COMMENT

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Professor Lerman's principal indictment of lawyers is that when they bill their clients, they lie about the extent of their services.[1] Her response is to suggest a detailed new rule on billing—very detailed; it would, for example, regulate when a time charge could and could not be rounded to a quarter of an hour.[2] It is not apparent from Professor Lerman's discussion, however, either that a detailed new rule is needed, or that she is warranted in her evident belief that enacting new, more detailed rules will improve professional conduct.

After criticizing the current rules of professional conduct, Professor Lerman states that "except in certain narrow circumstances (such as handling client funds or engaging in business transactions with clients) the drafters [of the Model Rules[3] and Model Code[4]] appear to assume that lawyers are always honest with their clients and that regulation is not needed in this area."[5] To charge a lawyer with naivete is almost as harsh as charging corruption. Examination of the Model Rules and Model Code, however, provides a sufficient answer to the charge.

A lawyer who agrees to bill on a time-spent basis, and then pads the bill, is not charging a "reasonable" fee, as required by Model Rule 1.5; nor has the lawyer kept the client "reasonably informed about the status of [the] matter," "compl[ied] with reasonable requests for information," or "explain[ed] [the] matter to the extent necessary to permit the client to make informed decisions regarding the representation, " as required by Model Rule 1.4. Also, Model Rule 4.1(a) forbids a lawyer to "make a false statement of material fact . . . to a third person," and a lawyer's duty of candor cannot be less demanding when the lawyer is making a statement to a client.

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1 *See* Lerman, *Lying to Clients,* 138 U. PA. L. REV. 659, 705-20 (1990).

2 *See id.* at 751 (Lerman's proposed Model Rule 1.5(f)(4)).

3 MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULE].

4 MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981) [hereinafter MODEL CODE].

5 Lerman, *supra* note 1, at 695-96.

And finally, Model Rule 8.4(c) forbids a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The Model Code has similar provisions (DR 2-106, on fees, and DR 1-102, on dishonesty, fraud, deceit or misrepresentation). The adequacy of these provisions may be tested by imagining the response of a disciplinary authority to a lawyer's argument that no rule forbids a padded bill.

At this point, comment should perhaps end. For one who argues for a new rule should at least show that the current rules do not cover the subject. Professor Lerman's article, however, raises other questions, broader than the question of the need for her proposed new rule on billing.

Assuming that Professor Lerman has shown that her suggested new rules would fill a gap in the present rules, the question remains whether the new rules would be enforced. Professor Lerman declines to answer this question as beyond the scope of her article, stating instead that her section on 'Regulating Deception' "focuses on what the standards should be, not on how to get people to comply with them."[6] Nevertheless, it seems reasonable to suppose that Professor Lerman thinks that there are, or will be, ways "to get people to comply with" the new rules she suggests. Otherwise, why would she suggest them? It is therefore striking to encounter elsewhere in her article evidence that she has very little faith that the current rules are enforced.

She has *no* faith in the profession's self-regulatory mechanisms. In her view, the attitude of the bar is one of "general unconcern about lawyer honesty with clients";[7] her view of the drafters of the Model Rules and Model Code has already been indicated. While she regards consumer law as having "enormous potential to increase the honesty of lawyers," she acknowledges that "courts have only recently begun to apply consumer law to lawyer misconduct,"[8] and she discusses neither the difficulties nor the likelihood of the poten-

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[6] *Id.* at 749.

[7] *Id.* at 693. Many, perhaps most, lawyers would agree that state disciplinary agencies need strengthening. *See generally* COMMISSION ON PROFESSIONALISM, AMERICAN BAR ASSOCIATION, ". . . . IN THE SPIRIT OF PUBLIC SERVICES": A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 45-46 (1986); *see also* AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1-9 (1970) (Final Draft 1970). The tone of Professor Lerman's criticism is so dismissive, however, as to suggest that she regards any attempt to strengthen disciplinary agencies as futile.

[8] Lerman, *supra* note 1, at 699.

tial she envisages being realized. As for malpractice, "[it] may deter some lawyer misconduct, but the remedy is not available to most deceived clients."[9] Still, she has some hope that developments in malpractice law will lead to better enforcement of rules of conduct. Thus, after observing that "judges are relying increasingly on the codes in malpractice cases,"[10] she states: "This coalescence of malpractice law and disciplinary law is a positive development."[11]

At least some will doubt whether such a development is positive. To hold that a lawyer may be liable for damages in a malpractice action for violation of a rule of professional conduct is to hold that the standard imposed on the lawyer's conduct by the rule is the same as the standard imposed by the law of negligence. This may present no difficulty. Certainly it is a violation both of Model Rule 1.1, requiring competence, and of the law of negligence to miss a statute of limitations. The danger, however, which Professor Lerman does not acknowledge, is that the greater the coalescence of the rules of conduct and the law of negligence, the greater the pressure to narrow the rules—to make them incorporate only the law of negligence, to the exclusion of any higher standard of conduct.

This narrowing process may be seen at work if one examines, as Professor Schneyer has recently done,[12] the evolution of the Model Rules. For example, the Discussion Draft version of Rule 1.1, concerning lawyer competence, provided that a lawyer should work only on matters in which the lawyer could "act with adequate competence," i.e., the competence displayed in "acceptable practice by lawyers undertaking similar matters."[13] Professor Schneyer's examination of the Kutak Commission's deliberations disclosed that "this language was dropped. The Commission feared that the provision would invite malpractice litigation, and wanted especially to protect sole practitioners and small town lawyers, who are not apt to specialize."[14] Similarly, "efficiency" was dropped as an aspect of competence when the ABA Standing Committee on Lawyer's Professional Liability complained that its inclusion was likely to result in malpractice claims.[15] Indeed, Professor Schneyer found that the

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9 *Id.* at 698.

10 *Id.* at 748.

11 *Id.*

12 *See* Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct,* 14 LAW & SOC. INQUIRY 677 (1989).

13 MODEL RULE Rule 1.1 (Discussion Draft 1980).

14 Schneyer, *supra* note 12, at 727.

15 *See id.*

Committee on Professional Liability "went through the Proposed Final Draft with a risk manager's fine-tooth comb and found a number of disturbing provisions."[16]

This experience with the making of the Model Rules suggests that the chance of Professor Lerman's proposed new rules being approved is slim—which may not concern her but nevertheless does seem relevant in considering any proposed new rule. Beyond this consideration of practicality, however, lies another, more fundamental, question, which is whether the rules of professional conduct *should* be narrowed to the point where they do no more than recite minimum standards of conduct that if satisfied will protect a lawyer against a malpractice action.

The belief that rules of conduct should state more than minimum standards is most clearly embodied in the Model Code, with its distinction between Disciplinary Rules, for the violation of which a lawyer may be disciplined, and Ethical Considerations, which describe standards to which a lawyer should aspire in the hope of becoming not merely a lawyer who will escape discipline but one who will realize the ideals of the legal profession.[17] While the Model Rules abandoned this distinction between Disciplinary Rules and Ethical Considerations, they nevertheless recognize that a lawyer's personal standards may lead the lawyer to conduct beyond that required to comply with the minimum standards imposed by the Rules. This recognition is manifested in two aspects of the Model Rules.

First, the Model Rules respond to the criticism that the Model Code at least encouraged, if it did not oblige, all lawyers to act as zealous advocates—less elegantly described as "hired guns." Thus, the Model Rules recognize that lawyers act not only as advocates[18] but as advisors,[19] intermediaries,[20] and partners and supervisors of

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16 *Id.*

17 For the classic discussion of the relationship of aspirational standards and minimum standards, the violation of which calls for discipline, see Frankel, *Book Review*, 43 U. CHI. L. REV. 874, 877-82 (1976) (reviewing the *Code of Professional Responsibility*). For a collection of excerpts from representative essays and a bibliography on professional associations and professional autonomy, see G. HAZARD & D. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 79-115 (2d ed. 1988). For a discussion of professionalism with particular reference to corporate lawyers, see Simon, Babbitt v. Brandeis: *The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 571-76 (1985); *see also* C. WOLFRAM, MODERN LEGAL ETHICS 68-78 (1986) (compact discussion of legal ethics and moral philosophy).

18 *See* MODEL RULES 3.1 - 3.9.

19 *See* MODEL RULE 2.1.

20 *See* MODEL RULE 2.2.

other lawyers[21] and of nonlawyer assistants,[22] with responsibilities distinctive to each role.

Second, as Professor Schneyer has properly emphasized, in his description of the making of the Model Rules, the Model Rules:

> invite lawyers in *any* role to take their own values into account. They permit lawyers to refuse on moral grounds to represent would-be clients [citing Model Rule 6.2 Comment (no duty to represent any particular client)]; authorize lawyers to "limit the objectives" of representation by excluding client aims they find "repugnant or imprudent" [citing Model Rule 1.2(c)] . . .—even if the client's interest will be "adversely affected" by the withdrawal! [citing Model Rule 1.16(b)(3) and 1.16(c) (requiring lawyer to continue representation when so ordered by a tribunal notwithstanding good cause for withdrawal)] These rules are meant precisely to resolve the "potential conflict between the lawyer's conscience and the lawyer's duty to vigorously represent a client."[23]

It may well be that, like many who have sought to teach the principles of professional responsibility, Professor Lerman agrees with the importance of the distinction between conduct permitted by a code and conduct required by a lawyer's conscience.[24] If this is so, however, it is not apparent from her Article, with its emphasis on improving lawyers' professional conduct, not by "invite[ing] [them] . . . to take their own values into account,"[25] but by enacting new, more detailed rules, to be enforced by malpractice actions.

A final—for purposes of this comment, anyway—question suggested by Professor Lerman's Article is whether the legal profession

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21 *See* MODEL RULE 5.1.

22 *See* MODEL RULE 5.3.

23 Schneyer, *supra* note 12, at 736 (citing ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 103 (1987).

24 The distinction is a—if not the—principal theme of the course in The Legal Profession and Professional Responsibility at the University of Pennsylvania Law School. Similarly, many others include in their teaching materials commentary by moral philosophers on the relationship between a lawyer's role as defined by professional criteria such as codes of conduct and by broader considerations. *See, e.g.*, G. Hazard & S. Koniak, The Law & Ethics of Lawyering (forthcoming 1990); Postema, *Self-Image, Integrity, and Professional Responsibility*, in THE GOOD LAWYER (D. Luban ed. 1983); T. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS 167-93 (1985); Wasserstrom, *Lawyers as Professionals: Some Moral Issues, reprinted in* A KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY (3d ed. 1989); *see also* COMMISSION ON PROFESSIONALISM, *supra* note 7, at 45-46; S. GILLERS & R. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 407-16 (1989).

25 Schneyer, *supra* note 12, at 736.

really is the assortment of liars and cheats she evidently believes it to be.

There seems little doubt that this is her view of the profession. At one point she states that her "Article does not purport to answer the difficult question of how much deception of clients takes place nor the question of what types of deception are typical."[26] But these disavowals are belied by the rest of her Article. If she does not know exactly "how much" deception takes place, she nevertheless does not think it is only a little; and if she does not know what types of deception are "typical," she is nevertheless satisfied that some quite virulent types are widespread.

Professor Lerman's general view of the legal profession is that it is not a profession at all but a business, and, moreover, an especially exploitative business.[27] The "engine," she says, "that drives [lawyers]. . . is profit motivation."[28] She adds: "Lawyers' desire to earn money does not distinguish them from anyone else in business. The law business is like any other business, except that the lawyers are exempt from many of the legal safeguards that are imposed on merchants to deter them from taking advantage of their customers."[29]

One of the techniques by which the thus-exempted lawyers take advantage of their customers is dishonest billing. "[D]eception" in billing, Professor Lerman says, "is common."[30] "[P]adding of wealthy clients' bills" is also "common."[31] "[M]any lawyers' billing practices are rough approximations at best."[32]

Another technique is covering up mistakes. Indeed, "[o]ne of the most common reasons that lawyers deceive clients is to avoid having to disclose their mistakes."[33] "[L]awyers often lie in situa-

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26 Lerman, *supra* note 1, at 665.

27 Others have expressed a similar if perhaps somewhat less drastic view. *See, e.g.*, G. HAZARD & D. RHODE, *supra* note 17, at 26 (reprinting M. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 56, 59 (1977) (while professions share certain elements with business, "at least ideologically, [they] espouse anti-market principles")); *see also* Goldberg, *"Then and Now: 75 Years of Change"*, A.B.A. J., Jan. 1990, at 56 (describing changes in the legal profession and noting that "(1) [o]ne sure sign that law had become big business was the emergence of megafirms": over the last forty years, from from five firms with over 50 lawyers to over 287 firms; over the last twelve years, from 47 firms with over 100 lawyers to 245 firms).

28 Lerman, *supra* note 1, at 672.

29 *Id.* at 672 n.49.

30 *Id.* at 720 n.253.

31 *Id.* at 712.

32 *Id.* at 749.

33 *Id.* at 725.

tions in which the truth would work just as well."[34] "Lawyers often avoid speaking with their clients if they have not accomplished work they promised to do, or if they have made errors they do not wish to disclose."[35] "Many lawyers do not consider what they characterize as 'puffing' to be lying . . . ."[36]

One gathers that Professor Lerman does not like lawyers. Not only does she accept criticism of them without indicating any disagreement or qualification, but she generalizes from the criticism. For example, after reporting one lawyer's "postulat[ion] that lawyers enjoy the power that they have and exercise this power by blatant dishonesty,"[37] she adds, "This suggests that some lawyers gain ego satisfaction from lying to others."[38] No doubt "some lawyers" do. But more lawyers than members of other professions? One wonders, given Professor Lerman's disdain for the legal profession, why she bothers. Why does she suppose that such a profession might enact the rules she suggests, or if enacted, obey them? It seems rather like suggesting that the fox should enact rules to limit its depredations in the hen house.

Putting this query aside, what is the basis of Professor Lerman's assertions of what is "common" practice by "many" lawyers? She interviewed three law students who had worked in law firms[39] and twenty lawyers.[40] Professor Lerman admits that these persons were "not a random sample . . . [and were] too few to be statistically significant,"[41] and that the data collected were "anecdotal in nature."[42] She also admits that "[i]t is certainly possible that I talked with atypical lawyers from atypical firms, and that another set of interviews would provide a different result," adding: "I have no doubt that there are lawyers whose standards of integrity would not allow them to deceive clients, even if others around them were doing so."[43] These admissions, however, seem *pro forma*; certainly they do not lead her to soften in any way her condemnation of the profession.

When sweeping conclusions rest on a fragile base, more questions are raised than answered. Was Professor Lerman never told an

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34 *Id.* at 738.
35 *Id.* at 755.
36 *Id.* at 721.
37 *Id.* at 738.
38 *Id.*
39 *See id.* at 703 n.186.
40 *See id.* at 703.
41 *Id.* at 704.
42 *Id.* at 664.
43 *Id.* at 759.

anecdote of decent, even outstanding, conduct by another lawyer? Did none of those she interviewed know, or know of, a lawyer who for an honest fee firmly guided a business out of trouble; provided wise counsel to parents of a child arrested for using drugs; won compensation for an injured worker; or for no fee defended a prisoner on death row? If she was told at least some anecdotes favorable to lawyers, what weight did she give them? If she was never told any such anecdote, did she inquire whether those she interviewed were not only not a random sample of the profession but an embittered handful? And what attempt did she make to verify their sweeping condemnations before repeating them?

Professor Lerman characterizes her article as " 'casual empiricism,' . . . an initial inquiry into an area that calls for a larger empirical study."[44] One can agree with this characterization and yet remain reserved about the importance of further empirical study of lawyers' deception.

For one thing, there is a definitional difficulty. What sort of "deception" should be investigated? Defining deception to include conduct as varied as padding a bill,[45] not telling a wife the beastly things her husband says about her,[46] and not discussing with a plaintiff the possibility that she may cry when questioned[47] will at the very least blur the focus of further research. If one puts this difficulty aside, however, the question remains of the extent to which the further research contemplated by Professor Lerman would improve the legal profession. For all can agree that it needs improvement. There are indeed dishonest lawyers—shockingly dishonest lawyers who should not simply be sued for malpractice or disciplined but put in prison.[48]

Two possible lines of empirical inquiry seem more promising than research into the extent of lawyers' "deception." One of these lines, moreover, is consistent with an observation by Professor Lerman.

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[44] *Id.* at 664 n.14.

[45] *See id.* at 709.

[46] *See id.* at 677, n.72, 678, n.77.

[47] *See id.* at 677 n.72.

[48] For a recent report of lawyers fraudulently expanding and prolonging litigation for the purpose of generating billable time—the very sort of conduct condemned by Professor Lerman—see DeBenedictis, *The Alliance,* A.B.A. J., Dec. 1989, at 59; *see also "Can a Tarnished Star Regain His Luster?",* N.Y. Times, Feb. 25, 1990, at C1, col. 1 (describing in the events leading to the bankruptcy of what was once the nation's fourth largest firm, the "[c]runch came [when the firm's largest client] claimed the firm was padding its legal bills").

In the course of her article, Professor Lerman observes how the "atmosphere" and "structure" of a law firm may affect whether a lawyer behaves deceptively.[49] This insight may be generalized to include not only deception but all sorts of behavior. For without question, law firms practice in different ways, which is to say, their lawyers have different values — different concepts of what it means to be a professional and of the appropriate relationship between one's professional and personal standards. How are values transmitted within a firm? How does a firm develop its particular culture, and what causes that culture to be preserved or to change? The same questions might be asked about the legal department of a corporation or government agency.[50] Empirical research to find the answers to these questions would be welcome.

A second possible line of inquiry might concern education, of both law students and practicing lawyers. A great deal of attention has been devoted over the past few years to education in professional responsibility. Casebooks, a hornbook, looseleaf services, videotapes—all have become available.[51] Has this made any difference? What, if anything, do lawyers do differently because of what they learned in their courses on professional responsibility? Surely some teaching techniques have more impact than others. But which ones? And how deep and lasting an impact?[52] Again, answers would be welcome.

The legal profession has been severely, and justly, criticized for the gap between its pretensions and its performance.[53] Many law-

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[49] *See* Lerman, *supra* note 1, at 743-44.

[50] For an empirical study of the general values of lawyers in large firms, see Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm,* 37 STAN. L. REV. 503, 511-521 (1985). For a report of a survey of women at the nation's largest law firms, see *Women Say They Face Obstacles as Lawyers,* N.Y. Times, Dec. 4, 1989, § A21, cols. 1-3.

[51] *See, e.g.,* G. HAZARD & S. KONIAK, *supra* note 24; A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY (3d ed. 1989); T. SHAFFER, *supra* note 24 (casebook); C. WOLFRAM, *supra* note 17 (hornbook); G. Hazard & W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct (with paper supplements); Lawyers Manual on Professional Conduct (ABA/BNA) (looseleaf); videotape may be obtained from, among others, the American Bar Association and CCH, Professional Responsibility for Lawyers: A Guided Course (forthcoming 1990).

[52] For a collection of references debating the efficacy of legal education, see G. HAZARD & D. RHODE, *supra* note 17, at 464-65; *see also* Schwartz, *Comment,* 37 STAN. L. REV. 653, 658 (1985) (commenting on Rhode, *Ethical Perspectives on Legal Practice,* 37 STAN. L. REV. at 589, and expressing reserved hope that the *Model Rules* may provoke dialogue that will heighten lawyers' moral sensitivity).

[53] *See generally* Rhode, *supra* note 52, at 589. Concerning the inadequate delivery

yers acknowledge the force of this criticism and are troubled, as Profession Lerman is troubled, about the state of their profession.[54] Some—the author of this Comment, at least—will think that Professor Lerman has painted with too broad, and too dark, a brush. But if she has, that will do no harm. Indeed, her article may be welcomed. For quite apart from whether her suggested new rules have, or should have, any future, she has raised, in provocative terms, the broader question of how to improve professional conduct. To the extent that her article encourages research that provides some answers to that question and thereby lights the way to constructive change, it will perform a valuable service.

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of legal services, see G. HAZARD & D. RHODE, *supra* note 17, at 310-439; on inadequate maintenance of professional standards, *see id.* at 440-505.

[54] For the "official" or "establishment" expression of concern, see generally COMMISSION ON PROFESSIONALISM, *supra* note 7.