is usually their judgment,⁷⁹ without explicit reference to rules, which dominates and determines conduct. It is also probably

76. It should be noted that any discussion approaching rules as potentially guiding or limiting conduct has rejected, at least implicitly, the critical legal studies critique of rules suggesting that they are completely illusory and indeterminate. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1703 (1976); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 427–29 (1985). The extent to which the critique has some truth compared to the extent to which it is an exaggeration is beyond the scope of the examination in this article of the potential use of rules for the guidance of lawyers' professional conduct.

77. There are fifty-seven primary rules in the ABA *Model Rules of Professional Conduct*, most of them containing multiple separate rules and parts. *Model Rule* 1.5 on fees, for example, has five major sub-rules, the fourth part (d) containing two distinctly different prohibitions. See MODEL RULES R. 1.5. Rule 1.13, mentioned above, contains seven major sub-rules. MODEL RULES R. 1.13. The total number of rules is thus well above one hundred, and probably somewhere in the hundreds.

78. See, e.g., Margaret Ann Wilkinson, Christa Walker & Peter Mercer, *Do Codes of Ethics Actually Shape Legal Practice?*, 45 MCGILL L.J. 645, 653–656 (2000) (finding that in a study of 154 lawyers in Ontario only 16% referred to Ontario's professional ethics handbook when answering questions about problem-solving in their practices); Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 75–76 (1999); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 392–94 (1989).

79. That judgment may be based on the ethical perceptions, habits and assumptions of the particular lawyer—in other words, on that lawyer's character and virtues. See *infra* Part III.C. Or it may result more from

true that in some areas of relatively well-understood rule-backed obligations, lawyers often function on the basis of a guide that resembles a principle more than a rule. For example, lawyers generally understand, feel bound by, and follow the obligation of client confidentiality, but they do so on that vague, general level of understanding—at the level of a principle or standard—rather than on the precise terms of the rules. They navigate the space and tension between the very broad and inclusive obligation of confidentiality understood by the profession and articulated by the rule (“shall not reveal information relating to the representation of a client”) and the broad permission to reveal and use information in service to the client (“unless . . . disclosure is impliedly authorized in order to carry out the representation”) on the basis of their day-to-day intuition and judgment, usually unarticulated and not reflected upon, and without reference to or conscious awareness of the particular terms of the rules.⁸⁰ Disclosures not in service to the client will be avoided (if noticed), but likely without looking up the rules, except in quite extraordinary situations where there is some strong reason suggesting disclosure. Similarly, lawyers are aware of and feel obligated by the general obligation to avoid conflicts of interest with clients, but they rarely consult the particular terms of the quite dense set of rules that govern conflicts.⁸¹ Thus, rules appear to dominate, as would be consistent with one’s intuition concerning lawyers, but in actual practice the lawyer’s judgment and character (often guided by general principles) may well be the more frequent determinant of conduct.

It should also be noted that any set or regime of rules can be said to have made the decision between a rules based decision and a decision based on character,

context, happenstance, pressures, and interests of the lawyer and those effected by and witnessing the conduct or decision. *See infra* Part III D.6. Or from a combination of both.

80. MODEL RULES R. 1.6(a). Note the remarkably broad scope of required confidentiality; there is no requirement that the protected information be actually secret, confidential, or generally not known; no requirement that it come from the client, or that there be a request for confidentiality. The Restatement, to the contrary, excludes “information that is generally known.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (2000).

William Simon’s theory of lawyers’ ethics is an argument for principles in general rather than rules (preferring “non-categorical” decision-making by lawyers), but he tends to be thinking of general legal principles (“justice”) rather than ones more closely connected to the rules that I am referring to here. *See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS 9 (1998) [hereinafter SIMON, PRACTICE OF JUSTICE].

[T]he lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice The essence of this approach is contextual judgment—a judgment that applies relatively abstract norms to a broad range of the particulars of the case at hand.

WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS 9 (1998) [hereinafter SIMON, PRACTICE OF JUSTICE]; *see also* Simon, *Role Differentiation*, *supra* note 56, at 1001–03; Pepper, *Integrating Morality*, *supra* note 56, at 1021–24; Simon, *Ethical Discretion*, *supra* note 56, at 1090–91.

81. On the occasions when large firms consult those rules, they frequently do so through their ethics committees, ethics partner, or general counsel. In such instances a group of lawyers are consulting the rules through the proxies designated by the firm for that function.

judgment, and discretion on a situation by situation basis (or, more precisely, category of situations by category of situations). In those situations in which a rule seems best, a rule has been promulgated; in those situations in which discretion seems more likely more often to reach the better result, a rule has not been formulated, leaving the particular decision-maker free to decide. For example, Rule 1.2(a) gives the client authority to decide objectives, but requires the lawyer only to “consult” with the client as to means. Thus, in the generality of matters, it is in the lawyer’s discretion whether or not to have the client decide a question of means.⁸² The final two sentences of the rule however, provide a brief list of questions of means in which the lawyer “shall abide” by the client’s decisions, substituting a rule for the lawyer’s discretion. For example: “A lawyer shall abide by a client’s decision whether to settle a matter.”⁸³ Thus this decision can be made at the level of the specific: should there be rules for confidentiality? For conflicts of interest? Or at even greater levels of particularity: should there be a rule or discretion in regard to confidentiality in situations of possible serious harm to third parties? The following discussion focuses more on the larger scale question of which might be, in general, more appropriate for the situation of lawyers. Even assuming one decided that discretion was more appropriate, in general, there would likely be a few situations where it would be preferable to have a rule. And, as just noted, even in the current situation of a regime of lawyers’ ethics dominated by a rules based approach, there are significant areas left for discretion.⁸⁴ Another example is that almost all of the exceptions to the obligation of confidentiality are expressed in permissive language, thus leaving revelation, or not, to the discretion of the lawyer. Rule 1.6(b), the prefatory passage to a list of six numbered exception, begins: “A lawyer *may* reveal”⁸⁵ Thus, there will always be some matters left to discretion, and very likely at least some rules. The question pursued here is which should be primary, which should be the generality, as the guide for most decisions of lawyers’ ethics—rules or discretion guided by judgment and character?

What follows is a brief summary of the strengths and weaknesses of rules followed by a similar discussion concerning character and discretion, each examined in the context of lawyers’ ethics.

82. This, of course, can often be a consequential decision. A student working in a criminal defense clinic told me of going to trial in a case where everyone thought on the facts they should win—the evidence was very weak and disputed. Her supervising professor suggested during jury selection disqualifying a prospective juror, saying: “He’s a convict and he’s a leader.” They were consulting with the client on jury selection, however. Having heard the supervisor’s opinion, the defendant client said he liked that juror and wanted him on the jury. The lawyers under Rule 1.2 had the discretion to make a contrary decision, but they exercised their discretion to follow the client’s preference. The man became the foreman of the jury, and the jury, to everyone’s surprise, convicted.

83. MODEL RULES R. 1.2(a).

84. See Bruce A. Green & Fred Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 276–77 (2006).

85. MODEL RULES R. 1.6(b) (emphasis added).

A. THE SUBSTANTIAL ADVANTAGES OF RULES⁸⁶

Rules are relatively *accessible*. When there is an issue as to how to act, which alternative to take, if there is an applicable rule, you can look it up. There is no need to think through the situation as deeply or as widely as in the absence of a rule; no need to find out more policy related facts, seek out other opinions or consult with either those with expertise or good judgment. No need for research beyond looking it up. There are, of course, often questions of interpretation and application—the normal grist for the lawyer’s mill. In many situations this will involve further fact gathering and investigation, the exercise of judgment in application, all of which can be quite problematic or elaborate, as first year law students come to understand. Still, all this is likely to be far more limited, far less elaborate and difficult, than the wide-open field—the far larger range of possibilities—encountered in the absence of a rule.

Rules are *predictable*. Because they are written and relatively brief and simple, the required conduct can be determined in advance. This is to some extent a corollary of the accessibility of rules.

Because they are predictable and accessible, rules allow for *coordination and cooperation* among varied persons and groups.⁸⁷ Reliance among strangers and across relatively long periods of time becomes possible. Knowing the rules of contracts and corporations, for example, allows for complicated structures of cooperation among large groups of persons and organizations.

Also because they are accessible and predictable, rules provide a *barrier to arbitrary decision-making and to arbitrary authority*. Rules provide a reason other than impulse, self-interest, convenience, whim or intuition on the part of the decision maker. They also provide the decision-maker with shelter from the exercise of arbitrary authority by others.

Rules are thus also *authoritative and reliable* in the sense that they rest on something relatively objective and in place prior to the particular occasion for their use. They do not rest just on the opinion, interest, impulse or intuition of the decision maker. They also do not rest on the opinion, impulse, intuition, or arbitrary decision of some authority over the decision-maker. It is possible, of course, for the rule itself to have been based upon the interest, impulse or arbitrariness of the rule maker.

Rules are *efficient*. The analysis underlying the framing of a rule or set of rules can be done once, and need not be replicated every time a decision presents itself. The problem can be thought through and investigated thoroughly once; requisite

86. Compare FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (2d ed.1993) (providing an extended consideration of, and justification for, the use of rules), with LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW (2001) (providing a more skeptical exploration of the same questions).

87. See SCHAUER, *supra* note 86, at 164–66; WENDEL, FIDELITY, *supra* note 15, at 106–07.

or helpful research and consideration can be done once. Each decision-maker need not do the work again each time; need not invest time and effort in research and analysis for all the factors relevant to this category of situations. A rule once framed serves for multiple decisions until it is revoked or reframed. Time and effort are saved.⁸⁸

Rules allow for *higher quality* in the rule itself through higher quality in the process by which it is created than is likely to occur on the situation-by-situation occasion of each individual decision. The rule can be drafted by experts with the appropriate information and preparation, or such experts can contribute to the process. Collective wisdom and collective process can contribute. Creation of the rule can be an occasion for reasoned deliberation concerning what the obligations and responsibilities ought to be under the circumstances. The rule and its bases and reasons can be thought through and considered carefully by those with various forms of relevant knowledge and interest.

Rules can be created through *fair procedures* (in turn created by fair rules for creating such procedures). Since rules are efficient in that they only need to be created once, but then are to be used in large number of subsequent applications, there is justification for investing substantial time in creating fair and rational procedures for constructing and adopting the rules.

As a result, the rule itself is more likely to be seen as *fair and just* if the process for creation and application are seen as transparent and fair. In addition rules offer the promise of uniformity of application and hence the appearance of *equal treatment*.

B. THE SUBSTANTIAL DISADVANTAGES OF RULES

Rules are *generalizations and approximations*. Inevitably they will be both under-inclusive and over-inclusive in relation to their purposes. The infinite variety of human behavior and interaction, the difficulty of prediction, and the very nature of generalization mean that the results dictated by a rule in any particular situation may well be wrong. Frequently wrong even as judged by the purposes or intentions underlying the rule itself; or wrong from a broader, more general perspective than the specific purposes or function of the rule. The fifty-five mile per hour speed limit on a particular stretch of highway at a particular time may be too high or too low in light of optimum safety and efficiency. The obligation to comply with the terms of a legally enforceable contract may turn out to be, under the particular circumstances, unfair or unjust to one of the parties, either in general or from the perspective of the parties at the

88. "It is a profoundly erroneous truism . . . that we should cultivate the habit of thinking about what we are doing. The precise opposite is the case. Civilization advances by extending the number of important operations which we can perform without thinking about them." SCHAUER, *supra* note 86, at 146 n.14 (quoting Alfred North Whitehead).

time of entering into the agreement.⁸⁹

Rules are also *rigid and relatively mechanical*—they bend relatively little to the particular circumstances. Rules prevent recourse to all the particular relevant facts, values and intentions making up the situation presenting the need for a decision. That is the cost attendant to the advantages of rules listed above. We have all experienced the wooden, unthinking bureaucrat applying a rule where it makes no sense. In such contexts rules do not seem so much a barrier to arbitrary and unfair decision-making (see part III. A. above) as arbitrary and unfair in themselves. From this perspective, rules entail the added significant problem of the decision-maker avoiding responsibility: “The rule made me do it.” And yet this is frequently part of the purpose of many rules or regimes of rules: to take discretion away from the persons making the immediate decision and applying the rule. The judgment of the rule-maker is preferred over that of the on the spot decision-maker.⁹⁰

The cost of the multiple potential benefits of rules listed above is that they frequently get the answer, the result of application of the rule, *substantively wrong* given the full context of any particular situation. In regard to rules, the values of procedure and substance are thus often in conflict: the procedure of deciding by rules has many advantages, but not infrequently the particular substantive result may well be wrong from a perspective more broad and inclusive than that of the rule itself. Because moral questions (including questions of professional ethics) are often too complex and multifaceted to lend themselves to rule-bound solutions, they are particularly subject to this difficulty.⁹¹

Lawyers are particularly well situated to experience and appreciate this tension. They work with and are experts in the use of rules and thus are likely to have direct and repeat experience of the limits of rule application to specific circumstances. When working with the particular application of a rule, they are

89. “Rule-based decision-making thereby entails an inevitable under- and over-inclusiveness, and accepting a regime of rules necessitates tolerating some number of wrong results—results other than those that would have been reached by the direct and correct application of the substantive justifications undergirding the rule.” SCHAUER, *supra* note 86, at 135 (summarizing the first six chapters of the book). Or, as Alexander and Sherwin put it: “[T]his bluntness of rules is therefore both morally desirable and morally problematic . . . [T]he results they dictate will diverge from those that particularism, applied correctly, would dictate.” ALEXANDER & SHERWIN, *supra* note 86, at 35.

90. SCHAUER, *supra* note 86, at 150, 151–55 (“Often we fear that some class of decision-makers, whether through unconscious bias or conscious ill-will, cannot be trusted to take certain types of factors into account.”). Some not insignificant number of lawyers may not be trusted to resist the temptation and opportunity to exploit the vulnerability of their unsophisticated individual clients. Others might not be trusted to resist the rewards and pressures presented by their powerful, often corporate, clients to assist in conduct unjustifiably harmful to third parties or social interests. See discussion *supra* Parts I.A–C.

91. See, e.g., Stuart Hampshire, *Public and Private Morality*, in PUBLIC AND PRIVATE MORALITY 48–53 (Stuart Hampshire ed., 1978); Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 909 (1996); Reed Elizabeth Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst?*, 1 GEO. J. LEGAL ETHICS 311, 328–31 (1987); Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J. L. ETHICS & PUB. POL’Y 25, 40 (2000).

likely to know the full facts and relevant nuances of a current situation far more than a remote rule-maker deciding far in advance and without knowledge of all the particularities. The lawyer is thus in a position to appreciate the frequent discontinuity between the purposes of a rule and its effect in an actual particular application. Lawyers are likely to understand the nature of rules as rough generalities made in advance for general purposes, and therefore not infrequently leading to “wrong” results (even in light of those purposes) in any given instance.⁹²

C. JUDGMENT, CHARACTER AND THE EXERCISE OF PRACTICAL REASON AND DISCRETION

If rules too often reach the wrong substantive conclusion; if life is too complex for rules to provide sufficient ethical guidance; is there a more promising basis for the ethical choices entailed in the practice of law? If we imagine for a moment a lawyer with both good judgment and good character, would ethical choices based on the discretion of such a lawyer more reliably reach the right ethical result than choices derived from and bound by a set of predetermined ethical rules? Would making an “all things considered” judgment on the basis of educated practical reason work better than a decision based on the applicable rule or rules?

A combination of good judgment and good character is what is usually meant by neo-Aristotelian thinkers when they discuss practical wisdom or practical reason. It is based on a combination of experience, mentoring, and knowledge.⁹³ Character in this usage means a combination of values and virtues that have been acquired as much from experience and practice as from study, and that as a result of experience and practice the exercise and application of these values and virtues has become a matter of habit. Judgment means the ability to reason and intuit one’s way to a conclusion based on a combination of experience, virtues, values and knowledge (exercising a combination of both rational and emotional intelligence). In this conception, good lawyers (good persons) exercising educated ethical deliberation would be able to deal with the complexity of human interaction and the multiplicity of relevant factors far more flexibly and

92. It is in this aspect of rules (and, thus, most law) that Professor Wendel’s conception of law misses an important point. The moral reason for not applying a particular rule or law often has nothing to do with reopening or rearguing its basic premises, justifications, or compromises. It may well be that with all those directly in mind, *in this particular instance the rule doesn’t work* to serve those premises, justifications or compromises. Both the fifty-five miles per hour speed limit and the unfair contract, mentioned three paragraphs above would be examples of such situations. See Pepper, *More Than the Law*, *supra* note 59, at 699. I believe the same criticism applies to the position of Professor Dare in TIM DARE, *THE COUNSEL OF ROGUES?: A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER’S ROLE* 103–08 (2009).

93. See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 185–88, 272 (1973); JEFFREY STOUT, *ETHICS AFTER BABEL: THE LANGUAGES OF MORALS AND THEIR DISCONTENTS* 269 (1988); Hampshire, *supra* note 91, at 38–39.

effectively than lawyers constrained by rules. Lawyers under this model would have developed the character and the virtues necessary for them to perceive ethical choices as they arose in their practices.⁹⁴ They would understand the values and appropriate role of the profession under the particular circumstances, and have the ability to deliberate and come to an ethically appropriate conclusion as to their conduct.

It is an attractive vision. It is seriously, movingly, and often persuasively portrayed in literature and popular culture.⁹⁵ A different branch of neo-Aristotelian ethics explores and attempts to analyze this as narrative ethics—the ethics of stories.⁹⁶ But can it work well enough and reliably enough in actual practice to supplant rules as the primary day-to-day guide for lawyers? There are at least six serious difficulties to be anticipated in a possible shift from rules to character, discretion and practical reason.

D. SIX PROBLEMS WITH DISCRETION AND PRACTICAL REASON

1) The first difficulty is that lawyers may not be well prepared or well-educated for such analysis and deliberation. Neither law school nor most undergraduate experience is likely to focus on ethics. Very few lawyers are undergraduate philosophy or psychology majors; not many have taken a college course in moral philosophy or moral psychology, or remember much about it if they did. Most law students are not trained in reasoned deliberation about questions of right and wrong (that is, moral philosophy or ethics). The required ethics or legal profession courses may touch on this, and a few may attempt to go into some depth, but the usual course focuses on the rules, and on analysis of and

94. The ability to see—to notice an ethical question—is a key moral virtue; you have to notice an ethical question before you can think about it. See Thomas L. Shaffer, *The Legal Ethics of Belonging*, 49 OHIO ST. L.J. 703, 706 (1988); Stephen L. Pepper, *How to do the Right Thing: A Primer on Ethics and Moral Vision* in GOOD BUSINESS (James O'Toole and Don Mayer, eds., Routledge (2010)). But there are often built in difficulties to this ability. See sources cited *infra* note 115 (exploring the psychology of moral decision-making).

95. See William H. Simon, *Moral Pluck: Legal Ethics in Popular Culture*, 101 COLUM. L. REV. 421, 421–25, 431–34 (2001). See also Carrie Menkel-Meadow, *Can They Do That? Legal Ethics in Popular Culture: Of Character and Acts*, 48 UCLA L. REV. 1305, 1315–25 (2001) (examining the popular portrayal of our “lawyer heroes” who “seek to serve the ends of justice” and how the portrayal has changed over the last fifty years). Menkel-Meadow concludes that in “movies and on television good lawyer character just as often demonstrates a departure from the rules of law in the name of a greater justice, as it does conformity to it.” *Id.* at 1325.

96. See, e.g., Robert Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of the Remains of the Day*, 105 YALE L.J. 177, 192 n.82, 217 nn. 206 & 209 (1995); Thomas Shaffer, *The Legal Ethics of Belonging*, 49 OHIO STATE L. J. 703, 703 (1988). See generally Paul LeBel, *The Stewardship of Lawyering: Lessons From a Visit to Wendell Berry's Port William*, 34 LOY. U. CHI. L.J. 815 (2003). Professor Shaffer extols narrative ethics, in part, as follows:

I find it useful to read, think and talk about stories. Stories *display* morals more than announce them. They involve quandaries, but they put quandaries in a narrative human context. The context cuts the quandary down to size. A story helps give the quandary an appropriate amount of weight, that is, the weight it has in life.

Thomas Shaffer, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS xxix (1985).

application of those rules. To the extent the required courses are branching out at some schools, they seem to be moving toward a descriptive sociology of the diversity of possible practice settings and constraints more than a turn toward ethics or practical reason.⁹⁷ Because ethical deliberation is difficult (and often awkward or pressured under the practical circumstances of lawyer-client relationships) and lawyers are neither trained for nor experienced in it, many if not most may be reluctant to enter into the effort. They may well prefer the simplicity of rules. In addition, such analysis is time consuming, and time remains most lawyers' stock in trade. Lawyers are likely to be reluctant to bill for time spent in ethical deliberation and clients resistant to paying for it. It is possible, however, that this concern is exaggerated. Ethical analysis is to some extent habitual and intuitive to each of us, part of our common culture. What we are considering here is making it somewhat more open, explicit and reasoned in the context of lawyer decision-making. And as noted in sub-section (4) below, there is a great deal of ethical consensus in our culture.

2) The second difficulty is that character, at least as understood from a neo-Aristotelian view of ethics (more commonly referred to as "virtue ethics"), requires a community and an established, functioning practice of that community from which character and professional practical wisdom are to be developed and nurtured.⁹⁸ Many would observe that lawyers in the U.S. for the most part probably do not have a sufficient community or a sufficient "practice" to support an ethics of character and virtues.⁹⁹ At least in large firm elite practice, it has been argued, high billable hour requirements and high salaries have created a culture that is too destructive to the mentoring relationships and the values necessary to develop, educate and support character.¹⁰⁰ This may be part of the reason why

97. Leading examples are new required first year courses at the University of Indiana and the University of California, Irvine. For a description of the Indiana course, see MAURER SCHOOL OF LAW DOCTOR OF JURISPRUDENCE (JD), <http://law.indiana.edu/degrees/jd/curriculum.shtml> (last visited March 29, 2015); for the Irvine course, see Ann Southworth & Catherine L. Fisk, *Our Institutional Commitment to Teach about the Legal Profession*, 1 U.C. IRVINE L. REV. 73 (2011). There is also a nascent movement toward incorporating a focus on student development of a professional identity, in the direction of practical wisdom, in some law schools. See, e.g., Daisy Hurst Floyd, *Practical Wisdom: Reimagining Legal Education*, 10 U. ST. THOMAS L.J. 195 (2013); Neil Hamilton & Verna Monson, *Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)*, 9 U. ST. THOMAS L.J. 2 (2011).

98. MACINTYRE, *supra* note 93; STOUT, *supra* note 93.

99. See, e.g., Douglas N. Frenkel, *Ethics: Beyond the Rules—Questions and Possible Responses*, 67 FORDHAM L. REV. 875, 879–81 (1998); Pepper, *Counseling at the Limits*, *supra* note 33, at 1608–09 (describing Thomas Shaffer's experience of being mentored in an elite law firm decades ago, and how that may well be a far less likely experience now and in more recent decades); Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 729–44 (1998).

100. See Patrick J. Schiltz, *On Being a Happy, Healthy, Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 915–18 (1999). For a critique of a similar ethos at Goldman Sachs, see Greg Smith, Op-Ed., *Why I am Leaving Goldman Sachs*, N.Y. TIMES, Mar. 14, 2012, at A27 (critiquing the focus on profit from rather than service to clients).

some have turned to specific practice areas—say securities or family law—as the appropriate locus for the creation of lawyers’ ethics.¹⁰¹ Not only may it allow for more specific and appropriate rules, but the smaller scale and the common practice context may allow for a more genuine community to support the development of character, virtues, judgment and practical reason. As we are reminded by the behavior leading to the 2008 economic collapse and to the prior debacle of the Enron era, lawyers serving large corporations may well work in a culture of greed and exploitation of the vulnerabilities of others.¹⁰² That seems unpromising soil in regard to developing a culture to support an ethics of character and discretion. If we move the focus to practice outside of the large elite firms, there may be less pressure, but probably not less temptation (just less sizable temptation). There does not seem to be much to indicate that lawyers in this sector of the profession¹⁰³ have the developed communities and “practices” in the neo-Aristotelian sense sufficient to support the necessary development of character, virtues and judgment to any greater extent than have large firms. We could of course rely on character in a more generic and less Aristotelian sense—what we ordinarily mean by character in common usage. This, however, leads to a large problem in regard to variety of result, discussed immediately below.

3) The third problem is that of moral pluralism. As noted above, law is a public good intended to be available to all, and the function of the legal profession is to provide access to that public good. The law any particular person or organization gets access to should be the same law, relatively neutral and uniform across the spectrum of lawyers. It ought not depend on the particularities of the lawyer one happens to consult.¹⁰⁴ If there is no common professional community and therefore no common ethical tradition to guide lawyers in providing access, however, a method that relies on the varied character, virtues, and judgment of individual lawyers will eventuate in access to the law being equally varied. For example, one client may have a lawyer willing to cross-examine to cast doubt on

101. See Leslie Levine & Lynn Mather, *Why Context Matters*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* (Leslie C. Levin & Lynn Mather, eds., 2012); Dana A. Remus, *Out of Practice: The Twenty-First Century Legal Profession*, 63 *DUKE L. J.* 1243, 1252–56 (2014) and sources cited there.

102. See, for example, reports of the Lehman Brothers quarterly financial statement manipulations prior to the bankruptcy (involving “materially misleading” accounting practices to hide debt), which must have been facilitated to some extent by lawyers. See Pepper, *More Than the Law*, *supra* note 59, at 702 and sources cited there.

103. Cf. HEINZ, ET AL., *supra* note 10, at 95–97.

104. At least one scholar disagrees on this point:

I do not think it all bad that the kind of advice clients get depends to some extent on the chance of whom they choose or have chosen for them as lawyers. That kind of chance happens all through life with the chance of whom we wind up with as parents, children, priests, ministers or rabbis, teachers, friends, and leaders.

Andrew L. Kaufman, *A Commentary on Pepper’s “The Lawyer’s Amoral Role”*, 1986 *AM. B. FOUND. RES. J.* 651, 655 (1986).

the truthfulness of a witness known by both lawyer and client to be telling the truth, while another client's lawyer in the same situation may well find such conduct morally unacceptable under the circumstances and not pursue that course of cross-examination.¹⁰⁵ The legal process available to different clients then has become unequal; it will vary substantially with the character and ethics of the particular lawyer. The application of rules, while certainly not uniform, is likely to be more uniform than is the discretion and judgment of individual lawyers.¹⁰⁶ But it must also be remembered that having more uniform results may not, in the context of rule application, mean the results are better.¹⁰⁷ Judgments reached on the character, judgment and deliberation of different lawyers might vary, but they might also be better moral decisions for the most part.

4) The fourth problem is the frequent lack of a larger community of cohesion and support for an ethics of character and judgment (practical wisdom). Not only is there no reliable *professional* community to support character ethics in the neo-Aristotelian sense, but also for many lawyers and law students there is also no external community to develop and support an ethics of character and virtue. This problem can be exaggerated, however. I have argued that there is more ethical consensus than is commonly recognized.¹⁰⁸ On the political hot-button issues there certainly is not, but that is why they draw so much attention, why they are, or become, the "wedge" issues that divide us. But on the ordinary questions of everyday morality there is generally consensus: all other things being equal, we should repay our just debts;¹⁰⁹ we should avoid harm to innocent persons absent some sufficient justification for such harm; truthfulness is ordinarily better than deception, absent some particular justification; and so on. For any morally difficult situation there may be differences of opinion or conclusion as to what is sufficient justification. But many situations are not difficult. And for those that are, having a consensus agreement on the foundation values and basic moral obligations moves one far down the path toward an agreed upon answer.¹¹⁰ So while many or most lawyers may not be deeply connected to a

105. Pepper, *Ethics in the Gap*, *supra* note 20, at 189–90 (1998).

106. Some might counter that sub-communities of lawyers—family law practitioners or securities lawyers—might provide a community for this function. But it seems unlikely that such groups have a sufficiently cohesive and coherent "practice" to provide consistent ethical guidance.

107. See discussion *supra* Part III.B (on the disadvantages of rules).

108. See Pepper, *Ethics in the Gap*, *supra* note 20, at 197–99.

109. The disagreement over the moral acceptability of strategic mortgage default appears to depend on whether one believes all other factors are equal: "the expectation of the parties may not have included further repayment beyond giving up the home upon default, and there may be far less than clean hands on the part of the financial institutions that initiated and now hold the debt." Pepper, *More Than the Law*, *supra* note 59, at 701 nn.49–50.

110. Reasoning toward such answers in specific situations, taking into account previous similar or analogous situations and all relevant factors, is a method of philosophical analysis sometimes categorized as casuistry. See, e.g., ALBERT JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* (1990). Telling the story of the National Commission for the Protection of Human Subjects of Biomedical and

community which provides a moral tradition or moral support, there remains a large reservoir of general community agreement on most moral issues: don't cheat; don't deceive; don't cause needless pain; and so on.

5) The fifth difficulty is that lawyers are not disinterested in regard to their clients. Lawyers are making a living from their work for clients, and the amount may vary to a significant extent as a result of the ethical choices made by the lawyer. In addition, the lawyer is to a greater or lesser extent involved in the life of the client and identified with the client. The lawyer's work life is intertwined with the client's concerns: in terms of emotions and hassles, the lawyer is not objective or removed. All of this makes the exercise of good judgment—practical wisdom—more difficult. Lawyers' entanglement with their clients and the dependence of their own financial interests to some extent on their clients tend toward making their ethical vision and decisions less reliable. It is difficult to think clearly and disinterestedly when we are in fact connected and interested; the human capacity for self-deception and for not noticing is clearly substantial and often difficult to overcome.¹¹¹ This is why we seek advisors less involved in a situation than are we; why we often seek the guidance of friends. And this circles us back to the fundamental reasons underlying the concept of professionalism developed in Part I above. The lawyer sometimes will be tempted to maximize income from service to the client rather than put the client's interests first (that is, exploit the client's vulnerability). Or, alternatively, the lawyer sometimes will be swayed by the powerful client to facilitate conduct harmful to an innocent third party (or assist in other morally dubious conduct) in service to that client's financial interests. The better the client does financially, the better it is likely to be financially for the lawyer. The more the lawyer is perceived as helpful and "on board," the less the lawyer is the squeaky wheel, the more positively the lawyer is likely to be perceived by the client. This also takes us back to one of the reasons for selecting a rule or a regime of rules rather than considering all the factors involved at the time of decision: in many situations we trust the person who will be making the on the spot decision less than we trust the more removed rule-maker. It may be helpful in resisting assistance in wrongdoing for the lawyer to be able to say: "The rules of my profession prohibit this; I can't do it."¹¹² We may prefer that lawyers be bound in advance rather than subject to all the pressures of the moment. Similarly, when it is the client who is vulnerable, we may prefer that lawyers be bound in advance not to reveal their clients' confidences to serve their own

Behavioral Research (1975–78), they note that consensus on the correct ethical conduct was frequently possible, although agreement as to underlying more abstract philosophy was not—that is, the right answer often seemed clear even without agreement as to the reasons that led to that conclusion.

111. Cf. Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. (forthcoming 2015) (manuscript at 19–24, 35–37) (on file with author); Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941 (2007); Dana A. Remus, *supra* note 101, at 1281–82.

112. As noted at the conclusion of Part I.B., *supra*, some lawyers perceive this as the primary purpose of the rules of legal ethics—providing the lawyer with a justification for refusing to assist in wrongful conduct.

or the community's interests; we may prefer that lawyers be bound to avoid conflicts of interest, even those unlikely to actually harm the client.

6) The final problem is applicable both to a character/discretion based ethic and a rule based ethic. The psychology research on ethical perception, conduct, and decision-making suggests that they are usually not based on rules or principles, but also are not based on character and deliberation.¹¹³ Ethical conduct and decisions appear to be heavily influenced by context and surroundings, and by immediate, unreflective perception and intuition rather than by rules, principles, character or thinking the matter through in anything resembling a deliberative process.¹¹⁴ For example, in one experiment subjects were put in a situation where they were walking across a campus with a task to accomplish. When they were late and in a hurry, they were very unlikely to stop to assist someone lying in a doorway moaning and in visible distress. They were unlikely to even notice them. When the context was not hurried or stressful, they were far more likely to stop and help. If one person is filling out forms in a room and what appears to be smoke starts coming in through a vent, more than seventy per cent of subjects will find the person in authority to point out the problem. If two other subjects are in the room and do nothing—give no appearance of being concerned about the smoke coming in—the number of subjects who attempt to do something drops to ten percent. These experiments suggest that character, rules or deliberation have far less influence on conduct than context.¹¹⁵ To the extent this is an accurate description, it presents a bleak picture for those of us interested in “ethics” in the traditional understanding: rational deliberation about moral questions. It is also somewhat bleak for those attempting to teach professional ethics in the required course in the law schools, and for those attempting to set up corporate ethics and compliance programs or similar programs for law firms and lawyers. At the least it presents a significant challenge.

E. BOTH SIDES NOW? FOUR NON-EXCLUSIVE POSSIBILITIES FOR RESPONDING TO THE RULES VERSUS CHARACTER DICHOTOMY

There are thus significant strengths and weaknesses for a regime of lawyers' ethics based on rules and, alternatively, for one based on discretion, character and

113. See, e.g., Fiery Cushman, Liane Young & Marc Hauser, *The Role of Conscious Reasoning and Intuition in Moral Judgment*, 17 PSYCHOL. SCI. 1082 (2006); Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001).

114. See, e.g., Perlman, *supra* note 111; Regan, Jr., *supra* note 111; Bradley Wendel, *Ethical Lawyering in a Morally Dangerous World*, 19 GEO. J. LEGAL ETHICS 299, 299–307 (2006) and sources cited therein; Haidt, *supra* note 113.

115. See JOHN MICHAEL DORIS, LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR 32–35 (citing BIBB LATANE & JOHN M. DARLEY, THE UNRESPONSIVE BYSTANDER: WHY DOESN'T HE HELP (1970) (artificial smoke experiment) and John M. Darley & Daniel C. Batson, “From Jerusalem to Jericho”: A Study of Situational and Dispositional Variables in Helping Behavior, 27 J. PERSONALITY & SOC. PSYCHOL. 100 (1973) (hurried passerby study)).

practical wisdom. A rule flags the moral choice presented and directs a clear decision. But, not infrequently, the indicated choice will be wrong—wrong both from the perspective of ordinary “all things considered” morality, and often from the perspective of the background values and intentions underlying the rule. Professor Schauer presents a helpful summary for which might be the best choice for directing lawyers’ ethics.

Where decision-makers are likely to be trusted, and where the array of decisions they are expected to make will contain a high proportion of comparatively unique decision-prompting events with serious consequences if they are decided erroneously [both often the case for lawyers’ ethical decisions], we might expect the rule-based mode to be rejected, or at least its stringency tempered. But where there is reason to distrust a set of decision-makers with certain kinds of determinations [unfortunately, also true for lawyers], and where the array of decisions to be made seems comparatively predictable, errors of rule-based under- or over-inclusion are likely to be less prevalent than decision-maker errors, and consequently the arguments for rules will be stronger.¹¹⁶

Because aspects of the situation of lawyers are found on both sides, we are left with no clear indication for lawyers’ ethics. We will briefly explore four possibilities.

1. MAINTAIN PROFESSIONAL RULES

In light of the advantages of rules and the difficulties of discretion, the profession could maintain the status quo of a rule-oriented regime. At least in regard to individual clients the professional model has descriptive accuracy and thus persuasive power—there appears to be a real need for client-protective rules. Clients (and patients) are vulnerable and dependent upon professionals in regard to very important parts of their lives. The professionals are making a living from that dependence and therefore are tempted to exploit that vulnerability. Strong client (and patient) protective rules therefore seem justified. With powerful clients this conclusion does not fit as well. The professional model and traditional understanding do not comport with the quite different nature of the risk,¹¹⁷ and perhaps as a result, sufficient rules have not yet been developed to deal with the risk of the powerful corporate client. Or perhaps elite lawyers, who have tended to dominate in the drafting of the rules, perceive the risks of the other hemisphere of the profession more clearly than they see the risks in their own.¹¹⁸ Even in light

116. SCHAUER, *supra* note 86, at 152. In this section of the book Professor Schauer is exploring the ways rules allocate power. Rules “allocate power to the past and away from the present,” SCHAUER, *supra* note 86, at 160, but they also “allocate power horizontally, determining who, at a given slice of time, is to determine what.” SCHAUER, *supra* note 86, at 161.

117. *See supra* Parts I.B., C., and E.2.

118. *See, e.g.*, Philip Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244, 245–46 (1968). As Shuchman quite persuasively articulates, we can also see

of the many disadvantages of rules, perhaps they remain the appropriate choice for at least some aspects of the situation of many lawyers.

2. IMPROVE THE RULES WITH PARTICULARITY

An effort could be made to foresee with greater clarity the kinds of situations in which current rules might fail or be inapplicable, and draft further rules or refinements to cover these situations—an effort by expansion of the specifics of the rules to lessen occasions of error. The 2002 amendments to the *Model Rules* are an example of such an effort: the ABA added specific exceptions to the obligation of confidentiality where the conclusion had been reached that confidentiality was over-inclusive (that is, was protecting that which should not be protected), and also added greater detail to the provisions on conflicts of interest.¹¹⁹ In this effort, we try to find the ways in which a particular rule could fail and draft caveats, exceptions, or sub-rules to deal with the anticipated failure. Some improvement may result. Ultimately, however, this direction leads to futility.¹²⁰ The various case and problem books developed for the required legal profession and ethics course in law school present situation after situation which straddle the rule lines, fall in gaps, or otherwise exemplify the failure of rules to provide a precise answer. One simply cannot anticipate all the situations that may arise. And, to the extent the effort is made, the resulting ramification and complication of the rules are likely to make them far less accessible. Moreover, rules for lawyers are already far more extensive than those for other professions.

3. HAVING IT BOTH WAYS—MAKE THE RULES THEMSELVES TO SOME EXTENT DISCRETIONARY

As we do now, we could have a set of client protective rules, derived from the risk to vulnerable clients. We could also develop a set of rules designed to restrain lawyer facilitation of corporate (or other powerful client) wrongdoing. We would then be doing the best we could with rules to deal with both sides of the dichotomies explored in Parts I and II, above. The serious limitations associated with the application of rules could be significantly ameliorated, however, by

this less flatteringly as simple interest group drafting of biased rules: The BLFs (“big law firm lawyers” in Shuchman’s usage) stigmatizing the LLs (the “little lawyers”). *Id.* at 250–51; *see also* HEINZ ET AL., *supra* note 10, at 95–97.

119. MODEL RULES R. 1.6, 1.9–1.11.

120. *See* Loder, *supra* note 90, at 311–12. One is reminded of Grant Gilmore’s oft-quoted conclusion: “In Hell there will be nothing but law, and due process will be meticulously observed.” GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977). Or, as I sometimes suggest to my students, any attempt to frame a rule or principle eventually will run into the “aggregate perversity of human behavior”: given enough time and a substantial enough number of applications of the rule, a situation will arise to make it look foolish in its application and consequences, at least in that instance. The occasional instance of a rule leading to a frustratingly wrong result is often overbalanced, however, by the far larger number of situations in which the rule leads to a relatively correct result under the policies and intentions leading to its creation. Some unfortunate results under a rule do not mean the rule lacks general utility.

considering them to be strong, but rebuttable, presumptions. The lawyer would be obligated to follow a particular rule unless there were strong, persuasive reasons not to. Those reasons are likely to be of very different kinds: (a) The underlying justification for the rules might not correspond well with the actual facts in the particular situation. (For example, a large corporation may well not be vulnerable in relation to the particular lawyer, the client may well have the greater knowledge and power, and it may be the client who is attempting to exploit the lawyer.¹²¹) (b) Client conduct to be facilitated by the lawyer following the rules would involve substantial injury to innocent third parties that could not be morally justified aside from the existence of the rule. (c) Whatever—an infinitude of varying situations of human interaction can arise that are likely, at some point in time, to make a rule directed answer just plain wrong under the circumstances. The strength of the character/discretion model is that it leaves room for everything that might be significant or relevant, and the attraction of a rebuttable presumption understanding of the obligation of ethical rules is that it makes significant room for the application of character and the judgment of practical wisdom, while maintaining much of the practical, day-to-day value of rules.¹²² Ordinarily the rules would still be determinative, but character would be given room to be effective.

121. See *supra* Part I.B.; I. E. 2.

122.

In most cases, the result generated by the most locally applicable and pedigreed rule controls. But in every case that rule will be tested against a larger and unpedigreeable set of considerations, and the rule will be set aside when the result it indicates is egregiously at odds with the result that is indicated by this larger and more morally acceptable set of values.

SCHAUER, *supra* note 86, at 205 (describing and justifying what he terms “presumptive positivism”). Earlier in the book, he identifies something similar as “rule-sensitive particularism”:

This form of decision-making treats rules as rules of thumb in the sense of being transparent to their substantive justification, but allows their very existence and effect *as* rules of thumb to become a factor in determining whether rules should be set aside when the results they indicate diverge from the results indicated by direct application of their substantive justifications.

SCHAUER, *supra* note 86, at 97 (citation omitted). See also the development of a theory of “recourse roles,” in Mortimer R. Kadish & Sanford H. Kadish, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules*, (1973) (suggesting a theory of “recourse roles” that permit actors with role-authorized discretion to violate otherwise applicable rules); W. Bradley Wendel, *Three Concepts of Roles*, 48 SAN DIEGO L. REV. 547, 553 (2011) (noting that “[t]he idea of recourse roles is intended to steer a middle course . . . [T]he actor is justified in departing from the specific requirements of the role [only] in order to further the substantive underlying policies embodied in the role”). Alexander and Sherwin adopt Schauer’s usage, but do not believe the approach can work. “It is our position that this gap between the morality of issuing rules and the morality of following rules cannot be closed . . . Rules cannot usefully be given a presumptive value or ‘weight.’” ALEXANDER & SHERWIN, *supra* note 86, at 54. The example they provide is of a prohibition on swimming in a particular area due to danger from frequent strong tides. ALEXANDER & SHERWIN, *supra* note 86, at 55. While the rule in general makes sense and is a good one, “[f]or those who understand the tides or swim powerfully, and who have a reason to swim, compliance may not be the right thing to do.” ALEXANDER & SHERWIN, *supra* note 86, at 55–56. Some significant portion of lawyers may be analogous to the swimmers in their knowledge of the

The choice not to be bound by the rules would need to be supported by deliberation—reasoned analysis, preferably developed at least partly through conversation with professional peers or friends (that is by some sort of community). Those lawyers disinclined to take the time or effort for this deliberation would not need to do so; they would have the rules to rely on. Under the rebuttable presumption approach, only the lawyer able to think through and articulate a problem carefully, and then persuasively frame reasons why a rule should not apply, would have a ground for rebutting the presumption.¹²³ As noted above, lawyers are not particularly trained or skilled in applied moral philosophy and are also often not surrounded by the kind of community that sustains character. Lawyers perceiving themselves in such a situation, or simply disinclined to go through the process and effort, would have the rules. On the other hand, also as noted above, lawyers tend to understand the weaknesses of rules, and to appreciate how often they reach the wrong result. This approach would allow lawyers with this appreciation, and a willingness to think through the particular situation, to sometimes come up with a better, more justifiable solution to the particular ethical problem at issue.¹²⁴

tides (facts and applicable legal rules), but they may well also have a sufficient appreciation of the weight and presumption of the rule at issue—and of the value and usefulness of rules in general—to desist from swimming (that is, from finding the particular ethical rule defeasible under the circumstances) unless there is an unusually strong moral reason for doing so. Lawyers as a category may have more training, judgment and wisdom under the circumstances than the knowledgeable swimmer hypothesized by Alexander and Sherwin. Or they may not: that is an empirical question on which readers of this article are likely to differ. Alexander and Sherwin noted that “some people will believe they understand the tides or swim powerfully when in fact they do not.” ALEXANDER & SHERWIN, *supra* note 86, at 56. Even if this is so, and they mistakenly swim to their great risk and occasional fatality, the rule will still have been effective for the far larger portion of the population who will have been effectively restrained from the excessive danger. And the same may well be true of lawyers in analogous situations.

123. This suggestion is analogous to Karl Llewellyn’s assertions in *The Bramble Bush* concerning the ability of the able judge to distinguish away precedents while the less able judge will remain bound. KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 68 (1960). Professor Simon has framed an understanding of legal ethics based on context and broad principals rather than rules, and argued that lawyers’ training in sophisticated analysis of law and policy prepares them sufficiently for the elaborate analyses and subtle distinctions he suggests. Simon, *Ethical Discretion*, *supra* note 56, at 1090–1113. The alternative sketched here is similar to Simon’s in that both reject rules and categorical thinking (at least to some significant extent in this proposal). The proposals differ in that Simon would substitute legal principles, whereas this proposal substitutes moral reflection and judgment. Pepper, *Integrating Morality*, *supra* note 56, at 1013–1020. Simon’s approach has been criticized on the basis that his purportedly legal principles seem so broad and indeterminate that they appear to amount to his own moral analysis and practical judgment. *Id.* at 1021–25; David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 892–93 (1999); see also Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21, 24 (2003) (supporting the propositions that “the lawyer’s professional responsibility carries with it a duty . . . to exercise . . . discretion,” and “requiring that that such decisionmaking be carried out through a justifiable process of ethical deliberation”).

124. Schauer notes that “it is often the case that specialized training or education makes some people better able than the rest of us to evaluate certain factors.” SCHAUER, *supra* note 86, at 150. He also notes that “[r]ule-based decision-making is thus an application of the theory of the second-best.” SCHAUER, *supra* note 86, at 152. In theory, sometimes discretion and full-context based decision-making might be ideal. Whether lawyers

How such an approach might be incorporated into a regulatory regime raises large and difficult questions. If the rules were not followed and discipline initiated, the issue would be whether or not the presumption that the rules govern had been sufficiently rebutted under the circumstances. The exercise of discretion—based on a rebuttal of the presumption that the applicable rule was binding—would need to be defended on the basis of a thought-through choice supported by reasoned justification. The adequacy and persuasiveness of that justification could then be adjudicated on a case-by-case basis, with a common law developing to provide guidance. The focus could be as much, or possibly more, on the consultation, deliberation and reasons (the process) as on whether or not the lawyer had reached the substantively correct answer.¹²⁵

4. CLIENT CONSULTATION, CONVERSATION AND MORAL DIALOGUE—A WAY FOR CHARACTER AND VIRTUE TO FUNCTION IN COMBINATION WITH BINDING RULES

Assuming a regime consisting primarily of rules (either option 1 or 2 immediately above, roughly the status quo in regard to lawyer regulation), character, virtue and judgment could be applied through lawyer-client conversations concerning moral aspects of the situation at issue. In this way the exercise of practical wisdom could be at least partly incorporated into the lawyer-client relationship, as it often is by many lawyers now. The problem of assisting morally wrongful (but lawful) client conduct can be ameliorated by conversations concerning the moral aspects of the matter. The lawyer can clarify that: (a) the client has a choice in the matter; (b) client's planned conduct is morally problematic, at least in the lawyer's understanding; and (c) the fact that the conduct is lawful does not remove the moral problem. The lawyer would be attempting to make explicit the client's moral responsibility for the conduct and draw out the client's values. In such a scenario the lawyer has honored the primary obligation of providing access to the law but has also leavened that access with moral considerations.¹²⁶ Such an approach could (and probably should) be used in combination with that in subpart (3) above: the lawyer would consult and counsel with the client in the course of determining whether the situation is one in which defeasance of the rule at issue is appropriate.

merit the trust to choose when a rule should or should not be applied—whether to entrust lawyers with such discretion—remains unclear. SCHAUER, *supra* note 86, at 97–98, n.26; *see also infra* the examples at Part IV.C. 4.

125. Professor Simon suggests a similar development for the disciplinary process for his principle/discretion-based proposals for a regime of lawyers' ethics. Simon, *Ethical Discretion*, *supra* note 56, at 1096–1102.

126. I have developed this suggestion before, as have others. *See* Pepper, *Ethics in the Gap*, *supra* note 20, at 190–92; Pepper, *Integrating Morality*, *supra* note 56, at 1016–20; Feldman, *supra* note 91, at 886–87. *See generally* Jamie Heller, *Legal Counseling in the Administrative State: How to Let the Client Decide*, 103 YALE L.J. 2503 (1994); Kruse, *Cardboard Client*, *supra* note 20; and other sources cited *supra* note 36.

Full counseling of this kind might be required by a rule-based obligation. When the lawyer perceives the gap between law and justice to be significant, perhaps it ought to be part of the requisite ethical responsibility to clarify to the client that he or she has a moral choice in the matter.¹²⁷ That clarification ought to include not only the fact that the client has a choice in the matter, but that if injustice occurs it will be the client's primary responsibility, not the law's and not the lawyer's.

This approach addresses most directly the second risk elaborated above and briefly discussed in addressing "the corporation as client and as risk": the powerful client using the lawyer's assistance in morally wrongful conduct.¹²⁸ It is also appropriate when an individual client, powerful or not, wants to use the lawyer's assistance for arguably wrongful conduct. In addition, however, it is a real possibility for ameliorating the other primary risk: lawyer exploitation of the vulnerable client. The presence or probability of this kind of conflict of interest is the paradigmatic situation where a client-protective rule rather than discretion might appear to be appropriate¹²⁹ because the lawyer's judgment may well be affected. In the situation presented in Part I. A. above, lawyer Novak is tempted to recommend acceptance of an early \$15,000 settlement offer rather than wait for the probable \$60,000 he believes a jury will likely award later (or a later offer closer to that \$60,000), because he would get a quick payment immediately with almost no work, whereas the later, larger payment would require a great deal of his time. The right answer here is clearly counseling and consultation: the client should be fully and honestly informed of the options and probabilities by the lawyer. The difficulty for the lawyer is to be straightforward and fully honest in such a conversation, not to exaggerate or dwell on the risks of recovering nothing, for example. It is not easy to facilitate the client's choice without manipulating or directing it toward the result that favors the lawyer's interests—it requires on the part of the lawyer both counseling skills and the requisite character to want to practice law as required by the "professional" ethic—that is, putting the client's interests first.¹³⁰ It should be noted that it is also difficult to facilitate the client's choice without manipulating it toward the conclusion the lawyer perceives as morally preferable.

127. See *supra* note 105. The rules currently in effect already require some of this communication and permit the rest of it. Rule 1.2 requires the lawyer to "consult with the client as to . . . means." MODEL RULES R. 1.2. Rule 1.4 repeats that requirement and adds the obligation to "explain a matter" sufficiently to allow the client to "make informed decisions." MODEL RULES R. 1.4. Rule 2.1 *requires* "candid advice" from the lawyer and *permits* reference to "moral, economic social and political factors" in providing it. MODEL RULES R. 2.1.

128. See *supra* Part I.C.

129. For example, under the rubric suggested by Professor Schauer and quoted in the text accompanying *supra* note 116.

130. Daisy Hurst Floyd, *supra* note 97, at 209–213.

IV. APPLICATIONS

Up to this point our consideration of the three dichotomies has consisted primarily of explication with relatively little application. To illustrate how the distinctions make a difference, three situations are presented below, with each of the three dichotomies briefly considered in relation to each of the situations. The possibility of using legally available mechanisms to intentionally delay resolution of a litigated matter is considered first. We then take a look at the well-known problem of a cross examination designed to cast doubt on the veracity or reliability of a witness known to be testifying truthfully. Finally, we consider the problem of accurate legal advice in a regulatory setting that may encourage the client to violate the law. In each situation, where one falls on the dichotomies may make a significant difference in the ethical analysis and the result reached.

A. DELAYING TACTICS IN LITIGATION

1. UNDER THE FIRST DICHOTOMY (PRIMARY RISK: CLIENT OR LAWYER?)

Consider two possible situations in which delay might be useful in litigation from the perspective of the first dichotomy: where is the primary risk; who needs protection?

[First,] a man whose lifelong dream has been to open a restaurant persuades a wealthy cousin to lend him \$50,000. The man is unsophisticated in business matters while the cousin is not. The man signs a demand note for the loan and opens the restaurant. Food critics give it excellent reviews; great success is predicted. Seeing this, the cousin calls the note, then brings an action on it, intending to acquire the restaurant in a foreclosure sale. The man goes to a lawyer who sees improbable defenses on the merits and who proceeds to make a series of nonfrivolous procedural motions calculated to gain time for her client until either the restaurant's cash flow is great enough to pay the note or a bank loan can be obtained. The motions are either weak, with the lawyer expecting them to fail, or they are highly technical. [For example, one motion points out that the law requires process servers to be eighteen, but the process server in this case was one month under that age.]

[Second,] while on her way home from a job as a housekeeper, a single mother of three children is hurt by falling debris at a construction site. She suffers permanent injuries that prevent her from resuming gainful employment. She sues the construction company. Its lawyer, recognizing only weak defenses on the merits, makes [the same procedural motions with] the effect of increasing pressure on the financially desperate plaintiff to settle for a tenth of what she could reasonably expect to recover at trial.¹³¹

131. Stephen Gillers, *Can a Good Lawyer Be a Bad Person?*, 84 MICH. L. REV. 1011, 1011–1022 (1986), as quoted in LISA LERMAN & PHILIP SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 646–647 (3rd ed., 2012).

A paradigm which conceives of lawyers' ethics as protecting a vulnerable client will not distinguish between these two situations. The job of the lawyer will be to serve the client's interests, and in each instance using the available technicalities for delay will substantially benefit the client. A paradigm concerned with clients using lawyers to effectuate wrongful conduct would, to the contrary, clearly distinguish the two situations. In the first the client is not powerful and, more significantly, is not engaged in wrongdoing. He appears to be threatened by wrongdoing. In the second situation a powerful corporation would be using the technicalities to reach a result both morally wrongful and unjust under the governing tort law¹³²—exactly the primary concern of the second ethical understanding.

2. UNDER THE THIRD DICHOTOMY (RULES OR LAWYER DISCRETION AND PRACTICAL WISDOM?)

A professional ethic based upon character and discretion also easily distinguishes between the first and second scenarios. All things considered, exercising the technicalities to achieve delay and save the restaurant for the client who conceived and created it clearly appears to be the right thing to do. Similarly, all things considered, using those same technicalities to prevent the injured mother from receiving compensation due her under the substantive law clearly appears to be the wrong thing to do.¹³³ Persons of good character would recognize this, and an ethical regime of discretion would allow them to choose to do the right thing—not assert the delaying technicalities.

Moving to the “rule” side of that dichotomy, given the currently dominant paradigm of providing the client with access to and assistance in using the law, one would expect a rule requiring that the lawyer assert the technicality on behalf of the client if that were the client's preference: the lawyer would be allowed to prevent injustice in the first scenario and required to effectuate it in the second. Surprisingly that is not the current rule. The lawyer is required to “abide by a client's decisions concerning . . . objectives,” but is only required to “consult . . . as to the means.”¹³⁴ In the second situation, the corporate client's

132. Morally wrongful has tended to be my focus of analysis, unjust under the substantive law has tended to be Professor Simon's. See Pepper, *Integrating Morality*, *supra* note 56, at 1014; Simon, *Role Differentiation*, *supra* note 56, at 995.

133. See Pepper, *Integrating Morality*, *supra* note 56, at 1027:

What the cousin is attempting to do in the first situation seems morally wrong (although it also appears lawful). He is attempting to acquire something which, from a moral perspective, is not rightfully his. It rightfully is the client's—the fruits primarily of his imagination and labor, and only very secondarily of the cousin's financing. In the second situation, the near consensus moral perspective would see the defendant corporation as “taking advantage” of the client's weakness and poverty to seize a benefit it does not deserve.

134. MODEL RULES R. 1.2(a). The rule is applicable to all questions of means, not just ethically questionable ones. It is probably framed to give lawyers discretion in accomplishing the specifics of the work, where the

objective is clearly to pay the least possible money regardless of the consequences to the woman and her children, and apparently the lawyer is required to “abide” by that. But the delaying technicalities are clearly means, and as to these the lawyer is only required to “consult.” The Comment to Rule 1.2 provides some further guidance:

Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and *concern for third persons who might be adversely affected*.¹³⁵

Should the lawyer choose to refuse to follow the client’s preference to implement the delaying legal provisions (that is, not defer to the client in a situation where the Comment states lawyers “usually” do), the rule gives no further guidance. The lawyer is required in general to “render candid advice,” and is permitted to discuss “moral . . . factors . . . that may be relevant to the client’s situation.”¹³⁶ Assuming the lawyer and client remain in disagreement, the lawyer can continue to refuse, and the client is left with deciding whether or not this particular means is important enough to justify the costs of firing the lawyer and finding another.¹³⁷ If this is a firm of multiple lawyers, as is probable, there are two possibilities. It may be that refusing to effectuate the client’s choice to do the morally wrong thing is a firm-wide decision, and the client has to decide whether to replace the firm. More likely in today’s corporate legal environment, the decision may be that of one firm lawyer, and it is probable that another lawyer in the firm is readily available to step in and effectuate the client’s preference for delay.

One could relatively easily frame a rule requiring the lawyer to effectuate a client’s request for assistance within the bounds of the law—a rule that would require the lawyer to facilitate delay in both scenarios. And the prior rule appears to have come close to this.¹³⁸ It is more difficult to imagine a rule that effectively

lawyer is most skilled and knowledgeable, and the client likely not. *See infra* note 135 and accompanying text quoting Comment 2 to the rule.

135. MODEL RULES R. 1.2 cmt. 2 (emphasis added). Comments to the *Model Rules* are advisory, not binding. MODEL RULES pmbl. 14, 21. Prior to the 2002 amendments, the distinction in the comment was directive and normative rather than descriptive in both clauses: clients and lawyers “should defer” rather than “usually defer.”

136. MODEL RULES R. 2.1.

137. Pepper, *Integrating Morality*, *supra* note 56, at 1015–20.

138. Disciplinary Rule 7-101(A) of the Code of Professional Responsibility read in part: “A lawyer shall not intentionally: (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law . . .” MODEL CODE DR 7-101(A) (1980). This was then discounted by 7-101 (B): “In his representation of a client, a lawyer may: (1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.” MODEL CODE DR 7-101(B). No indication is given as to what is meant by “where permissible,” but it would appear to be a reference to law external to the Code, and thus to have left the rules, again, without a clear answer to a quite basic question.

distinguishes between the first and second scenarios, but an attempt could be made to frame such a provision. Character, virtue and discretion, however, easily make such a distinction.

Before moving on, it should be noted that any consideration of the third dichotomy as it applies to any particular situation leads toward a consideration of what specific rules or principles might be framed to guide or determine the lawyer's conduct. The evaluation of our rules and consideration of alternatives in this fashion is, of course, a staple topic of scholarship concerned with lawyers' ethics and professional responsibilities. Consideration of the possible specific rules which might be framed to govern the conduct at issue in these applications would, however, entail an undertaking appropriate to several full articles, and is thus well beyond the scope of the exploration undertaken here.

3. UNDER THE SECOND DICHOTOMY (PRIMARY ALLEGIANCE TO THE CLIENT OR TO SOME LARGER COMMUNITY?)

If the lawyer's primary allegiance is to the individual client's autonomy, under the restaurant financing scenario it would appear to be ethically appropriate to use the legally available delaying tactics to protect the client's ownership of the restaurant. If the larger community interest is primary, and can trump individual interest, the analysis is more difficult. Ordinary morality is served by using the technicalities to create delay. But the law of contract and the legal procedure for enforcing it would be frustrated. In addition, on the community interest side of the balance, delay in litigation is generally perceived as a significant communal problem. Delay manufactured by one party to serve its own interest is seen as a serious sub-part of that problem and often considered wrongful conduct.¹³⁹ It is far from clear which side of these more general communal interests would be considered the stronger. Do we judge on the balance of benefit and detriment in this particular instance, or in some kind of aggregate, rule-utilitarian calculation? Does the reader have a clear preference as to which interest is stronger? As to which metric should be used?

A second problem with determining the larger community interest in the restaurant situation is the question of pretextual use of the law. The purposes of the available technicalities are not articulated in the example, but the provisions

139. Intentional delay is usually considered the problem, yet the *Model Rules* do not try to prohibit or limit it. Rather, they require that the lawyer go further and "make reasonable efforts to expedite litigation consistent with the interests of the client." MODEL RULES R. 3.2. Of course the final clause comes close to rendering the rule nugatory: lawyers are obligated to serve the interests of their clients, and if those are served by delay, the rule appears to be cancelled. The Comment then attempts to cancel out that clear effect of the proviso: "Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client." Considering that "financial gain" is what most lawyers are working toward for most clients, and that lawyers are working in a predominantly capitalist economy, this is quite a curious statement. Comments are not binding, however, and do not change the meaning of the black letter rules.

were not created in order to allow discretionary delay in litigation. Is it ethically acceptable for a lawyer to use these provisions for delay, a purpose clearly different from those for which they were created? If we need a hammer, but only have a large wrench at hand, we are likely to use the wrench as a hammer. Is it acceptable for the restaurant owner's lawyer to use these technicalities to delay litigation enforcing a valid contractual debt, even though such a use was not intended? If we switch for a moment to the other scenario, is it acceptable for the construction corporation's litigation counsel to use these technicalities to force the plaintiff into a settlement far below the value indicated by the substantive law? This is a large and problematic topic, bringing up several difficult questions. The law is there; it is publicly available. Should lawyers be responsible for limiting its use to the purposes for which it was created? Or, should that be the client's choice? Would limiting the "off label" uses of law constrain its creative and positive development? Should it be up to the lawyer to decide what is a creative and positive pretextual use and what is wrongful or abusive one?¹⁴⁰ Or, once again, should there be some rule-utilitarian guidance or limitation on the lawyer's conduct?

Moving to the construction accident scenario, we have the added difficulty under the third dichotomy of understanding how to envision the corporate entity client. Should we conceive of the corporation as an individual? If so, then the analysis above for the restaurateur would remain the same for the construction company: if the client's autonomy is the guide, the delaying technicalities should be deployed as the client has directed. Similarly, if we assume some larger communal interest is the lawyer's primary ethical allegiance, the same analyses and difficulties arise as above. But if we conceive of the corporation as itself a community or a communal interest, the alternatives become more puzzling. Do the corporation's interests gain in weight or legitimacy because it is a communal entity and not an individual? Are its choices due more deference from the lawyer than an individual's would be under otherwise similar situations? Earlier, in the elaboration of the dichotomies, we considered the possibility that the opposite is actually the case: because corporate entities do not have the full range of individual human sensibilities and emotions, and because their managers have a role specific morality focused on shareholder value and profit, the lawyer arguably should be more constrained in providing access to the law to effectuate

140. Professor Wendel has articulated a traditionally client centered ethic premised on access to the law. WENDEL, *FIDELITY*, *supra* note 15, at 50–52. But he would prohibit what I have called here pretextual uses of law for the client's benefit. *Cf. id.* Professor Simon's ethic appears to have a similar focus on discerning the genuine purposes of legal provisions and limiting the lawyer to effectuating those, but has a far less client centered orientation. Simon, *Ethical Discretion*, *supra* note 56, at 1090–1119. I have suggested that "off-label" use of the law should normally be the client's choice, with the help of the lawyer's counsel and deliberation. Pepper, *Integrating Morality*, *supra* note 56, at 1013–20. *See also* Kenny Heglund, *Quibbles*, 67 *TEX. L. REV.* 1491, 1498–1500 (1988–89).

morally wrongful results.¹⁴¹

B. CROSS EXAMINING THE TRUTHFUL WITNESS

Another example of pretextual use of the law is the cross-examination of a witness known by the lawyer to be telling the truth with the purpose of suggesting to the trier of fact that the witness is in fact mistaken, lying or unreliable. The issue on which the witness is testifying might be determinative, and the matter is of substantial importance to both parties. The right of cross-examination is created as a tool to facilitate discerning and determining the truth (the actual facts underlying the litigation) so that the substantive law can be correctly applied to those facts. The lawyer in this well-known situation is using the mechanism for exactly the opposite purpose.

1. UNDER THE FIRST DICHOTOMY

Civil litigation is a contest for the power of the state: the party who loses will face the power of the state assisting their adversary.¹⁴² It is the client who appears vulnerable from this perspective; if the lawyer shirks, is disloyal or incompetent, the client will be at a large disadvantage. If the concern underlying lawyers' ethics is protection of the client, then it would appear that the lawyer should undertake the cross-examination.¹⁴³ If, however, the animating concern of lawyers' ethics is for third parties who might be victimized by a powerful lawyer-client combination, then it would seem ethically inappropriate to conduct such a cross-examination. The lawyer, in a public formal venue, is suggesting that the truthful witness is lying or otherwise unreliable—an apparent wrong to the witness and to the opposite party in the litigation.¹⁴⁴

2. UNDER THE SECOND DICHOTOMY

The second dichotomy cuts the pie in this situation just as does the first and presents a very clear picture of the difference in orientation. If primary allegiance were owed to the individual client, then the lawyer clearly would be obligated to undertake the cross-examination helpful to that client despite the disservice to the truth and regardless of the injury to the witness and the opposite party. On

141. *Supra* Part I.C.

142. Pepper, *supra* note 58, at 623.

143. Query whether this is true if the client is a large corporation: vulnerable to either the state or the lawyer?

144. How important or determinative are the two factors on this side of the dichotomy: that the conduct is wrongful and that the client is powerful. If the cross-examination is conducted on behalf of an individual and the victimized opposite party is a large powerful corporation, is it the corporation that should be protected by lawyers' professional ethics? Our concern about wrongdoing by the powerful lawyer-client combination makes more sense if the situation is the opposite: the lawyer conducting the wrongful cross-examination represents a powerful corporation against a single individual.

the other hand, if primary allegiance goes to a larger community interest, then the cross-examination appears manifestly inappropriate. It disserves both the truth and resolving the dispute according to the substantive law. Only if we determine that allegiance to the individual client when considered in the aggregate itself constitutes a determinative community interest can we reconcile the dichotomy, essentially by defining it away. The aggregate communal interest in lawyers providing individually oriented access to the law—including pretextual usages—would be considered a communal interest of greater importance than either substantively just dispute resolution or avoiding false public accusations against witnesses.

3. UNDER THE THIRD DICHOTOMY

Once again, resolving the situation through exercise of the lawyer's character and judgment in light of all the circumstances and context is attractive. Unlike with our first example, however, the morally correct answer in this situation remains obscure. It depends on knowing more, on a thicker description of the situation. Moreover, in this situation it seems likely that different lawyers are likely to reach different resolutions. Some lawyers will value the truth more highly than others; some will value a substantively correct outcome more highly than others. Some are likely to value client vulnerability and consequent lawyer allegiance more highly than others. As a result, the access to the law that clients receive will diverge significantly depending on the values and moral proclivities of the particular lawyer they happen to find—a substantial downside of the character-discretion based ethic. Aside from this concern about uniformity of the law to which access is gained, individual lawyer character and discretion as the basis for deciding whether or not to undertake such a cross-examination also raises the question of the extent to which we want to trust the moral judgment and practical wisdom of individual lawyers. That concern is particularly present when the lawyer's own self-interest is likely to be involved in the decision.

Given the weaknesses, inequality, and indeterminate nature of recourse to character and discretion, the decision might be that the other side of the dichotomy—a rule—is preferable. But that leaves the difficult question of what that rule ought to be. Once again we might assume that if the cross-examination is lawful, the client can choose to make use of it. But Rule 1.2, as we have seen above, is to the contrary. The lawyer is required to discuss the question of means with the client (and the cross-examination of the truthful witness to suggest falsehood is clearly a means to an end), but is not obligated to defer to the client's choice.¹⁴⁵ In some ways, it appears that the rule defaults to an individual, discretionary choice by the lawyer: the rule in these cases could be seen as recourse to the individual lawyer's judgment and discretion. But this surprising

145. See *supra* notes 134–37 and accompanying text.

rule is not the only possibility. We could easily frame a rule that requires the lawyer to give access to legally available means if the client so chooses. And that is likely what many, perhaps most, lawyers believe their obligation is. Such a rule would seem to reflect the modern American lawyer ethos more than does the current non-rule. Or, we could frame a rule that is more truth protective, requiring that lawyers in litigation not take action that intentionally deceives or misleads the trier of fact.¹⁴⁶

C. ENFORCEMENT INFORMATION ON WATER POLLUTION LIMITS

In this application, assume that the client operates an industrial facility in a rural area that discharges ammonia. The Environmental Protection Agency has promulgated:

[A] water pollution regulation, widely publicized to relevant industries, prohibiting discharge of ammonia at amounts greater than .050 grams per liter of effluent. The client owns a rural plant that discharges ammonia in its effluent, the removal of which would be very expensive. The lawyer knows from informal sources that: (1) violations of .075 grams per liter or less are ignored because of a limited enforcement budget; and (2) EPA inspection in rural areas is rare, and in such areas enforcement officials usually issue a warning prior to applying sanctions unless the violation is extreme (more than 1.5 grams per liter).¹⁴⁷

Should the lawyer inform the client of all this information, knowing that this knowledge may well lead the client to a violation of the formal .050 effluent limit, and thus to greater water pollution? Or should the lawyer inform the client only of the .050 formal regulation, likely leading to the client's compliance with that limit?

1. UNDER THE FIRST DICHOTOMY

If the lawyer chooses to inform the client of the .050 limit only, conveying that compliance with that limit is what "the law" requires, the client arguably has been denied full access to and knowledge of the law. The client has not been informed of the option of violating with either highly improbable sanctions or the limited

146. When I teach the required Legal Profession course I frame a discussion by asking the students whether they would vote to adopt the following rule: "A lawyer shall not elicit testimony that leads to a conclusion the lawyer knows to be false." This would appear to prohibit a cross examination designed to cast doubt on the testimony of a witness known to have testified truthfully, among a number of other practices it would prohibit. I ask them this question after they have read an excerpt from Marvin E. Frankel, *The Search for the Truth: an Umpireal View*, 123 U. Pa. L Rev. 1031 (1975), testing the extent to which they agree with Judge Frankel. (In the same assignment they have also read quite different views on the lawyer's obligation to the truth from Phillip Shuchman and Monroe Freedman.)

147. Pepper, *Counseling at the Limits*, *supra* note 33, at 1551.

sanction of a warning only. In regard to the former it has been denied the option of discharging between .050 and .075. In regard to the latter, it has been denied the option of violating between .075 and 1.5 and taking its chances with a probable warning or other possible enforcement. From this perspective the client is vulnerable in relation to the lawyer's superior knowledge; its freedom of choice has been constrained by the lawyer's decision as much as by the formal law. Furthermore, it is possible that the corporation will be placed at a competitive disadvantage in regard to others in the industry whose lawyers may well be willing to share the enforcement related information. Corporate managers not infrequently express a perception of vulnerability in relation to the government (leaving lawyers aside), often seeing regulators as overzealous or unreasonable, and regulations as heavy-handed and a drag on productivity, efficiency and innovation.¹⁴⁸ If the correct ethical orientation is to protect vulnerable clients and give them full access to the law, on first look it would appear that the lawyer is obligated to provide the client with knowledge of the enforcement related information that may facilitate or encourage violation of the written .050 limit.

If, on the other hand, the function of lawyers' ethics is to protect third parties and the public from wrongdoing by a combination of powerful client and lawyer, then it would appear that the lawyer ought to inform the client of the .050 limit only and withhold the further information that might facilitate violation of the formal law. Presumably, ammonia effluent is limited because it is harmful, either to downstream wildlife or people or both. A limited enforcement budget, not a determination of no significant harm, has led to the de facto (perhaps temporary) move to .075 enforced from .050 written. If discharge in this range is harmful, then the alternate side of the dichotomy suggests lawyers should attempt to protect those who would be harmed. It is possible, however, that inspection is rare and discharges under 1.5 result only in a warning in rural areas because there is little chance of harm from such levels of pollution in such relatively undeveloped and unindustrialized areas. The EPA may be calibrating rural enforcement as a matter of risk assessment and policy, not just budget constraint.¹⁴⁹ If this is the case, then it is more difficult to cast the lawyer/client conduct as "wrongful" to third parties and there would seem to be no ethical constraint on informing the client of the enforcement related facts. Both sides of the dichotomy on this application are complicated by the question of how to best understand regulatory limits and penalties. Is the intended message of the law

148. See, e.g., Donald C. Langevoort, *Someplace Between Philosophy and Economics: Legitimacy and Good Corporate Lawyering*, 75 *FORDHAM L. REV.* 1615, 1618 (2006) ("Either because of special interests or lawmaker incompetence, [corporate managers] think, the law will often be inferior to what the market would do on its own, or with less heavy-handed regulatory interference.").

149. These possibilities are laid out in more detail in Pepper, *Counseling at the Limits*, *supra* note 33, at 1570-71.

that the foreseeable penalty be understood as a cost that the actor is free to discount by its probability and balance against the potential benefits of the unlawful conduct? Or does the formal legal line express a norm and a societal intention to establish a prohibition in a way that suggests the actor ought not violate the limit even if it calculates that it is likely to benefit by doing so?¹⁵⁰

2. UNDER THE SECOND DICHOTOMY

If the ethical orientation of the lawyer is to the individual client, the water pollution scenario again brings us to the question of the appropriate understanding of the corporation. Is it an individual, albeit an artificial, legally fabricated one? Is it to be treated as a collection of individuals, and thus as a surrogate for their interests? If either of these is the case, then it would seem that an obligation primarily oriented to this “individual,” group of individuals, or surrogate for individuals, would require full information as to both the formal law and the enforcement realities that limit it, allowing the corporation to make its own choices in regard to its understanding of the nature of legal obligation and its preferred level of risk of legal consequences. If we choose, on the other hand, to consider the corporation not to be an individual, or a surrogate for individuals, then we are moved to the other side of the dichotomy and must consider the corporation as itself a community, or we must determine what the larger community interest is in a corporation’s access to and use of the law.

We might understand the corporation as a creation of the community, and in creating it (or authorizing its creation) the community might have included an obligation on corporations to defer to the law greater than that of a natural individual. Under this view, a corporation might be understood as obligated to defer to the formal law as a condition of its legal creation, whereas an individual has the option to consider the probability of enforcement and the severity of consequences. Even if corporate law did not formally delimit corporate personhood in this manner (as it currently does not), lawyers’ ethics might. An understanding of lawyers’ ethics as oriented primarily toward a larger community interest, rather than to individuals, might require lawyers to limit the assistance given to corporations in just this way. Lawyers could provide access to the formal law but not to enforcement realities that might undermine that law while being beneficial to corporate clients. This understanding dovetails to some extent with the perspective of the first dichotomy. Corporations are frequently large and powerful in relation to their lawyers, third parties, and the community. Because they are more of a threat, and are far more limited in their concerns and sensibilities than natural persons, a special, limited understanding of their right to

150. See Langevoort, *supra* note 148, at 1619–20 and sources cited therein; Cynthia Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1286–1300 (1998).

access to and use of the law could be argued as justified.¹⁵¹

Identifying what the community interest is brings us back to the question raised at the conclusion of the prior section, an issue arguably more apt in regard to the second dichotomy than the first. What does the community intend to signal: the formal line or the discounted penalty? Even assuming an ethical orientation primarily toward a communal interest or obligation, it is difficult to discern in this instance what that is. Communicating to clients only the formal line may be masking information the community intended to make available and have effectuated in the risk assessment influenced choices of those clients. It seems unlikely that lawmakers and enforcement officials are acting with such precise intentions and effects in mind, but some economists see in such enforcement policies and choices the aggregate wisdom and precision of the invisible hand at work, even though those making and enforcing the law are not usually considered to be market actors.

3. UNDER THE THIRD DICHOTOMY

On first consideration the water pollution situation seems one in which discretion and character may well provide the better solution. Is this rural area one in which discharge of ammonia above the .05 limit is unlikely to entail serious harm? Or is there a community or communities, or an ecosystem, downstream subject to significant harm? The effluent limitation is a general rule, generally applicable (and framed with that in mind), but the lawyer is advising in regard to a specific application in a specific place. The lawyer should have specific knowledge of the local risks of pollution in this particular situation or can gain it from the client.¹⁵² Thus the lawyer is in a good position to assess the risk entailed in encouraging the client to violate the .05 limit by providing enforcement information. In addition, the lawyer may well have specific knowledge about the client. Does this client have a low regard for regulatory officials and enforcement, considering them inept or heavy handed? Does it consider legal regulation essentially as a cost risk, and nothing more? Or does it understand legal regulations as norms that ought to provide guidance and restraint, absent strong countervailing reasons? Does it have a mixed and reasoned approach to such questions, seeing regulation as both possible cost and as norm, balancing the two in a nuanced manner? The lawyer's knowledge of this might also be quite limited. She might be familiar with the one or two corporate actors who are her contacts as to this matter, but have little knowledge of the balance, mix or possible complexities of "the corporation's" attitude or

151. See *supra* Parts I.E.2., II.B.

152. If neither the lawyer nor the client has the information, the lawyer may be able to obtain it from public sources or suggest that the client determine it to the extent practicable. If for no other reasons, the lawyer should advise that such risks should be known for purposes of avoiding potential tort liabilities.

understanding of such questions as applied by the relevant corporate decision-makers in this situation. This might be a quite complicated question of the interaction of corporate culture and the particular decision makers involved. The lawmakers and enforcement actors are remote; their knowledge general and based on the aggregate situation. The lawyer, to the contrary, is in the immediate situation, with context specific information.¹⁵³ This seems the kind of situation appropriate for the exercise of discretion and practical wisdom.

On the other hand, each of the six difficulties with character and discretion described above is arguably apposite to this situation.¹⁵⁴ Of particular concern would be the likely variability of approach to the situation by different lawyers (best categorized under the fourth difficulty). Some lawyers are likely to understand the formal .05 limit as a prohibition or norm which the client is obligated to follow. Others are likely to see the more flexible enforcement practices as indicating a potential cost the client has discretion to factor into its effluent and pollution decisions, and discount by their probability. Lawyers are thus likely to vary widely on their understanding of the significance of the gap between the .05 formal line and the enforcement actualities. The information the client receives about the legal limit and its enforcement may well depend on the particular lawyer advising it. Moreover, the tone and attitude toward enforcement and violation (and the attendant advice) are also likely to vary. If lawyers are understood as one of the primary ways that law is transmitted and applied, then this would be a significant problem in regard to equality and uniformity of application of this particular legal provision.¹⁵⁵ Leaving aside the legal limit and enforcement practices, lawyers are also likely to vary on their understanding of the seriousness of the risks and costs attendant to water pollution in this rural area. Some may be inclined to see such relatively mild pollution as unimportant or not harmful in light of the benefit of the client's enterprise; others might be more likely to see ammonia pollution as a significant harm and wrong. Variability in regard to this fundamental aspect of the situation will also affect the information and advice received by the client.

This troubling variability of legal advice and counsel under a character and discretion guide could be removed by the use of a rule, but it is unclear what such a rule should allow or require. A rule framed on the premise that the profession's underlying role is to provide access to the law might require that all information about the law relevant to a client's decision ought to be conveyed to the client, leaving decisions about how and to what extent to be influenced by that law to the client. Given that the current paradigm is client centered in this way, it should be no surprise that the current rules can be read in just this way. Rule 1.4 (b) requires

153. Pepper, *More Than the Law*, *supra* note 59, at 693–95.

154. See *supra* Part III.D.

155. As noted above, Professor Kaufman has suggested that such variability is just part of human nature. Kaufman, *supra* note 104.

that a lawyer “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Rule 2.1 requires that a “lawyer render candid advice.” From these rules it would appear that the lawyer is required to inform the client about both the formal .05 line and about the limiting enforcement practices.

As an alternative, we might frame a rule that would prohibit advice about the law that facilitates its violation. It would be a rule focused more on protecting the community from the client, rather than the other way around (the second dichotomy). It would be a rule that sees the client as the risk, not the one in need of protection (the first dichotomy). And, despite the fact that our current rules are primarily client protective and client centered, there is now a rule that could be understood to include just such a prohibition. Rule 1.2(d) states that a lawyer “shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent” Whether informing the client of the currently limited nature of enforcement of the .05 effluent rule would constitute “assistance in criminal conduct” remains unclear.¹⁵⁶ If not, it would seem that under Rules 1.4 (b) and 2.1 the lawyer would be required to inform the client of enforcement facts which might well lead to violation of the limit and pollution at higher levels than the .05 line.¹⁵⁷ The underlying question here is: who is to make the choice, client or lawyer, as to how to be influenced by the law, and whether to consider it a binding norm or, to the contrary, merely a discretionary risk and foreseeable possible cost.¹⁵⁸

One could, of course, consider adopting other possible rules to govern such situations. An attempt could be made to reconcile the two differing directives of Rules 1.4 and 1.2(d) in a general manner.¹⁵⁹ Or an attempt could be made to frame a more specific rule for regulatory matters, or possibly an even more specific rule framed for industrial pollution.¹⁶⁰ As noted above, a consideration of possible rules under the third dichotomy tends to move beyond the scope of the more general and theoretical exploration undertaken here and into the subject matter and complications of that particular rule.¹⁶¹

156. For an extensive discussion and further references, see Pepper, *Counseling at the Limits*, *supra* note 33, at 1551; for an application to the situation of advice concerning enforcement of the federal criminal prohibition on marijuana sales in states that have legalized such transactions, see Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 ORE. L. REV. 869, 919 (2013).

157. The tension in the two arguably conflicting rule requirements can currently be reconciled in this situation by a limitation within the text of Rule 1.2(d) itself: Despite the prohibition on counsel or assistance, “a lawyer may discuss the legal consequences of any proposed course of conduct with a client” MODEL RULES R. 1.2(d). The possible or likely enforcement results and consequences of discharge in excess of .05 grams per liter would seem clearly to fall within this proviso. Thus the text of 1.2(d) appears to defer to the requirements of *Model Rule 1.4*.

158. Pepper, *Integrating Morality*, *supra* note 56, at 1022–23; *supra* Part IV.C.1.

159. Pepper, *Integrating Morality*, *supra* note 56, at 1022–23.

160. *See supra* Part III.E.2.

161. *See supra* Part IV.A.2.

4. DEFEASIBILITY OF THE APPLICABLE RULES

The discussion above suggested a possible method for gaining some of the benefits of both rules and a discretionary approach: having a set of rules where they seem necessary, appropriate or helpful, but having those rules themselves be to some extent discretionary or defeasible.¹⁶² Assuming that current Rules 1.4 and 1.2 would require providing enforcement related advice that the lawyer concluded was likely to lead to violation of the ammonia effluent limit, at least two possible factors might weigh toward a choice not to follow the rules completely in this instance. First, as noted above, the justifications for an ethic centered on client protection and client interests may be significantly weaker when the client is a large corporation. In such a situation management's role specific ethic of serving shareholder value or profit may well bias or interfere with a decision to follow or exceed the legal effluent limit. There might be a tendency to see law as more cost and risk calculation than as obligatory norm.¹⁶³ Those in the corporation making this particular decision might also have developed a perception of legal regulation as nuisance, as intrusive and possibly heavy-handed or insensitive to actual risks and practicalities. Second, the lawyer may perceive serious harms to innocent third parties as potentially resulting from the ammonia discharge. The client may well be discounting such harms, or insufficiently sensitive to them, possibly for the corporate reasons just suggested. Following deliberation on the particular factors involved in the specific situation,¹⁶⁴ the lawyer may conclude that in this instance the full requirements of Rules 1.4 and 1.2 are inappropriate. The lawyer may choose to simply convey that the .05 ammonia limit is the legal requirement, period. The lawyer here would have chosen to give essentially preemptory advice: "This is the law that you have to follow."¹⁶⁵ Of course there is a range here of how preemptory to make the advice: perhaps the "that you have to follow" part will be not so absolute, or perhaps left out altogether.

162. See *supra* Part III.E.3.

163. See *supra* Part I.C for a discussion of the amoral role "squared."

164. See *supra* Part III.E.3. on the need for deliberation.

165. Professor Hazard suggests that,

[a]dvice that is technical in form and peremptory in effect can be given only under special conditions. The text of the law has to be quite clear. There has to be a substantial possibility that the law will be invoked. The consequences that may result if the law is invoked have to be serious. For a private client, this set of circumstances usually arises only when the conduct in question is what used to be called *malum in se* as distinguished from *malum prohibitum*, that is, conduct that is wrongful according to accepted morality and not simply wrong according to legal proscription.

GEOFFREY HAZARD, *ETHICS IN THE PRACTICE OF LAW* 148 (1978). Professor Hazard's requirements would appear not to be met in the water pollution application, suggesting he would conclude that advice about the enforcement realities must be provided to the client. That is one of the reasons that the possibility of defeasible ethical obligations merits serious consideration. For more on the *malum in se* versus *malum prohibitum* distinction in regard to this application, see Pepper, *Counseling at the Limits*, *supra* note 33, at 1576–1580.

A more stark illustration may also be helpful. Consider the criminal defense lawyer with a client about to go on trial for capital murder. The maximum penalty for witness tampering is minor compared to the probable result of the trial.¹⁶⁶ Is this situation analogous to the ammonia effluent situation in regard to the applicability of Rules 1.4, 1.2 and 2.1? Does the lawyer have an arguably similar obligation to inform the client of the possibility of “communicating” with witnesses, the probable criminality of such conduct, and the possible penalties? The limited enforcement practices in regard to the water pollution violation are arguably more closely connected to the violation itself than is witness tampering to the murder charge and trial, but the possibility of witness tampering is directly relevant nonetheless (and of much more important consequence to the life of the client). Providing such advice intuitively seems to fall more directly under the prohibition in Rule 1.2(d) of “counseling” or “assisting” in criminal conduct than it does under the obligations of Rules 1.4, 1.2(a) and 2.1 to inform the client of that which is legally relevant. As noted above, however, the text of Rule 1.2(d) indicates that “a lawyer may discuss the legal consequences of *any* proposed course of conduct,”¹⁶⁷ thus seemingly approving discussion of both the criminality and consequences (both positive and negative) of witness intimidation. Particularly if the client asks about this possibility, the lawyer arguably has an obligation of candid advice under the current rules, including concerning the possible penalties. Acting upon character and discretion to conclude that this is a situation where the rules requiring communication ought not be applied—thus, where defeasance is appropriate—would appear to be an attractive and highly useful option. Most lawyers, one would think, would opt for the preemptory advice: witness tampering is criminal; you can’t do it. If the client asked for further information about enforcement likelihood and possible penalties, the lawyer could refuse to provide it, and repeat the preemptory advice.¹⁶⁸

Before moving on it should be noted that the possibility of defeasance may be attractive in other instances we have considered. In the first application considered above, delaying tactics in litigation, the lawyer may simply choose not to inform the corporate construction client of the option of delaying matters to add additional pressure on the plaintiff for a favorable (but unjust) settlement. Exercising character, judgment, and discretion, the lawyer might conclude that this situation is an occasion when the obligations of Rules 1.4 and 1.2 are best left unmet—that is, defeasance of the applicability of those rules to this particular situation. As discussed above, there are factors weighing both for and against lawyers having such discretion.¹⁶⁹

166. See Pepper, *Counseling at the Limits*, *supra* note 33, at 1551, n.9.

167. See *supra* note 157.

168. See HAZARD, *supra* note 165, at 143–49; Pepper, *Counseling at the Limits*, *supra* note 33, at 1551.

169. See *supra* Part III.

V. CONCLUSION: BRIDGES AND CONNECTIONS

Several common themes have developed as the dichotomies have been sketched out and explored:

Corporations are Different. Corporations are more dangerous to third parties. As discussed above,¹⁷⁰ corporations are different in at least two ways. First, relatively large corporations are more powerful (and thus capable of causing greater harm) than almost all individuals. The purpose of incorporation is to allow the aggregation of capital and of multiple coordinated human effort to allow vastly increased effectiveness in the world. The scale of effects that a corporation can have is vastly different, in general, from that of individuals. Second, corporations have more limited motivations than ordinary persons, generally focused on or limited to financial and material goals. The fundamental end is usually shareholder profit or value, a quite limited function when compared to the complexity and range of individual human motivation, values and ends.¹⁷¹ Also, one should note, a dangerously limited end. Third, communicating with and correctly understanding the goals and intentions of a corporation is far more difficult and complex than with an individual. The corporation acts through multiple individuals, each of whom has a limited range of authorization. These individuals can have complex (sometimes conflicting) relations with the corporate entity and with each other. Taking direction from a corporation and having a conversation with it (including a moral conversation) is often not simple or obvious.¹⁷² Who is authorized to deliberate and speak for the corporation, and to what extent and in what circumstances, is often far from transparent. The degree to which corporations and other organizations are different varies. A corporation that is the major life project of an individual, or of a small group of individuals, may well function and have the range of motivations and values more like an individual. From this perspective we have a spectrum, with individuals and very small organizations on one end and the very large corporations on the other.

It would therefore be helpful for lawyers serving corporations to keep the first two dichotomies in mind when ethical problems arise. Who is threatened with harm, and who needs protection; who is relatively strong, and who is relatively weak? Should the lawyer be primarily concerned with serving and protecting the client and its interests, or with possibly restraining the client from harmful use of the law? Ought the ordinary allegiance toward the client be diluted because of its

170. See *supra* Part I.C.

171. One way of expressing this is that corporations do not have a conscience. This is true, but it is somewhat simplistic and limited to but one area of the vast range of possible individual human motivations.

172. The current *Model Rules* address this complexity with a short descriptive statement: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." MODEL RULES R. 1.13(a). Sections (b) through (g) of the rule then address some specific limited aspects of the complexity of corporate representation. MODEL RULES R. 1.13(b)–(g).

nature as a corporation, and, if so, how can this appropriately and ethically be effectuated? Consideration of these questions leads in turn to other possibilities developed through our focus on the dichotomies.

Counseling. One way to restrain the possibly wrongful use of the law is to counsel with the client—particularly the corporate client—to make explicit that the potential conduct, although lawful and to the client’s benefit, may be morally wrongful in that it is unjustifiably harmful to the legitimate interest of others.¹⁷³ Conversation with the client can make explicit who is relatively strong and who relatively weak. It can make explicit that legal rights and lawful conduct do not necessarily equate to morally justifiable conduct: there is more to be considered than just whether the conduct to be facilitated is lawful and in the client’s interest. With the client’s input the conversation can consider whether the lawyer’s primary allegiance in the particular situation should be to the client, or to some larger interest, and how those interests might be harmonized. And if the client is corporate, it can similarly make explicit questions of whether shareholder interests are properly primary in the context of the particular situation and its risks, thus possibly ameliorating the problem of the amoral ethics “squared.”¹⁷⁴ Conversations can be imagined that would be helpful for each of the three situations considered in Part IV, above. Dialogue of this sort is useful even if not effective in changing the prospective conduct of the client in that it enlivens and enriches our shared moral experience and understanding, while a purely legal and material perspective may well diminish and impoverish it. The client’s expectations and perception (a significant part of the moral landscape) may change as a result of such counsel and conversation, affecting future perception and actions, even if the proposed conduct goes forward. Counseling can thus help effectuate explicit consideration of each of the three dichotomies, making for a much richer understanding of the ethical question at issue.

Rules. Keeping the three dichotomies and the choices they entail more explicitly in mind is also likely to improve the framing, amending and application of our rules of professional conduct. Those rules currently appear to focus on risk to the vulnerable client from the more powerful and knowledgeable professional, rather than on possible risk to third parties and the public from the powerful lawyer-client combination.¹⁷⁵ This could be addressed by framing different sets of rules for the two quite different risks entailed by the work of lawyers, or by developing additional rules for the second risk to add to the now predominant stance of the rules as a whole. We could similarly be both more explicit and more nuanced in the rules about the issues of the second dichotomy: where is the primary allegiance of the lawyer, and how are conflicting allegiances to be

173. See *supra* Parts I.E.2.b and III.E.4.

174. See *supra* Part I.C.

175. See *supra* Part I.

balanced?¹⁷⁶ The rules could also be more explicit about, and provide more guidance in relation to, in what areas and situations lawyers have discretion and are not bound by rule. Incorporating within the rules more expressly the presence of discretion, how it should be exercised and guided, and what the limits might be, could provide helpful ethical encouragement and assistance to practicing lawyers. Rules could signal that such decisions exist, that they involve serious ethical questions, and provide guidance or structure for approaching them.

Defeatance: Rules as Rebuttable Presumptions. One possible bridge between rules on one hand, and judgment, character and discretion on the other, is the possibility of rules in general, or at least some rules, as being defeasible. Rules could be presumptively applicable to the situations they cover, but the presumption could be rebutted under the particular circumstances.¹⁷⁷ This possibility could function as a bridge across the first dichotomy as well: Rules designed to protect vulnerable clients might be suspect—and subject to possible defeatance—when apparently applicable in situations where the client’s lawyer facilitated conduct threatened unjustifiable harm to others. And rules designed to protect third parties from wrongful client conduct might be less likely applicable when the situation involved not a threat to third parties but a relatively vulnerable client. Although posing difficulties in implementation, such a regime is attractive in the possibility of joining some of the advantages of rules with the quite different advantages of character, judgment and discretion. Even if not adopted as part of a formal structure of regulation, the procedure remains a possibility for individual lawyers in their ethical deliberation and choices.

Conclusion. This article began with the suggestion that the way we understand and approach questions of lawyers’ professional ethics is to a significant extent determined by several underlying conceptual dichotomies. The more these foundational assumptions remain implicit and unidentified, the less we will be able to make fully informed ethical decisions—whether at the level of specific conduct, rule framing, or more general theory. The article has been an effort to identify and explore three of these fundamental conceptual questions. Is the primary purpose of lawyers’ ethics to protect vulnerable clients from the more powerful and knowledgeable lawyers who are making a living through providing assistance to them in the use of the law? Or is that purpose to protect the rest of us from the threat of the combination of the powerful (often corporate) client and the power of the law as leveraged through the sophisticated, knowledgeable lawyer? The first is the traditional concern of professionalism in general; the second has been the more pressing concern for lawyers’ ethics over recent decades. Second, is the underlying obligation and allegiance of lawyers in their day-to-day work to the client only, essentially excluding (or at the least marginalizing) concern for

176. See *supra* Part II.

177. See *supra* Parts I.E.2.d, III.C, and III.E.3.

the interests of others, or the common interest, affected by that work? Again, the traditional understanding—in part in answer to the threat perceived in the first dichotomy—has been an almost exclusive allegiance to the client’s interests. Third, and quite different, how do we best effectuate professional ethics for lawyers, whatever the primary purpose or function may be? Is a system of rules best? That has been our assumption over the last fifty years, as reflected in the adoption of three iterations of such rules and efforts to expand and improve regulatory structures to enforce them. Or would we be better served relying on the judgment, character and discretion of individual lawyers applied in light of the entire context of the particular situation?

The discussion in each of the first three parts above sketched the two quite different alternative understandings and assumptions of the three conceptual divides. In each case, this was followed by developing the possible choices presented and possible bridges connecting the alternate sides of each dichotomy. Three not uncommon problematic ethical scenarios were then presented to illustrate how these basic dichotomies would apply. The primary intention has been to make these distinctions and the choices they present more explicit. Awareness of the dichotomies assists in broadening the perspective and keeping the mind more open in relation to ethical problems at all levels. For the practicing lawyer, the academic scholar and teacher, and the student, keeping the dichotomies in mind helps in perceiving an ethical problem, framing a conceptual understanding, and considering solutions.