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# The Role of a Lawyer's Morals and Religion When Counseling Clients in Bioethics

## **Cover Page Footnote**

Douglas T. Hickey Professor of Business, Siena College, Loudonville, N.Y.; B.A., Colgate University, 1974; J.D. Harvard Law School, 1977; M.Div., Yale Divinity School, 1989. The Author was formerly the A.A. and Ethel Yossef Professor of Legal Ethics at the Creighton University School of Law, Omaha, NE.

# THE ROLE OF A LAWYER'S MORALS AND RELIGION WHEN COUNSELING CLIENTS IN BIOETHICS

*Joseph Allegritti\**

The fields of bioethics and law are inextricably entangled. Many of the toughest and most controversial issues in bioethics—abortion, surrogacy, control of frozen embryos, removal of life-support systems, physician-assisted death—end up being resolved, for better or worse, in the courts. The other branches of government are involved as well—legislatures pass laws, administrative agencies issue regulations, and presidents convene commissions and make funding decisions.

Wherever there is law, there are lawyers. When we think of lawyers and bioethics, we usually think of packed courtrooms and contentious litigation, but lawyers are more often involved behind the scenes, counseling clients who are facing life and death medical decisions. Counseling clients who want to execute a will or advanced directive; counseling clients who hope to adopt a baby; counseling clients who are worried about an elderly relative who has grown feeble and irrational; counseling clients whose child was born with Down's Syndrome and needs stomach surgery to survive; counseling a client whose mother is in a persistent vegetative state, and is being kept alive by artificial nutrition and hydration; counseling hospitals, nursing homes, and hospices on individual cases and institutional policies; counseling legislators and administrative agencies on what laws to write, and which regulations to issue. We rarely pause and consider this role of the lawyer.

While legal literature contains thousands of articles on bioethics and law, there are few works that examine the dynamics of the lawyer-client relationship. Scholars studying the intersection of law and medicine often ignore the context in which the two disciplines converge daily in countless offices around the country—with lawyer and client sitting together, talking, wrestling with tough choices, deciding what and what not to do.

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This conference represents an important step in remedying that oversight. Yet it seeks to do more than merely examine the interactions between lawyer and client. It adds yet another element to what is already a complex picture—*religion*. This conference focuses not only on the role of the lawyer in bioethics, but also on the relevance of religion to the lawyer's work. This conference can thus be seen as the natural outgrowth of several other symposia hosted by Fordham Law School that have examined the relationship between religion and lawyering.<sup>1</sup>

Law, Bioethics, and Religion. Three academic disciplines. Three spheres of life. How do they come together in the lawyer-client relationship? How do they overlap, intersect, and interpenetrate? More specifically, what role should a lawyer's religion play in her relationships with clients? Should religion be part of the conversation between a lawyer and her client? What if a lawyer has religious objections to a course of action that appears to be in her client's best interests? Should the lawyer voice her objections, or stay silent?

As we deal with these issues, keep in mind the simple image of a lawyer and client, sitting together, talking, wrestling with tough choices. Let us consider two questions. First, how should we envision the relationship between a lawyer and her client? Second, what role should the lawyer's religion play in that relationship?

## I. THE LAWYER-CLIENT RELATIONSHIP

### A. Hypothetical

My grandmother died a few years ago. At one point our family discussed the possibility of a feeding tube for my grandmother, but she died before we could make a decision. For the purposes of analysis, assume my grandmother has been comatose, on a ventilator and feeding tube for months, with no reasonable chance of recovery.<sup>2</sup> Assume further that my grandmother has left no living will or other indication of her wishes about life-supports. Under

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1. E.g., *Dialogue on the Practice of Law and Spiritual Values*, 28 FORDHAM URB. L.J. 991 (2001); Symposium, *Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent*, 26 FORDHAM URB. L.J. 821 (1999); Symposium, *The Relevance of Religion to a Lawyer's Work: An Interfaith Conference*, 66 FORDHAM L. REV. 1075 (1988). Another important source for those interested in exploring the religious dimensions of legal practice is Symposium, *Faith and the Law*, 27 TEXAS TECH L. REV. 911 (1996).

2. This hypothetical is admittedly unrealistic, however, it is not being used to examine the intricacies of the law of death and dying, but to explore the various ways lawyers relate to clients. For our purposes, the simplicity of the hypothetical is useful,

these circumstances, the law of our state allows the next-of-kin to make the decision. I am my grandmother's closest living relative.

In my discussions with the nursing home, I have raised the possibility of removing the life-supports, but have been told to wait a few more months before making a decision. Not sure of what to do, I decide to see a lawyer to learn more about my options.

Assume I visit three lawyers. The first listens to me for a minute or two, and then interrupts. She tells me that under the law of our state I can have the life-supports withdrawn. If the nursing home refuses, I can get a court order requiring removal. "Look," she says, "here's what we'll do. I'll call the nursing home immediately and demand they withdraw the life-supports. If they say no, we'll go to court." She pauses for a moment, as if awaiting my approval. "I'm not sure," I say, "It seems OK, but I'm still not sure what to do." The lawyer explains that she's seen a lot of these cases, and that withdrawing the life-supports is the right thing to do. "You're too emotionally involved to make the decision," she tells me. "That's what I'm here for. Leave everything to me." I tell her I'll think about it and get back to her tomorrow.

I go to a second lawyer, who listens intently to what I say. She nods understandingly. When I am finished, she says, "We have several options open to us. It all depends on what you want. We could wait awhile, we could schedule a meeting with the nursing home, or we could go to court. It's really your choice." I try to explain that I'm not sure what to do. "A part of me thinks it's right to remove my grandmother from life-support, but another part of me thinks it's wrong, almost like murder." The lawyer tells me to think some more about what I want to do, make a decision, and then get back to her. "Whatever you want to do, we can do," she tells me as I leave.

I go to a third and final lawyer, and tell my story again. This lawyer does not tell me what to do. She does not promise to do whatever I tell her to do. She listens to me, asks questions, and identifies options. We are drawn into a discussion of the moral issues surrounding the use and removal of life-supports. As I become more comfortable with her, I reveal that I have religious concerns about removing the life-supports. The lawyer suggests I meet with my parish priest to talk about the religious issues. She says she will arrange a meeting with my grandmother's physician and the administrator of the nursing home. Perhaps then, we will

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as it allows us to draw clear distinctions between different models of the lawyer-client relationship.

find out what we need to know to make an informed and wise decision. I leave, still not knowing what to do, but feeling surprisingly better.

These crude portraits are unreal, of course, and simplify both the dynamics of the lawyer-client relationship, as well as the procedures involved. These hypothetical scenarios are meant to highlight several typical models of legal counseling currently prevalent in the profession. Each of my hypothetical lawyers represents a distinctive orientation or perspective on the lawyer-client relationship. They are roughly based on models developed by law professors Robert Cochran, John DiPippa, and Martha Peters in their important work, *The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling*.<sup>3</sup> The authors identify three models of lawyer-client relationships: authoritarian, client-centered, and collaborative.<sup>4</sup> Each model will be examined in turn.

### 1. *The Authoritarian Model*

The authoritarian model, exemplified by the first lawyer in our hypothetical, presumes that the lawyer is in charge of the relationship.<sup>5</sup> Clients are expected to be docile and passive. They should trust their lawyers to act in their best interests. They should not ask too many questions or take too active a role on their own behalf. In contrast, lawyers are expected to be aggressive, decisive, and commanding. In his famous study of lawyers and clients, David Rosenthal calls this the "traditional approach."<sup>6</sup> Rosenthal concludes, "The traditional idea is that both parties are best served by the professional's assuming broad control over solutions to the problems brought by the client."<sup>7</sup>

The reasons for such a model are not difficult to understand.<sup>8</sup> As I have written elsewhere, "Clients are often vulnerable, troubled persons. They frequently lack an understanding of the language or the nuances of the law. They are strangers in the strange land of the courts. They have little choice but to trust in the com-

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3. ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* (1999).

4. *Id.* at 2.

5. *Id.* at 2-4.

6. DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 7-13 (1974).

7. *Id.* at 7.

8. See, e.g., William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 52-60; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 15-24 (1975).

petence of their lawyer.”<sup>9</sup> Add to this that lawyers have undergone a socialization process that leads many to see themselves as “members of an elite . . . different from and somewhat better” than the clients they are hired to serve.<sup>10</sup>

When these factors are present, it becomes easy for a lawyer to act paternalistically towards a client and deal with her not as an adult, but as a child, or perhaps, as a broken object needing to be fixed.<sup>11</sup> The lawyer is tempted to treat her client “as though the client were an individual who needed to be looked after and controlled, and to have decisions made for him or her by the lawyer, with as little interference from the client as possible.”<sup>12</sup>

Cochran identifies four problems with the authoritarian approach.<sup>13</sup> First, it disregards the client’s dignity.<sup>14</sup> The client should be in charge of the important decisions about her life, not the lawyer. Second, it is likely to be less satisfying for clients “because clients, in general, are likely to be the best judges of their own interests.”<sup>15</sup> Only the client knows her own values, goals, and willingness to take risks. Third, client control is likely to achieve better monetary results than the authoritarian model. Cochran notes that Rosenthal’s study found that “plaintiffs who are actively involved in their cases obtain higher settlements and higher verdicts than plaintiffs who allow their lawyers to control the representation.”<sup>16</sup> Fourth, the authoritarian model is contrary to the thrust of the Model Rules of Professional Conduct, which give the client the ultimate authority to decide the objectives of the representation.<sup>17</sup>

There are other problems with this approach. Under the authoritarian model, client problems are viewed as *legal* problems for which the lawyer provides *legal* solutions.<sup>18</sup> As a result, it is un-

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9. Joseph Allegretti, *Lawyers, Clients, and Covenant: A Religious Perspective on Legal Practice and Ethics*, 66 *FORDHAM L. REV.* 1101, 1111-12 (1998) [hereinafter Allegretti, *Religious Perspective*].

10. Wasserstrom, *supra* note 8, at 18.

11. *Id.* at 21.

12. *Id.* at 22.

13. COCHRAN ET AL., *supra* note 3, at 3-4.

14. *Id.* at 3.

15. *Id.*

16. *Id.* at 3-4 (citing ROSENTHAL, *supra* note 6, at 36-46).

17. MODEL RULES OF PROF'L CONDUCT R. 1.2 (1983); COCHRAN ET AL., *supra* note 3, at 4. As the Comment to Rule 1.2 states, “The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations.” MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt [1].

18. COCHRAN ET AL., *supra* note 3, at 2.

likely that the parties will engage in a full and frank discussion of the moral issues involved with the representation. Feelings, emotions, morals, religious values, concerns for third parties—all seem irrelevant. There is little incentive to raise moral issues if the lawyer views the client as a child, rather than an adult. The client may feel as if her own moral doubts or concerns cannot be voiced, and the lawyer may bracket her own moral values and come to see herself not as a moral agent but as a moral neuter—in Richard Wasserstrom's felicitous phrase, an "amoral technician"<sup>19</sup>—whose work is divorced from the rest of her life, including her deepest values and religious commitments.

Of course, not all lawyers adopt the authoritarian approach. Many sophisticated clients, particularly businesspersons, possess a certain legal savvy that allows them to meet their lawyers as equals.<sup>20</sup> Another obvious fact that may be easily overlooked is: "[P]rivate practitioners depend wholly on their clients for their livelihood, and this dependence is fundamental in the distribution of power."<sup>21</sup> In some cases, an authoritarian client may dominate and control her lawyer.

Even if the authoritarian model is less likely to exist in the corporate context, it may be common among lawyers who practice divorce law, elder law, or bioethics law. Lawyers in these fields often deal with clients who struggle with agonizing decisions about life and death issues. Their clients are emotionally vulnerable, and sometimes cognitively impaired. Many of their clients have never been to a lawyer before, and find it difficult to make decisions or verbally express their wishes. Additionally, many clients are more than willing to defer to a lawyer, if only to have someone else take up the heavy burdens they have been carrying. I suspect that the authoritarian model, even with all the criticism it engenders,<sup>22</sup> is alive and well in the areas of family law and bioethics law.

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19. Wasserstrom, *supra* note 8, at 5-6.

20. See DEBORAH L. RHODE ET AL., *LEGAL ETHICS* 610 (1st ed. 1992) ("One might wonder, however, whether . . . worries about power asymmetries are appropriate in cases involving sophisticated business clients rather than divorce or legal aid clients, particularly since corporate managers often use their own in-house counsel to direct and control outside attorneys.").

21. David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1036-37 (1990).

22. For additional criticisms of the authoritarian model, see David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454; Simon, *supra* note 8, at 52-60; Wasserstrom, *supra* note 8, at 15-24.



## 2. *The Client-Centered Model*

In response to the criticisms directed at the authoritarian model, a second model has developed, illustrated by the second lawyer in my hypothetical. Cochran calls this the "client-centered model."<sup>23</sup> He dates its emergence to the 1977 publication of David Binder and Susan Price's book, *Legal Interviewing and Counseling*.<sup>24</sup> As its name suggests, this model places client autonomy at the forefront.

Binder and Price urge lawyers to expand their view of the client's "case" to include nonlegal aspects. The lawyer's role "involves having clients actively participate in identifying their problems, formulating potential solutions and making decisions. Thus, client-centered lawyering emanates from a belief in the autonomy, intelligence, dignity, and basic morality of the individual client." Lawyers are asked to convey "empathic understanding" to their clients. Lawyers invite clients to define the goals of the case, to suggest alternatives to pursue those goals, and to make decisions to advance the case. In client centered-counseling, the lawyer must maintain an appearance of neutrality and refrain from providing direct advice. Whereas the client has a very limited role in the authoritarian model, the lawyer has a very limited role in the client-centered model.<sup>25</sup>

Although Cochran considers the client-centered model superior to the authoritarian model, he points out several shortcomings.<sup>26</sup> First, all decisions are made on the basis of what will maximize the client's interest, leaving no room for the lawyer and client to discuss how the client's decisions might impact other people.<sup>27</sup> Second, the client-centered model is a "one-size-fits-all approach."<sup>28</sup> It assumes that the client must make all important decisions for the client, and ignores the possibility that a client might *want* her lawyer to make certain decisions on her behalf. Third, the client-centered model overlooks the reality of legal practice; sometimes clients come to lawyers only for "short-term help in resolving a narrow issue."<sup>29</sup> In such cases, the client-centered model is inflexi-

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23. COCHRAN ET AL., *supra* note 3, at 4-6 (citations omitted).

24. DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977). This book was later revised and updated in DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH* (1991).

25. COCHRAN ET AL., *supra* note 3, at 5.

26. *Id.* at 5-6.

27. *Id.* at 5.

28. *Id.*

29. *Id.* at 6.

ble and time-consuming. Finally, the client-centered model may go too far in its well-intentioned effort to avoid lawyer domination of clients, as the lawyer may be reluctant to bring her own “practical wisdom” to the lawyer-client relationship.<sup>30</sup> As Cochran notes, “Lawyers should be careful not to overpower clients, but they should not deny to clients the primary thing that the client may have come for: help in making decisions.”<sup>31</sup>

The client-centered model substitutes one form of domination for another, and when a client dominates the lawyer, the same problems arise as when the lawyer dominates the client:

Once again there is not a relationship of equality in which the two sides are open to the other. Once again moral issues are bracketed. The lawyer is encouraged to ignore the moral consequences of his actions and to do whatever the client wants as long as the client is paying.<sup>32</sup>

Under these circumstances, the lawyer becomes a mere hired gun, whose job is to shoot first and ask no questions at all.<sup>33</sup> The client’s moral and religious values, like the lawyer’s, have no place in such a relationship.

While the authoritarian model provides too large a role for lawyers, the client-centered model does just the opposite.<sup>34</sup> An approach that respects the autonomy and human dignity of both parties is needed. Cochran therefore proposes a third approach, which he calls the “collaborative model.”<sup>35</sup>

### 3. *The Collaborative Model*

Under the collaborative model, “the client would control decisions, but the lawyer would structure the process and provide advice in a manner that is likely to yield wise decisions.”<sup>36</sup> Cochran quotes David Rosenthal, who has urged lawyers and clients to work towards “mutual participation in a cooperative relationship in which the cooperating parties have relatively equal status, are

30. *Id.*

31. *Id.*

32. JOSEPH ALLEGRETTI, *THE LAWYER’S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* 41 (1996).

33. See Joseph Allegretti, *Have Briefcase Will Travel: An Essay On The Lawyer As Hired Gun*, 24 CREIGHTON L. REV. 747, 749 (1991) [hereinafter Allegretti, *Hired Gun*].

34. COCHRAN ET AL., *supra* note 3, at 5-6.

35. *Id.* at 6.

36. *Id.*

equally dependent, and are engaged in activity 'that will be in some ways satisfying to both [parties].'<sup>37</sup>

Cochran argues that the collaborative approach avoids the problems of the authoritarian and client-centered models. As compared to the authoritarian model, the collaborative model promotes client dignity and yields better results.<sup>38</sup> The collaborative model is superior to the client-centered model as well, because it encourages the client to consider not only her own self-interest, but also the interests of others who might be affected by her decisions.<sup>39</sup> Since the collaborative model allows both parties to bring their practical wisdom to bear upon problems, it is likely to lead to better, more-informed decisions.<sup>40</sup>

Perhaps most importantly, the collaborative model allows lawyers and clients to engage in a moral dialogue. The lawyer is not the client's boss, but neither is she the client's hired gun. Each party is empowered to raise moral concerns. Cochran suggests analogizing the relationship between a lawyer and client to the relationship between friends.<sup>41</sup> This does not mean, of course, that lawyers must become friends with each and every client, but that lawyers "might discuss moral issues with a client in the way that they would discuss moral issues with a friend; not imposing their values on the client, but exploring the client's moral values, and not being afraid to influence the client."<sup>42</sup>

A collaborative relationship is like a friendship, as each party maintains moral accountability for her own actions within a context of mutual accountability to and for the other. Neither party is the rubber stamp of the other. Cochran quotes Anthony Kronman, who argues that a good lawyer, like a good friend, helps a client by being both sympathetic and independent:

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37. *Id.* at 7 (quoting ROSENTHAL, *supra* note 6, at 10).

38. *Id.* at 6-7.

39. *Id.* at 7.

40. *Id.*

41. *Id.* at 176-82; *see also* THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 40-54 (1994) (arguing for the lawyer-as-friend analogy); Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439, 455-59 (1990) (arguing that lawyers should deal with clients as they would a good friend). Professor Charles Fried uses the analogy of the lawyer-as-friend for a quite different purpose. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1076-87 (1976) (arguing that the lawyer-as-friend analogy explains why lawyers may do things for clients that ordinary morality would condemn). For a sharp criticism of Fried, *see* Edward A. Dauer & Arthur A. Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573, 575-80 (1976).

42. COCHRAN ET AL., *supra* note 3, at 177.

Friends take each other's interests seriously and wish to see them advanced; it is part of the meaning of friendship that they do. It does not follow, however, that friends always accept uncritically each other's accounts of their own needs. Indeed, friends often exercise a large degree of independent judgement [sic] in assessing each other's interests, and the feeling that one sometimes has an obligation to do so is also an important part of what the relation of friendship means. What makes such independence possible is the ability of friends to exercise greater detachment when reflecting on each other's needs than they are often able to achieve when reflecting on their own. A friend's independence can be of immense value, and is frequently the reason why one friend turns to another for advice. Friends of course expect sympathy from each other: it is the expectation of sympathy that distinguishes a friend from a stranger. But they also want detachment, and those who lack either quality are likely to be poor friends.<sup>43</sup>

Thomas Morgan also employs the friendship analogy to explain the lawyer-client relationship.<sup>44</sup> When we go to a friend, we expect "advice on what to do. We do not want to be preached at, and we do not want to be manipulated. We would not consider ourselves well advised, however, if our friends failed to consider the moral, as well as any other dimensions of our problem."<sup>45</sup> Lawyers should be free to give "the kind of candid, tough advice" that a friend would give.<sup>46</sup>

For some of us, the collaborative model and friendship analogy are also grounded in religious values. Elsewhere I have examined how a religious lawyer in general, or a Christian lawyer in particular, should approach the lawyer-client relationship.<sup>47</sup> Based upon my reading of Scripture and my understanding of the Christian way of life, I have proposed what I call a "covenantal model" of lawyer-client relationships, in which each party recognizes the sacred worth and moral equality of the other.<sup>48</sup> Under this model, the lawyer serves as a kind of moral companion to her client. Neither

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43. *Id.* at 8 (quoting ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 131-32 (1993)).

44. Morgan, *supra* note 41, at 455-59.

45. *Id.* at 458.

46. *Id.* at 459.

47. See Allegretti, *Religious Perspective*, *supra* note 9, at 1129; see also WILLIAM F. MAY, *THE PHYSICIAN'S COVENANT: IMAGES OF THE HEALER IN MEDICAL ETHICS* (1983) (proposing a covenantal model of the doctor-patient relationships); see generally ALLEGRETTI, *supra* note 32.

48. ALLEGRETTI, *supra* note 32, at 37-50; Allegretti, *Religious Perspective*, *supra* note 9, at 1116-29.

the client, nor the lawyer is in charge of the relationship, and neither is obligated to ignore her own moral values.<sup>49</sup> This leads me to adopt the friendship analogy for fundamentally religious reasons:

Lawyers and clients in covenant are not precisely the same as good friends – we do not buy our friends with money – but they are like friends in that each has made a commitment to be open to and to learn from the other. One of the things I want from a friend is a kindly ear, a willingness to listen and to withhold hasty judgments.

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But that is not all that I want. I also want honesty and moral companionship from my friend. There are times when a friend, a true friend, will say to me candidly, “Look, that doesn’t sound like you. Are you sure that’s what you want to do?” A true friend reminds me of the kind of person I aspire to be at my best rather than blindly supporting whatever I choose to do at my worst. In the same way, lawyers can serve as a voice calling clients back to their better selves, reminding clients of their deepest values, loves, and obligations. A lawyer can serve as a moral guide or moral companion to her clients.<sup>50</sup>

As an example of what this entails, consider a man who comes to a lawyer with a complaint against his son.<sup>51</sup> He is angry because of his son’s announcement that he and his girlfriend are going to have

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49. Allegretti, *Religious Perspective*, *supra* note 9, at 1124-27.

50. *Id.* at 1124-25 (citations omitted). I am not suggesting that the friendship between lawyers and clients is the same as the ideal of friendship developed by Aristotle, but there are similarities. Most importantly, both Aristotle’s ideal of friendship and the friendship model of lawyer-client relations agree on the importance of exploring moral issues. As Robert Bellah explains:

For Aristotle and his successors, it was precisely the moral component of friendship that made it the indispensable basis of a good society. For it is one of the main duties of friends to help one another to be better persons: one must hold up a standard for one’s friend and be able to count on a true friend to do likewise. Traditionally, the opposite of a friend is a flatterer, who tells one what one wants to hear and fails to tell one the truth.

ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 115 (1985). *But see* Jack L. Sammons, *Rank Strangers to Me: Shaffer and Cochran’s Friendship Model of Moral Counseling in the Law Office*, 18 U. ARK. LITTLE ROCK L. REV. 1, 7-27 (1995) (criticizing the friendship model of lawyer-client relations as contrary to Aristotle’s understanding of friendship). For a response to Sammons, see Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers as Strangers and Friends: A Reply to Professor Sammons*, 18 U. ARK. LITTLE ROCK L. REV. 69 (1995).

51. This hypothetical is taken from Allegretti, *Religious Perspective*, *supra* note 9, at 1125-26. It is loosely based upon THOMAS SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT* 3-4 (1981).

a baby. The client, a devout Christian with traditional views about marriage, tells his lawyer to rewrite his will to exclude his son. The lawyer, of course, could immediately redraft the will. But to do so represents a cramped and unsatisfying vision of the lawyer's role and the lawyer's relationship to her client. Instead, the lawyer should encourage a full and frank dialogue about the change:

But if the lawyer knows her client well, and if she sees herself in covenant with her client, then she understands that her responsibilities go beyond the provision of technical legal assistance. The lawyer recognizes that she and her client are in a relationship in which they cannot help but influence each other. Like a good friend, the lawyer cannot help but wonder if what her client demands, in the heat of the moment, is really in her client's best interests. Like a good friend, the lawyer will seek to engage her client in a conversation about the proposed change.<sup>52</sup>

Some scholars have worried that the collaborative and friendship models might be a cloak for subtle manipulation and domination by the lawyer.<sup>53</sup> Professor Jack Sammons objects to the friendship model, doubting that lawyers and clients share sufficient common moral values.<sup>54</sup> Cochran admits, "There is a danger that a lawyer who seeks to counsel one with different moral values may think that she is engaging the client in moral discourse, when she is merely imposing her values on the client."<sup>55</sup>

While this is an important objection, several points can be made in reply. Cochran suggests several steps lawyers may take to reduce the risk of dominating their clients.<sup>56</sup> First, the lawyer should try to create an atmosphere that empowers the client and conveys a sense of respect and moral equality.<sup>57</sup> For example, a lawyer may decide to discuss the issue of control openly with her client. Second, the lawyer can adjust the "intensity" with which she approaches the relationship. Depending upon the issue and the client, the lawyer may be more or less direct, more or less neutral, in the language she uses and the emotions she displays.<sup>58</sup> In some cases the lawyer may decide to be relatively neutral on moral issues by asking non-leading questions and displaying little emotion,

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52. Allegretti, *Religious Perspective*, *supra* note 9, at 1125.

53. *See generally* Sammons, *supra* note 50, at 38-42. *But see* COCHRAN ET AL., *supra* note 3, at 182-87 (discussing ways to avoid lawyer domination of clients).

54. Sammons, *supra* note 50, at 8-27.

55. COCHRAN ET AL., *supra* note 3, at 186.

56. *Id.* at 183-84.

57. *Id.* at 183.

58. *Id.* at 184.

while in other cases the lawyer may take a more active role and raise moral issues directly with her client.

Another protection against lawyer domination and overreaching is for the lawyer to explain her approach to counseling at the outset of the relationship. A client may assume her lawyer is ready to do whatever the client wants, without raising moral questions or doubts. To guard against any misunderstanding, the lawyer should take the first available opportunity to sketch her vision of the lawyer-client relationship. The lawyer need not use words like "collaborative model" or "covenantal relationship"; she need only indicate by her words and actions that she hopes to foster a relationship marked by mutual trust and respect, one in which both parties are free to openly raise moral questions. A client is free to decline such a relationship if she would prefer a lawyer with a different, perhaps more subservient, view of the lawyer's role.

Two additional points should be added. First, lawyers and clients often share a common moral tradition, or at least share enough common moral values to make moral discourse possible. Many people, regardless of their moral and religious differences, agree that it is wrong to lie, cheat, or steal. Most adhere to some version of the "Golden Rule"—we should treat others in the way we would like to be treated.<sup>59</sup> As Cochran and Shaffer insist:

Despite their diversity, North Americans are likely to share moral values . . . . [S]ome of the moral values that are most likely to be relevant in the law office – justice, mercy and truthfulness – are shared across many different religious and moral traditions. This can be a starting point for addressing moral issues.<sup>60</sup>

Second, moral discourse is possible even if the lawyer and client do not share a common moral tradition. There will probably be some overlap of moral values. Even if there is little common moral ground, lawyers and clients can still discuss moral issues while respecting their differences. The best discussions I have ever had about moral and religious matters have not occurred while talking

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59. LINDA K. TREVIÑO & KATHERINE A. NELSON, *MANAGING BUSINESS ETHICS: STRAIGHT TALK ABOUT HOW TO DO IT RIGHT* 300 (2d ed. 1999) (finding some version of the Golden Rule in Buddhism, Christianity, Confucianism, Hinduism, Islam, and Judaism).

60. SHAFFER & COCHRAN, *supra* note 41, at 49. Of course, a lawyer should not assume that a client holds certain moral values merely because of the client's religious affiliation. A lawyer who is Roman Catholic, for example, should not presume that a client who is Roman Catholic will hold the same views as the lawyer does on issues such as assisted reproduction or the removal of life-support.

to those who shared my core values, but when talking to those who held different values, thereby challenging me to think more seriously about what I believe, and why. A lawyer can always encourage her clients to consider the moral dimensions of their problems:

It does not violate client autonomy to ask, "Is that really what you want to do?"; or to say, "Let's talk about this some more."

. . . .

Instead of telling the client . . . what he *can* do, the lawyer can ask her client to reflect about what he *should* do. Sometimes the lawyer need only speak a single word: *Why?* Why do you say that? Why do you want to do that? This is the essence of the lawyer's role as moral companion: to assume the best about our clients, not the worst; to create a space for clients to think before they act; and to help clients to act in accord with their fundamental values.<sup>61</sup>

What have we learned from this comparison of the various models of the lawyer-client relationship? Ultimately, each lawyer must decide for herself which model is best. The rules of professional conduct certainly "permit a lawyer to choose among philosophies of client counseling."<sup>62</sup> I believe, however, that the collaborative or friendship model is preferable to the authoritarian model. It avoids the twin temptations of lawyers dominating clients and clients dominating lawyers, preserves the moral equality of the parties, is most likely to produce results more satisfying to the client, and is the only one of the three models that encourages the lawyer and client to discuss moral issues openly. Only under this model is the lawyer free to raise moral questions and doubts with her client. For all these reasons, lawyers should approach their clients as if they were good friends who need help in making a decision.

Of course, there will be cases where the client will not be willing or able to reciprocate. Some clients will have no interest in forging a relationship of mutuality and equality, but the lawyer can approach clients with the collaborative or friendship model as a goal. The lawyer can *invite* clients to enter into such a relationship by her

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61. Allegretti, *Religious Perspective*, *supra* note 9, at 1126 (emphasis added) (citations omitted).

62. Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 43 (1997). The authoritarian model, however, may be inconsistent with some of the basic values underlying the Model Rules. See *supra* text accompanying note 17.



words and actions. True friendship cannot be compelled—but it can be nurtured and encouraged.<sup>63</sup>

## II. THE ROLE OF THE LAWYER'S RELIGION

Let us assume, for purposes of this Article, that lawyers should strive to create a collaborative relationship with their clients. This raises other questions: Assuming a collaborative relationship exists, how much of a role is there for the lawyer's own religious values? Should the lawyer be free to voice her religious doubts about a case? How should a lawyer react if her client wants to do something that violates the lawyer's fundamental religious values?

Again, it may be helpful to begin with a hypothetical case, and examine the various approaches available to the lawyer. Consider a case in which a lawyer is assigned to represent a pregnant woman who has been incarcerated.<sup>64</sup> The woman wants the lawyer to request bail for her so the client can obtain a legal abortion. The attorney is strongly opposed to abortion on religious grounds, and believes that abortion is always wrong and constitutes murder. What are the lawyer's options, assuming the court will not allow her to withdraw from the appointment?

One approach would be for the lawyer to adopt the authoritarian model and simply do what she thinks is right.<sup>65</sup> She might

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63. Although I endorse the collaborative model, it is not without its own problems. See *supra* notes 53-61 and accompanying text (discussing and responding to the criticism that the collaborative model can lead to lawyer domination of clients). In my discussions with lawyers, the most common criticism of the collaborative model is that it may be unduly time-consuming, and hence too expensive for clients (at least for those clients paying on an hourly basis). There are at least four responses to this criticism. First, the criticism may not be true. It is not certain, at least to me, that treating clients respectfully and inviting moral reflection will necessarily increase the time spent counseling clients. Second, even if the amount of time spent with clients does increase, the extra time might be well worth it to clients because of the advantages that flow from this model. See *supra* notes 38-43 and accompanying text (discussing the advantages of the collaborative model over the authoritarian and client-centered models). Third, as Cochran reminds us, "some clients come to lawyers for short-term help in resolving a narrow issue." COCHRAN ET AL., *supra* note 3, at 6. In these cases, the full-fledged collaborative model might not be necessary. A client should be free to make an informed choice to have her lawyer make the decisions in the case. *Id.* (arguing that a client can consent to give her lawyer control of decisions). Fourth, a lawyer who adopts the collaborative model should explain her approach to counseling at the outset and thereby give would-be clients the opportunity to choose another lawyer instead.

64. This hypothetical is based upon *Panel Discussion: Does Professionalism Leave Room for Religious Commitment?*, 26 *FORDHAM URB. L.J.* 875, 891 (1999).

65. See *supra* notes 5-22 and accompanying text (discussing the authoritarian model).

keep secret her objections to abortion, procrastinating until it is too late for the client to obtain an abortion. Alternatively, she might give less than candid advice and mislead her client into believing that bail is not obtainable, or that an abortion is not possible under the circumstances.

This approach is unethical and immoral. It violates the rules of professional conduct governing the profession.<sup>66</sup> It may constitute legal malpractice,<sup>67</sup> and may constitute an intentional tort. By unilaterally usurping control of the relationship, the lawyer has violated the client's autonomy. The case is now being conducted not to benefit the client, but to benefit the lawyer's unspoken interests. As Professor Bruce Green argues:

In general, a client seeks the lawyer's advice in order to be able to make an informed decision. Advice that undermines the client's ability to make an informed decision – because the advice is coercive, false, incomplete, or so offensive as to undermine the client's trust in the lawyer – thus may be contrary to applicable professional norms.

. . . .

For these reasons . . . it would be improper for a lawyer to recommend a course of conduct when the lawyer's motivation is to promote the lawyer's *unexpressed* personal views.<sup>68</sup>

Perhaps this case is too easy. Few lawyers or ethicists would argue that this lawyer acted properly. Consider a second possibility, where the lawyer decides that her task—her only task—is to determine what her client wants, and do whatever she can to achieve her client's objective. Her own views on abortion are irrelevant, and so she keeps her moral and religious doubts to herself. In effect, the lawyer adopts the client-centered model discussed earlier.<sup>69</sup>

This lawyer violates no rule of professional conduct. She commits no legal malpractice. But is this the best course of action for her client and herself? At first glance, she seems to be acting as a good lawyer. The client, of course, has the ultimate authority over

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66. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1 (1983) (requiring a lawyer to provide competent representation); *id.* R. 1.2(a) (stating that decisions about the objectives of a case are for the client to make); *id.* R. 1.2(c) (stating that a lawyer may limit the objectives of a case only if the client consents); *id.* R. 1.3 (requiring a lawyer to act diligently and promptly); *id.* R. 1.4 (requiring a lawyer to keep a client reasonably informed and to explain matters sufficiently to allow the client to make informed decisions).

67. *Panel Discussion, supra* note 64, at 893 (remarks of participants).

68. Green, *supra* note 62, at 44 (emphasis added).

69. *See supra* notes 23-34 and accompanying text (discussing the client-centered model).

the ends of the representation.<sup>70</sup> The lawyer's job is to help her client make a decision and take the necessary steps to implement that decision. The lawyer should not try to manipulate the client or control her decision. As Binder says, "Because client autonomy is of paramount importance, decisions should be made on the basis of what choice is most likely to *provide a client with maximum satisfaction*."<sup>71</sup> Of course, the lawyer has an important role to play in helping the client clarify objectives, identify alternative courses of conduct, and assess the likely costs and benefits of each alternative.<sup>72</sup> However, the lawyer must remain neutral and impartial at all costs.<sup>73</sup> The lawyer's religious values and doubts seem to have no place in a client-centered approach.

This does not mean that a lawyer must always accept a client's choices at face value.<sup>74</sup> As Anthony Kronman states, even if a client seems adamant in her choice, the lawyer should make certain that the client's choice is not "impetuous":<sup>75</sup>

Most lawyers would agree, I think, that under these circumstances it would be irresponsible simply to do what the client asks without first assuring oneself that his decision is a well-considered one . . . . It may not always be clear that the client's decision is impetuous, but when surrounding circumstances suggest that it is, a responsible lawyer will test his client's judgment [sic] before accepting it, recognizing that in such situations the danger of regret is large and that a lawyer must protect his client from this familiar species of self-inflicted harm as well as the harm caused by others.<sup>76</sup>

But how can the lawyer ensure that a client's decision is well considered? Kronman cautions against evaluating a client's choices on the basis of the lawyer's own values:

It would be inappropriate for the lawyer to conduct this inquiry from the perspective of his own personal desires by asking whether he would want to do what the client has proposed, and to conclude that the client's decision is impetuous if the lawyer would not have made it for himself.<sup>77</sup>

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70. MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

71. BINDER & PRICE, *supra* note 24, at 261.

72. *Id.* at 289-308.

73. *Id.* at 289.

74. See COCHRAN ET AL., *supra* note 3, at 179 (quoting KRONMAN, *supra* note 43, at 129-32).

75. KRONMAN, *supra* note 43, at 129.

76. *Id.*

77. *Id.* at 130.

Instead, the lawyer should try to enter the client's world. The lawyer should "place himself in the client's position by provisionally accepting his ends and then imaginatively considering the consequences of pursuing them."<sup>78</sup>

While there is much good in this approach, it has serious problems as well. As a practical matter, we may question whether the kind of neutrality envisioned by the client-centered model is even possible in a case where a lawyer has deeply-felt religious misgivings about a client's course of conduct. If a lawyer believes for religious reasons that her client is making a bad decision—in our hypothetical case, that her client is going to commit murder by having an abortion—then it may be too much to ask the lawyer to put aside her own values and accept the client's ends as if they were her own. It is more likely that the lawyer's moral and religious doubts will influence the way she identifies the various options open to the client and assesses the likely consequences of each. Process can control substance: lawyers know that *how* you present alternatives will often determine *which* alternative the client chooses. For example, if a lawyer believes that removal of life-supports from a comatose patient is murder, this belief can shape how the lawyer approaches the case, explains the law to her client, and evaluates the pros and cons of each option. A lawyer's conscious or unconscious moral and religious misgivings do not disappear merely because the lawyer decides to keep them to herself.

In such cases the lawyer may continue with the representation, yet be plagued by nagging doubts or a vague sense of guilt or anxiety. As I have argued elsewhere, "If . . . a lawyer refuses to voice her moral doubts, those doubts do not disappear. Her moral misgivings go underground and fester, contaminating and subverting her dealings with her client."<sup>79</sup> This may lead to resentment and hostility toward the client, or even to a sense of self-loathing.<sup>80</sup> It may also help to explain the paternalism and manipulation that lawyers often engage in towards clients. When a lawyer feels resentment or anger towards a client, these feelings might lead the lawyer to treat the client "more like an object than a human being, and more like a child than an adult."<sup>81</sup>

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78. *Id.*

79. Allegretti, *Religious Perspective*, *supra* note 9, at 1127.

80. See Joseph Allegretti, *Shooting Elephants, Serving Clients: An Essay On George Orwell and the Lawyer-Client Relationship*, 27 CREIGHTON L. REV. 1, 12 (1993) [hereinafter Allegretti, *Serving Clients*].

81. Wasserstrom, *supra* note 8, at 19.

Another problem with this approach lies in its single-minded devotion to the client's autonomy.<sup>82</sup> Client autonomy, while certainly important, is not the only value that deserves to be honored in the lawyer-client relationship. There are at least two other parties whose interests should be considered: other persons and groups that may be affected by the client's choices, and the lawyer herself.<sup>83</sup> A lawyer does both of these parties a disservice if she brackets or ignores her religious doubts about a case.

Talk of client autonomy runs the risk of abstracting the client from the relationships and communities that nurture and sustain us all. "In the beginning is relation," says philosopher Martin Buber.<sup>84</sup> Life is essentially social—we are shaped and formed by our relationships with others. Theologian Richard McCormick states that, "[O]ur well-being is interdependent. It cannot be conceived of or realistically pursued independently of the good of others. Sociality is part of our being and becoming."<sup>85</sup> Some thinkers have gone so far as to claim that human beings exist only in relationships. There can be no sense of "I" except in relation to others.<sup>86</sup>

This means that we are never truly autonomous. As legal ethicist Thomas Morgan says, "We were born into families and nurtured by communities. As a result, we owe obligations to those individuals and groups, as well as to the broader society."<sup>87</sup> This understanding leads Morgan to argue that a "lawyer should refuse to engage in conduct when the resulting harm to third parties will be more than is necessary to further the client's legitimate concerns."<sup>88</sup>

We may raise questions about the scope and desirability of Morgan's standard.<sup>89</sup> Nevertheless, Morgan has put his finger on a basic truth that has important implications for client counseling. A client does not live in moral isolation. The client's obligations to

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82. See *supra* notes 26-34 and accompanying text.

83. There are also questions about the client's and lawyer's obligations to the system of justice itself, but these are beyond the scope of this article.

84. MARTIN BUBER, *I AND THOU* 18 (2d ed. 1958).

85. RICHARD A. MCCORMICK, *HEALTH AND MEDICINE IN THE CATHOLIC TRADITION: TRADITION IN TRANSITION* 55 (1984).

86. BRUCE C. BIRCH & LARRY L. RASMUSSEN, *BIBLE & ETHICS IN THE CHRISTIAN LIFE* 69 (revised & expanded ed. 1989).

87. Morgan, *supra* note 41, at 447.

88. *Id.* at 454.

89. How, for example, is the lawyer to balance the harm done to third parties against the legitimate goals of a client? How would such a principle be enforced? Could such a standard prove workable in the courtroom?

other parties are a legitimate topic of discussion. Indeed, a lawyer's religious doubts about a case will often derive from her concerns about the possibility of harm to third parties. The lawyer should be free to discuss her doubts and concerns with the client or else the client may never consider the impact of her decision on others. For example, in our abortion hypothetical, the lawyer's religious objections are rooted in her beliefs about the harm being done to the client's unborn child. If the lawyer adopts an unduly narrow view of her role and does not voice her doubts, the issue of the client's duties to the fetus may never be considered.

Paul Zwier and Ann Hamric have expressed similar arguments, proposing that lawyers adopt an "ethic of care" when counseling clients.<sup>90</sup> Under their approach, the lawyer would not focus solely on the client's lawful interests, but would also facilitate a discussion about the likely impact of various alternatives on the other persons who will be affected by the client's decision. The lawyer and client should "think through all possible alternative activities to determine which are responsible (i.e., loving and just) to those who are involved in the situation."<sup>91</sup> Similarly, one of the reasons Cochran prefers the collaborative model to the client-centered model is that the former encourages discussion about the interests of other parties, while the latter focuses solely on the client's interests.<sup>92</sup>

This is *not* to say that the lawyer in our hypothetical should lecture the client about her religious objections to abortion. Nor am I proposing that the lawyer should mislead the client about her legal options, or present those options in a way that favors whatever alternative the lawyer thinks is best. I am not saying that the lawyer and client must engage in theological and philosophical arguments about the meaning of personhood or the sanctity of life. I am certainly not saying that the lawyer should "testify" about her own religious values, or try to evangelize her client.<sup>93</sup> In fact, lawyers should be extremely reluctant to use explicitly theological language with clients, for doing so will often convey both a lack of respect

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90. See Paul J. Zwier & Ann B. Hamric, *The Ethics of Care and Reimagining the Lawyer/Client Relationship*, 22 J. CONTEMP. L. 383, 383-86 (1996).

91. *Id.* at 402.

92. COCHRAN ET AL., *supra* note 3, at 177.

93. See Howard Lesnick, *The Religious Lawyer In A Pluralist Society*, 66 FORDHAM L. REV. 1469, 1497 (1998) ("For a religious lawyer simply to 'testify' to the strength of his or her convictions would be a grievous wrong, for it would fail to address the client as a concrete human being and moral agent.").

for the client's own views, and a failure to recognize the client's vulnerability.<sup>94</sup>

Rather, I am saying that a lawyer owes it to her client to give the client an opportunity to reflect about the moral aspects of a case. A lawyer does not do her client a disservice when she provides the client an opportunity to think about these matters. Further, a lawyer who has religious objections to a client's cause need not keep silent about her misgivings, but should feel free to raise them in an appropriate, non-paternalistic manner.

I agree with Professor Russell Pearce who, when commenting upon the hypothetical of the lawyer whose incarcerated client seeks bail to obtain an abortion, wrote, "I would have no problem with the lawyer having a conversation with the client where the lawyer brings his or her moral concerns into the conversation."<sup>95</sup> How and when to raise such concerns is another matter. As Professor Lesnick notes, "The challenge to the attorney is to integrate strong conviction with a lively awareness that in a pluralist society even the strongest conviction is personal, and that the manner of counseling must reflect the realities of a client's vulnerabilities."<sup>96</sup>

In our hypothetical case, the lawyer must take great pains to avoid manipulating and controlling her client, especially since the client is incarcerated, and might reasonably believe that her lawyer holds the keys to her freedom. Under such circumstances, the lawyer should take all steps to ensure she does not impose her own values upon the client. As suggested earlier, a lawyer can invite moral reflection without dominating a client by asking questions such as: "Why? Why do you want to do this? Are you sure you want to do this? Can we talk about this some more?"<sup>97</sup>

Now we can see more clearly why it is important for the lawyer to try to create an atmosphere marked by trust and collaboration. "It is possible to discuss moral issues openly and frankly with a client, without falling into the trap of lawyer domination or client domination, but *only if* there already exists a relationship of mutual

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94. See Green, *supra* note 62, at 46-47.

A lawyer-client relationship is not conducive to the kind of theological dialogue that might be necessary to convince [a client] of the appropriateness of [the lawyer's] theological views and, in any case, it would be abusive to use the representation as an occasion for an uninvited discussion of religion.

*Id.*

95. Panel Discussion, *supra* note 64, at 892.

96. Lesnick, *supra* note 93, at 1496-97.

97. See *supra* text accompanying note 61.

respect and trust.”<sup>98</sup> If a friend of mine proposes to do something that I believe is wrong or immoral, she might be willing to discuss her decision with me, because she trusts me to provide her with guidance without being overbearing or controlling. She knows that I want only the best for her. But she is unlikely to listen to a stranger, because there is no relationship of friendship and trust to fall back on. That is why the kind of full and frank discussion I envision presupposes Cochran’s collaborative approach,<sup>99</sup> or what I prefer to call a covenantal relationship.<sup>100</sup>

Allowing lawyers the freedom to discuss their moral and religious values is also good for the client. In order for the client to choose wisely, she needs to consider the full range of factors relevant to her decision, including the moral aspects. Since clients often take their cues from their lawyers, a lawyer’s unwillingness to raise moral issues often means that such issues will not be raised at all.<sup>101</sup> A refusal to discuss moral issues, of course, speaks loudly about the irrelevance of moral discourse.<sup>102</sup>

The Model Rules of Professional Conduct permit, even if they do not require, a lawyer to raise moral issues with her client. The Model Rules provide, “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”<sup>103</sup> The Model Rules recognize that a failure to explore moral issues can detract from the quality of the lawyer’s representation. As a comment to the above rule explains:

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical consid-

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98. Allegretti, *Religious Perspective*, *supra* note 9, at 1126 n.167.

99. COCHRAN ET AL., *supra* note 3, at 6-9, 176-82.

100. Allegretti, *Religious Perspective*, *supra* note 9, at 1116-29; *see supra* text accompanying note 48.

101. *See* Allegretti, *Serving Clients*, *supra* note 80, at 17-23 (discussing the “conspiracy of silence” between lawyers and clients, which often leads to a failure of either party to discuss moral questions).

102. Jack Sammons has noted that, “[N]ot raising morality shapes the client’s morality. You cannot avoid the moral issue. It is like politics in that regard. *Not* to be political is one form of being political. *Not* to raise morality is one way of making a moral statement.” JACK L. SAMMONS, *LAWYER PROFESSIONALISM* 28-29 (1988).

103. MODEL RULES OF PROF’L CONDUCT R. 2.1 (1983).



erations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.<sup>104</sup>

I would go further and suggest that in many cases a lawyer *cannot* adequately represent a client if the lawyer brackets or ignores her own moral and religious values. A lawyer, after all, is someone who speaks for someone else.<sup>105</sup> But a lawyer cannot speak effectively and persuasively for a client if the lawyer ignores either her client's moral values or her own. Gerard Postema puts it well:

Both positivist and natural law theorists agree that moral arguments have an important place in the determination of much of modern law. But the lawyer who must detach professional judgment from his own moral judgment is deprived of the resources from which arguments regarding his client's legal rights and duties can be fashioned.<sup>106</sup>

A lawyer's refusal to explore moral issues with her clients diminishes the quality of the representation.<sup>107</sup>

The lawyer suffers as well if she brackets or ignores her moral and religious values. She ceases to be a moral agent, and instead becomes little more than the client's hired gun.<sup>108</sup> The client's ends become the boundaries of the lawyer's moral universe. When this happens, the lawyer has no reason to consider the impact of her decisions—and her client's decisions—on third parties and society at large. She is unlikely to raise issues of care, compassion, and reconciliation.<sup>109</sup>

In effect, such a lawyer splits her life in two and lives what I call a "compartmentalized life."<sup>110</sup> Her moral and religious values—those core values that sustain the rest of her life—are deemed off-limits at work. The result is a kind of moral schizophrenia. When

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104. *Id.* R. 2.1. cmt. [2].

105. See Sammons, *supra* note 50, at 43-58 (arguing that a lawyer is best viewed as a rhetorician).

106. Gerard J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 79 (1980).

107. As mentioned earlier, there is some evidence that clients are happier with their lawyers' work and more satisfied with the outcomes when they have been treated as equal partners in the relationship. See *supra* text accompanying notes 15-16.

108. See Allegretti, *Hired Gun*, *supra* note 33, at 774-75.

109. See Joseph Allegretti, *Rights, Roles, Relationships: The Wisdom of Solomon and the Ethics of Lawyers*, 25 CREIGHTON L. REV. 1119, 1134-36 (1992) (examining the role that caring, compassion, and relationships should play in the practice of law) [hereinafter Allegretti, *Rights, Roles, Relationships*].

110. ALLEGRETTI, *supra* note 32, at 15-17.

she is away from the office, the lawyer is presumably a good and decent person who tries not to lie, cheat, or be mean-spirited. However, when she is at work she feels "compelled to leave [her] religious values at the door . . . . There the dog-eat-dog mentality or the I'm-only-following-the-rules excuse holds sway."<sup>111</sup> Not surprisingly, a morally schizophrenic life is inherently unstable. Studies suggest that if a lawyer takes positions at odds with her personal values, over time her personal values will change to conform to her public behavior.<sup>112</sup>

For all these reasons, lawyers should be free to bring their moral and religious values with them into the practice of law. They should be free to discuss moral issues and religious doubts with their clients in ways that respect the dignity and autonomy of clients. Lawyers need not shed their religious values in order to practice law.

One final point should be considered. Let us assume that a full and frank discussion of moral issues has taken place. The lawyer's moral and religious doubts have been raised and explored. In the end, however, important decisions such as whether to sue or to settle are for the client to decide.<sup>113</sup> What is likely to happen now that the lawyer has discussed her moral and religious doubts with her client?

One possibility is that the client's views will change. After discussing the matter with a trusted advisor, the client may decide against what she was previously considering. In our abortion hypothetical, the client might decide that she does not really want to have an abortion.

Another possibility, of course, is that the parties will explore the issue fully without reaching a mutually satisfactory agreement. In our hypothetical, the parties may discuss the morality of abortion, yet come to no agreement. The client may still want to obtain the abortion; the lawyer may still feel that she cannot help the client do so without violating her own deeply held religious values. Under these circumstances, the lawyer may have no choice but to refuse to assist the client. This freedom to say "no" is a necessary element in any relationship between moral equals. It is part of any true friendship. "This too is part of the lawyer's duty towards her client.

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111. *Id.* at 19.

112. Erwin Chemerinsky, *Protecting Lawyers From Their Profession: Redefining the Lawyer's Role*, 5 J. LEGAL PROF. 31, 32 (1980).

113. MODEL RULES OF PROF'L CONDUCT R. 1.2 (1983); see *supra* note 17 and accompanying text.

To be willing to say, after discussing a matter fully, 'I will not do this. I cannot do what you ask.'"<sup>114</sup>

Under these circumstances, the lawyer should withdraw from the case.<sup>115</sup> Courts should be sensitive to moral and religious objections by lawyers, and should be willing to allow withdrawals in such cases.<sup>116</sup> In our hypothetical, the lawyer should be allowed to withdraw from the appointment if, after discussing the matter fully with her client, the client remains committed to obtaining the abortion, and the lawyer remains opposed for sincere religious reasons.<sup>117</sup>

There is a third possibility, however, which should not be overlooked: Perhaps *the lawyer* will change. Perhaps the lawyer's moral doubts will be dispelled as he listens to his client tell his story. Perhaps the lawyer will come to understand more fully what motivates his client, appreciate and accept the client's objectives, and continue as the client's companion and lawyer.<sup>118</sup>

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114. Allegretti, *Religious Perspective*, *supra* note 9, at 1127.

115. The Model Rules require a lawyer to withdraw from a representation if "the representation will result in violation of the rules of professional conduct or other law." MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1). The Model Rules permit a lawyer to withdraw from a case if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent," or if there is "other good cause." *Id.* R. 1.16(b)(3), (b)(6). Withdrawal is subject to court approval. *Id.* R. 1.16(c). In our hypothetical, withdrawal is not required, but may certainly be permitted. Lawyers should not be too quick to seek withdrawal for religious reasons, but should do so only after fully discussing the issue with their clients, and only when their religious objections are strong and sincere.

116. *See* Lesnick, *supra* note 93, at 1494 (discussing and criticizing a decision of the Board of Professional Responsibility of the Supreme Court of Tennessee, which held that a lawyer who had strong religious objections to abortion could not decline an appointment to represent a minor who was seeking an abortion without parental consent pursuant to state law); *see also* Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Op. 96-F-140 (1996).

117. Under the Model Rules, a lawyer should not try to avoid a court appointment except for "good cause." MODEL RULES OF PROF'L CONDUCT R. 6.2. "Good cause" includes cases where:

- (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law; (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

*Id.* Our hypothetical case seems to fit squarely within (c). *But see* Lesnick, *supra* note 93, at 1494.

118. ALLEGRETTI, *supra* note 32, at 46.

Whatever the result, it is better for a lawyer and client to discuss moral issues than avoid them.<sup>119</sup> It is better for a lawyer to voice her concerns and invite moral dialogue than to bracket or ignore her moral and religious values. A lawyer can bring her moral and religious values with her into the workplace—as long as she remembers that she is neither her client's boss, nor her client's hired gun, but rather her client's companion, her client's partner, and even, at times, her client's friend.

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119. See SHAFFER & COCHRAN, *supra* note 41, at 28-29 (arguing that it is beneficial for lawyers and clients to discuss moral issues, even if the lawyer ultimately decides to end the representation).