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Articles

*415 NAVIGATING TROUBLED WATERS: DEALING WITH PERSONAL VALUES WHEN REPRESENTING OTHERS

Mitchell M. Simon [FNa1]

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I. Introduction

Legal academics have long struggled to define the appropriate role a lawyer's moral judgment ought to play in client representation. [FN1] In its simplest terms, the question is: Must a lawyer be a "hired gun," seeking all lawful objectives sought by a client, or may a lawyer act independently to avoid the harm a client's actions will cause innocent parties? Following disclosure of lawyer involvement in the Savings and Loan, Enron and WorldCom failures, many in society joined those scholars calling for greater moral responsibility. [FN2]

Based on my experience representing clients, teaching law students, and consulting to law firms, I conclude that few lawyers employ the academic analysis in their day-to-day work. Despite the importance and quality of the ***416** scholarship on moral responsibility, most graduating law students recall only that controversy exists over how to behave if a decision is not controlled directly by rules of professional conduct or other law. [FN3] They have not, in law school or after, developed a workable system to balance a client's lawful desires with their own moral code. [FN4] Even the few who work out an acceptable analysis while in law school discover in practice unanticipated economic and other workplace pressures to ignore their own beliefs. [FN5]

In this article, I provide an analytical approach consistent with existing law and practice that seeks to find a place for an individual lawyer's moral principles. Lawyers, particularly new lawyers, need to know just how much discretion they will have to follow their consciences. Understanding the limits on one's moral discretion will affect the way a lawyer practices and should influence her choice of practice environment. Prior to accepting a position, a lawyer should know whether she will be comfortable with the prevailing standards of practice.

I became profoundly aware of the need for an accessible mode of moral analysis many years ago while supervising legal services attorneys. A newly hired and gifted attorney asked to meet with me. She was defending a single mother with three children in a civil child neglect case. The attorney had developed a number of creative procedural defenses and wanted my opinion on ***417** the merits of each theory. I told her the defenses, in my opinion, had a substantial chance of success and complimented her on her hard work and creativity.

However, rather than being pleased with this news, the attorney clearly was distressed. She told me she hoped I would find the claims to be without merit because she believed, based on the case file and her own factual investigation, that the client was an unfit mother. She was convinced that the children would have a

chance to thrive if removed from the home, and no chance if they remained with their mother. Based on her belief that all children have the right to a happy and safe childhood, she argued that it was immoral for us to raise the procedural defenses.

We talked for several more hours about this case. We argued about the proper interpretation of the underlying facts and the rules of professional conduct, and discussed our respective concepts of morality. My colleague recalled vividly her Professional Responsibility teacher telling her that a lawyer could "follow her conscience." Unfortunately, she was now unsure how to do this within the bounds of the existing client-attorney relationship.

At the end of our meeting, she deferred to my judgment that the important values of due process and family integrity support raising the defenses. Early the next week, she presented the issues and won the case; within a month, she left practice to work at a nonprofit agency addressing the needs of children.

At our exit interview, she told me our conversation had convinced her that the decision was correct for the case. However, she remained confused about the role her values could play in her work as an attorney. Like many new lawyers with whom I have worked, she noted that classroom discussions failed to capture the complexities of the real world. In practice, the analysis must end with a decision. Do I plead the defenses or not? Do I disclose unknown facts that are material in a negotiation? She indicated that the profound uncertainty and discomfort she felt in trying to resolve this case would haunt her in all cases where her values were in conflict with a client's desire for aggressive legal representation.

Reflecting on this and other similar cases, I conclude that there are at least two ways to assist lawyers and law students facing this dilemma. First is the presentation of an analytical foundation, grounded in the world of practice, on which to structure moral deliberations. In ethical inquiry, there is no simple formula for analyzing complex problems. However, it may be helpful to identify the points at which and ways in which lawyers may act on moral beliefs, even when not in the client's interests.

***418** Second is an analysis of how a lawyer, by altering client counseling and better understanding the limits set by other sources of law, might reduce the incidence of conflict between client representation and one's own morals. For example, counseling clients to view their cases with a long-term perspective might help clients to avoid those shortsighted choices that often raise moral dilemmas. Also, given the push for greater substantive justice following the Savings and Loan scandal, lawmakers-whether legislatures, common law courts, or courts in their rulemaking role-have developed causes of action that restrict many client choices that an individual lawyer might see as immoral. [FN6] Claims, such as those filed under expanding theories of negligent misrepresentation or the Consumer Protection Act, should remove certain troubling options from consideration, and thereby diminish the need for a lawyer to choose between client allegiance and one's own morals.

This article explores the academic debate over the proper role for a lawyer's moral beliefs in client representation (Section II), proposes a four-step approach to resolving the tension between client desires and a lawyer's moral beliefs in a manner consistent with existing law and practice (Section III), and provides an in-depth analysis of this approach (Section IV). Section IV also applies this approach in the case of a defendant who has not disclosed certain important facts to the opposing party prior to settlement of a tort case.

II. Client-Centered Representation v. Contextualism

There has been a great deal of scholarship on how a lawyer should respond when asked by a client to take a lawful action, not barred by the rules of professional conduct, that will result in harm to third-parties. [FN7] The debate largely has been defined by two opposing positions: client-centered representation and

contextualism (sometimes referred to by the more descriptive name of moral activism). [FN8]

***419** Under the client-centered approach, a lawyer is a client's agent, charged to craft legal solutions that satisfy a client's self-defined interests. [FN9] The lawyer's moral judgments about lawful options chosen by a client have little, if any, role. [FN10] Adherents believe that client autonomy is the key value in representation [FN11] and that the lawyer has no special expertise in assessing what matters most to the client. [FN12] With respect to moral issues not governed by the Rules of Professional Conduct, the client-centered lawyer strives to be neutral and nonjudgmental. [FN13]

The client-centered approach is the traditional approach to resolving questions of professional ethics when there are no governing rules. [FN14] It traces its intellectual foundations to a series of articles written by Professor Murray Schwartz. [FN15] Schwartz's underlying principles have been described as follows:

> First, lawyers act as zealous partisans on behalf of their clients, doing everything possibleto obtain their clients' objectives, except to the extent that a clear rule of professional conduct or legal principles prohibit the lawyer from acting. Under a client-centered philosophy, if doubts exist about the propriety of an action, the lawyer is justified in proceeding [the principle of professionalism].Second when acting in this professional role, lawyers are not legally or morally accountable for their actions [the principle of nonaccountability]. [FN16]

In the child neglect example described above, the client-centered lawyer would identify for the client the advantages and disadvantages of raising the defenses and abide by the client's choice.

This approach has been criticized for making lawyers no more than "hired guns" and for encouraging clients to consider only a cost-benefit analysis in decision-making. [FN17] On a deeper level, critics have charged that allowing a lawyer's conduct to be evaluated through his role as a lawyer, rather than by ***420** conventional morality, is itself morally unsound. [FN18] Some suggest that compelling lawyers to act consistent with the client-centered approach has a great deal to do with lawyer dissatisfaction. [FN19]

The contextual or moral activism approach represents the opposite position and posits that a lawyer should be an independent actor who asserts control of the moral issues that arise during legal representation. [FN20] Contextualists reject the notion of role-differentiated ethics and the superiority of client autonomy over other moral values. [FN21] Under this view, lawyers should have discretion to take actions that they believe to be required by common morality, even if this results in "betrayal by the lawyer of the client's projects." [FN22]

Critics of Contextualism contend that granting lawyers such discretion undervalues client autonomy and leads to subjective decisions. [FN23] They point out that lawyers often have different socio-economic, ethnic, and racial backgrounds than their clients. [FN24] This can lead to inadequate understanding of the client's real interests and moral values and the "danger that lawyers will be confident of their moral judgments when such confidence is not justified." [FN25]

Professor William Simon sought to address this concern by anchoring lawyers' duties to the concept of justice, rather than to the subjective notions of personal morality. [FN26] Simon writes:

> "Justice" here connotes the basic values of the legal system and subsumes many layers of more concrete norms. Decisions about justice are not assertions of personal preferences, nor are they applications of ordinary morality. They are legal judgments grounded in the methods and sources of ***421** authority of the professional culture. I use "justice" interchangeably with "legal merit." [FN27]
>
> ....

The moral basis for the lawyer's decisions are the same principles that underlie and legitimate legal judgments generally. A lawyer who limits the distance she will go for a client on the basis of norms of legal merit or justice does not deprive the client of anything he is entitled to; on the contrary, she simply insists on respecting the entitlements of others. [FN28]

One critic of Simon's approach has argued that such certainty is illusory, and that Simon's notion of justice as discerned by the lawyer is "likely to look a lot like the lawyer's ideals. There is a danger that Simon's model will cloak the lawyer's moral judgment in legal jargon giving it the authority of law." [FN29]

Under Contextualist theory, the lawyer in the child neglect case described above would analyze the case differently. Such a lawyer would decide whether hindering protection of the children in need of such assistance would be a moral course for individuals in society at large. If not, the lawyer would be authorized to forego raising the defenses. [FN30]

The difference under Professor Simon's theory is that the lawyer would determine whether raising the defenses serves justice as defined by the underlying statute. If a lawyer operating under this theory concluded that the statutory purpose is to stop child neglect, raising procedural defenses that interfered with the valid determination would not further substantive justice. [FN31]

***422** In addition to the conceptual issues presented by Contextualism, lawyers face three practical dilemmas when trying to employ this theory. First, Contextualist scholars have not yet developed a system for implementation. Therefore, law students and lawyers are confronted with these powerful ideas without guidance on how they play out in the world of practice. One commentator has written:

The [Contextual] school has not developed its theory into a step-by-step method of client counseling. What does the conversation between lawyer and client look like when the lawyer decides that moral concerns should influence the representation? Does the lawyer persuade the client to adopt her viewpoint? Does the lawyer threaten to withdraw if the client does not agree with her? Or, as William Simon's theory might suggest, does the lawyer merely present her conclusions of what justice requires as being what the law requires? [FN32]

Second, Contextualists have not satisfactorily addressed how a lawyer, particularly at the early phase of her career, combats the enormous institutional pressure to comply with the lawful wishes of a powerful client. Unless the culture and norms of most law firms change, refusing to comply with the wishes of a firm's largest client will likely end one's chance for advancement and could lead to termination. [FN33] This is, to say the least, a challenging step for a new lawyer, especially one deeply in debt with educational loans.

Third, and perhaps most troubling, the call for moral responsibility may be least effective for those at whom it is aimed-primarily those representing powerful interests. [FN34] There is little evidence that it has affected large firm ***423** culture. [FN35] My experience is that the literature more profoundly impacts those representing low and middle-income clients. These individuals often are in practice settings that are less hierarchical, thus allowing greater discretion for the attorney. [FN36]

For example, my legal services colleague in the child neglect case certainly was far freer to act on her beliefs than would be an associate in a large firm. Had she not come to see me voluntarily, the decision would have been solely hers. If I am correct, Contextualism, contrary its noble intent, could lead to overly paternalistic and less effective representation for powerless clients and little change in the behavior of those representing powerful clients.

III. Proposed Approach

In light of the uncertainty in the literature, I offer the following proposed

approach to representing clients. [FN37] I believe it to be consistent with existing law, capable of being used in actual practice, and mindful of the moral issues presented in practice. The analysis consists of four steps:

1. Has the lawyer fully counseled the client about the consequences of the decision, including the long-term consequences, and obtained an informed judgment from the client on acceptable options?

2. Is there a Rule of Professional Conduct that either requires the proposed choice, bars such a choice, or requires a different choice?

3. Is there any other source of law that imposes significant barriers or costs to such choice?

4. Does this choice deviate substantially enough from the lawyer's moral principles that the lawyer will be materially limited in following the client's wishes?

***424** This approach may be subject to criticism for diametrically opposed reasons. Those leaning towards Contextualism may wonder if it adequately addresses moral questions, since acting on one's moral values is considered only at the end of the analysis. [FN38] Client-centered proponents might believe it gives too much credence to the role of personal morality in lawyering and, thus, could lead students and lawyers towards excessive control of their clients.

I have found quite the contrary result in my classes and consulting practice. Basing discussions on this model has increased both the attention given to the client's wishes and the frequency with which my Professional Responsibility students and the younger lawyers with whom I worked have raised and addressed moral concerns. The early focus on client-centered lawyering techniques and rule-based solutions has the lawyer utilize fully their traditional tools. Having exhausted these tools, the lawyers and students seem freer, and at times even compelled, to confront the deeper moral questions that remain.

IV. Description of the Four Steps

The first three steps in the process do not address directly moral concerns. Rather, they deal with more general principles of client representation and legal analysis necessary to frame the options for a client. These steps are important both for adequate client counseling and because they may obviate the need to reach moral issues. Only if the option selected by the client after these steps presents a serious moral question for the lawyer must she consider the more complex and value-laden fourth step. This section describes each step and evaluates how effective the action or source of law is at lessening the moral questions presented in client representation.

A. Broad Identification of Appropriate Strategy Choices

Much has been written generally on client counseling. [FN39] Sources agree that a lawyer must determine early on in a case the range of available options to meet the situation presented. [FN40] The amount of legal and factual research necessary to frame the options will vary according to the experience of the ***425** practitioner and the complexity and significance of the decision. But there will come a point when the lawyer must identify the range of plausible options.

The question is how broadly the options should be framed and what role the client will play in this process. My contention is that a lawyer, in order to best serve the client, must approach this task with a long-term perspective and with significant client involvement. [FN41] Such an approach will yield a more refined definition of success, thereby encouraging better client choices. Decisions cognizant of long-term implications tend to present fewer moral dilemmas for the lawyer since they focus on deeper interests of clients, rather than on short-term

gain. [FN42]

To assess the long-term efficacy of an option, the lawyer must have a clear picture of the client's goals for the case or transaction. [FN43] This seemingly simple proposition is not without controversy. Many busy, practicing lawyers believe the main goal of the client interview is to get legally relevant information, not abstract goals. [FN44] Without a clear picture of the long-term goals as defined by the client, the lawyer cannot possibly assess the strategies in any meaningful way.

The debate in the profession on this point centers largely on whether "the clients' feelings and priorities should be probed before, during, or after discussing alternatives." [FN45] The argument for only discussing client preferences in concrete terms is that the client may feel frustrated discussing issues in the abstract. Experts in the field, however, have argued that:

> [P]robing feelings and priorities before you have summarized the alternatives and consequences may encourage a more thoughtful self-examination by the client. That sequencing of the discussion is more open ended and puts greater pressure on the client to articulate feelings and values. Probing first avoids the possibility that your client will jump on one of the alternatives without ***426** adequate deliberation and the subconsciously edit responses to probes to justify the jump. In addition, it is the impact on the priorities that changes from one alternative to the next, not the priorities. [FN46]

Given the concerns voiced by many critics of the profession's paternalism, [FN47] adopting a counseling model that requires the lawyer to understand the goals of the client from the outset and to explain longer-term implications will enhance client relations.

To illustrate this concept, consider the following example. A defense lawyer in a tort case is representing an uninsured client. The client has meager resources, but will imminently take possession of significant assets as the beneficiary of a will. The defense lawyer is aware that plaintiff's counsel knows of defendant's current financial situation, but does not know of the inheritance. There is strong case for liability and the plaintiff, who has a family, was severely injured. [FN48]

In this situation, the defense lawyer, when preparing for settlement discussions, should readily be able to determine that she and the client will have to choose whether to disclose the inheritance or remain silent. [FN49] This choice will have great consequences for the parties and potentially their attorneys. [FN50] Not disclosing could result in an unjust and inadequate settlement to the ***427** plaintiff. Disclosure will cost the defendant additional funds, something most defendants wish to avoid.

If viewed as primarily a question of what will constitute a "legal" victory, usually conceived of as keeping the settlement amount down, the answer to this section of the test is easy-remain silent. However, before recommending that option, the lawyer will need to do serious analysis of whether such a settlement can be successfully attacked and set aside due to the nondisclosure. The legal issue presented in such a situation will be discussed in Section IV C. [FN51]

More importantly, even if the lawyer concludes that the settlement will most likely be upheld, there may be reasons why this is not the best option for this particular defendant. For example, if the parties are neighbors or have an on-going relationship, the short-term benefit of not disclosing may be outweighed by reputational damage or loss of future business opportunities. Also, the psychological need or general desire of the defendant to put this matter conclusively behind him or her, and not to risk the delay caused by the motion to set aside the settlement, might be of the greatest value to the defendant. The literature on mediation has proven that the lawyer's sole focus on the amount of money to be gained or spent and on a "legal win" can interfere with a resolution satisfactory to the parties. [FN52]

By focusing on the broader interests and goals communicated to the lawyer by the client, the lawyer is compelled to consider more than the value of winning in the legal sense. This first step sets up an analytical process that is client-centered, but permits the lawyer to assist in a just resolution by assisting the client to see broader interests. [FN53] It also provides a framework from which the lawyer can move to the remaining legal issues and, if still necessary, an independent analysis of the moral issue.

B. Impact of the Rules of Professional Conduct

Once the lawyer has successfully arrayed a set of options consistent with the client's longer-term goals, the lawyer must assess the feasibility of the ***428** options. External factors, beyond the client's preferences, may limit the use of these options. I believe the proper place to start in this winnowing process is with the lawyer's ethical rules. Starting here has two advantages: 1) From the outset of the case, counsel considers the governing ethical principles and the limitation on the lawyer's conduct; and 2) The rules, though far from clear in all sections, constitute a somewhat defined and limited set of principles. This differs from the next step in the analysis, in which the lawyer will have to look to disparate sources of law, such as tort, contract, civil procedure, and criminal law, all with emerging theories of liability.

The attorney must determine if any of the identified options run afoul of the professional rules governing his conduct. [FN54] Obviously, a lawyer may not, in representing a client, take an action that violates the applicable rules without running the risk of serious sanctions, including the loss of her license to practice. [FN55] For example, in the case of the defendant with the imminent inheritance, the defense lawyer could not, without subjecting herself to professional discipline, tell the plaintiff's attorney that she has reviewed the defendant's financial picture and has concluded it unlikely to change. Such a statement would be false and violate Rule 4.1 (a). [FN56] Even if this "option" might help get the defendant a more favorable settlement, the Rules of Professional Conduct correctly take it off the table.

Not all questions of professional conduct will be so easily resolved. The more complex question in this example is whether the lawyer, without making ***429** these explicit statements, can complete the negotiations based on the plaintiff's incorrect understanding of the defendant's financial situation. To resolve this specific question, the lawyer will have to determine whether she may remain silent, must remain silent, must reveal the information, or should withdraw from the representation. [FN57] By analyzing the approach of the Model Rules to this question, we gain understanding of how likely the rules are to help the lawyer reach satisfactory resolutions of moral dilemmas.

I have chosen to analyze a factual situation with no easy answer under the Rules of Professional Conduct since my argument is not that the rules resolve all moral concerns in lawyering; they certainly do not. Rather, my point is that the rules, based as they are on some fundamental norms, will further limit some of the amoral or immoral options. [FN58] One must remember that the Rules of Professional Conduct were not designed to be a moral code, rather, they seek to strike an appropriate balance between justice and the demands of our adversarial legal system, with its high regard for client confidentiality. [FN59]

The hypothetical situation described here is governed by two rules. Model Rule 4.1(a) provides that a lawyer during representation "shall not knowingly make a false statement of material fact or law to a third person." [FN60] Rule 8.4 (c), ***430** a broad rule governing misconduct whether the lawyer is representing a client or not, prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." Put simply, the issue presented under either rule will be whether silence in this case is tantamount to making a false statement or

misrepresentation.

The language of Rule 4.1 (a), which was not changed when the ABA adopted the amended rules in 2002, bars only explicit false statements. However, the amended comment one makes clear that misrepresentations include "omissions that are the equivalent of affirmative false statements." [FN61] Somewhat confusingly, the same comment states that "generally [a lawyer representing a client] has no affirmative duty to inform an opposing party of relevant facts." [FN62] The drafters and courts that have interpreted this rule seem to be grappling with how to determine those situations where silence is sufficiently deceptive to be the equivalent of a misstatement for disciplinary purposes. [FN63]

Many Rule 4.1 cases that address omissions, rather than false statements or partially true statements, arise in settlement negotiations. [FN64] For example, in State ex rel. Nebraska State Bar Ass'n v. Addison, a lawyer was disciplined for failing to tell a hospital administrator with whom he was negotiating release of a lien that the defendant had an umbrella insurance policy of which the administrator was unaware. [FN65] The amount of the release [FN66] indicated that the administrator was basing his decision on an erroneous assumption about the likely recovery the plaintiff could obtain. In light of this, the judicial referee ***431** found that the attorney's act of omission in failing to correct the administrator's false impression constituted a violation of Rule 4.1. [FN67]

Broad cases like Addison, though, do not remove all potential moral issues from such cases. The principle that the lawyer need not, and likely under the confidentiality rules may not, simply reveal relevant facts unknown to a third party cannot be ignored. [FN68] For example, the ABA Ethics Committee found it was not an ethical violation to negotiate a settlement in a matter the plaintiff's counsel knew to be barred by the statute of limitations. [FN69] The Committee, pointing to Rule 4.1, approved counsel's decision to negotiate, but cautioned plaintiff's counsel not to make any affirmative misrepresentation that the case was not time-barred. [FN70]

The difficulty in practice is to determine when silence is tantamount to a misrepresentation. As these cases illustrate, the answer likely will be very fact dependent. Also, disclosure when in doubt will not be an acceptable option. Voluntarily disclosing facts gained during the representation that one is not required or permitted by the rules or some other source of law to disclose is itself a violation of the fundamental confidentiality rule. [FN71]

The court in Ausherman v. Bank of Am. Corp. [FN72] thoughtfully distilled much of the extensive literature and case law on this topic. Judge Grimm wrote the following:

> The above discussed cases and journal articles help to define the problem associated with fashioning a workable rule governing attorney conduct during settlement negotiations, as well as to suggest its solution. In the end, Professor Hazard well may have stated it correctly [when he argued that legal regulation of trustworthiness can not go beyond prescribing fraud]. While the duty imposed by Rule 4.1 [a] may be a narrow one-not to misrepresent knowingly facts or law material to the negotiation-it is also an absolute one. [FN73]

***432** If Professor Hazard is correct, as I think he is, that Rule 4.1 merely makes a disciplinary offense of conduct that is now considered fraudulent by other law, one can legitimately ask if our analysis of the rules has been at all helpful in eliminating the moral question in our example. In fact, the January 1980 draft of the Model Rules would have been much more restrictive of lawyer's conduct, requiring lawyers in negotiation to be "fair in dealings with other participants" and to make disclosures to correct "manifest misapprehensions of fact" in certain situations. [FN74]

Does this choice reflect the bar's commitment to "create a world in which lawyers are and will remain available to help crooked people cheat others?" [FN75] I do not

think so. A more plausible explanation is that the law of deceit has developed in a way that sets defined and enforceable boundaries on conduct. If that is so, the choice to incorporate the law of fraud, without expansion of the term, is not so much an abdication of ethical principles as a choice to put a lawyer's license at risk for conduct that could also result in other types of sanctions.

Regardless of how one analyzes this issue, the rule does prohibitcertain conduct. A lawyer's focus on and identification of prohibited conduct, at least in some situations, will bar the lawyer from assisting in certain actions that will be damaging to the general welfare.

There is one other rule constraining an attorney's ability to remain silent in the face of facts on which the other side is relying. Model Rule 8.4 is a broadly written rule containing a number of related principles, all which are deemed misconduct. Many Professional Responsibility courses overlook this rule, since it constitutes such a potpourri of concepts. Despite its lack of popularity in the classroom, it has proven to be important in the disciplinary world, since it covers conduct outside the confines of the attorney-client relationship. [FN76]

The key provision of Rule 8.4 for the purposes of this article is Section (c), which provides that it is professional misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." [FN77] Like Rule 4.1, the ***433** broad language of the rule covers not only lying, but also certain failures to disclose. [FN78]

"Catch-all" rules such as this are designed to insure that the rules cast a broad enough net not to be unnecessarily confined by "technical manipulation." [FN79] However, there is also the inverse danger that the rule will fail to give fair warning of the conduct prohibited. [FN80] The Restatement states:

> Tribunals accordingly should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within the applicable code. No lawyer conduct that is made permissible or discretionary under an applicable, specific lawyer-code provision constitutes a violation of a more general provision so long as the lawyer complied with the specific rule. Further, a specific lawyer-code provision that states the elements of an offense should not, in effect, be extended beyond its stated terms through supplemental application of a general provision to conduct that is similar to but falls outside of the explicitly stated grounds for a violation. [FN81]

The importance of this provision, therefore, lies in its coverage of events outside the lawyer-client relationship and not its expansion of what constitutes a Rule 4.1 violation, despite its broad use of the term dishonesty.

The Model Rules define some situations in which silence is not an acceptable option. Admittedly, as with many ethical issues, the line may not be as clear or broad as some might like. However, the rules as interpreted will eliminate in many settings the moral question by removing the option of silence.

In the example of the defendant with the imminent inheritance, the lawyer must consider whether in this situation the rules would be interpreted so that her silence will be a disciplinable misrepresentation. If the discussion centered on the inability of the defendant to satisfy a large settlement, the lawyer likely could not remain silent without running the risk of sanctions. The resolution would be different if the dispute in the negotiation was over the damages suffered or culpability. Even if the answer to this part of the analysis is that the ***434** rules do not bar the lawyer from remaining silent, she must still do a significant analysis of the other source of law to determine the utility to the client of such a course. [FN82]

In summary, the second step in the analysis is the correct point at which to determine whether the rules, as interpreted by the courts and disciplinary

committees of the state, have resolved the issue. If the rules compel a certain step, the lawyer will need to comply under pain of professional sanctions. Similarly, if the rules bar a desired course, the lawyer will have to remove this option from the array she finally presents to the client. If, however, the rules do not bar the identified option or compel a different course of action than those the client selected in step one, the lawyer must still consider the viability of the option in step three-whether there are other sources of law, such as tort or contract, that bar or impose a cost on the option- and step four-whether the lawyer can, consistent with her moral beliefs, continue with the representation. It is to that part of the analysis to which we now turn.

C. Constraints Imposed on the Lawyer by Other Sources of Law

Lawyers often do not pay sufficient attention to the impact other sources of law have on the utility of client choices. This analysis can be challenging since the applicable law is varied, fact dependent, and not codified in one place, as are the ethical rules. These external constraints come from common law, statutes, regulations, and court rules.

There are many external sources of law directly impacting the client that should be raised in Step 1 as part of the client's long-term assessment of options. For example, a favorable settlement with significant prospect of being set aside for failure to disclose material facts may not be the best long-term option for the client. [FN83] Similarly, if the client will be exposed to a substantial risk of civil or criminal liability by adopting what may be the most aggressive strategy, the value and feasibility of the strategic choice are dramatically ***435** lessened, if not eliminated. [FN84] Failing to disclose information when asked or destroying damaging evidence may seem in a client's short-term interest, but if it leads to monetary sanctions, unfavorable jury instructions, or criminal charges, the consequences to the client are dramatic and should eliminate this strategy as a potential option. [FN85]

In this section, I will focus on theories of liability that directly constrain the lawyer, rather than the client. The key question is whether these sources of law are likely to act as significant barriers to proposed actions that might otherwise be deemed to present significant moral choices. A related question is whether courts, legislatures, and administrative agencies, which are not a part of the organized bar, are more likely to establish norms that satisfy common notions of morality than do the ABA's Model Rules. [FN86] I will evaluate these questions by looking at three different sources of law in this section: the common law of negligent and fraudulent misrepresentation, application of a state legislature's Consumer Protection Act, and the use by the courts of sanctions for discovery abuses.

1. Negligent and Fraudulent Misrepresentation

Courts could lessen controversial lawyer behavior by imposing liability on lawyers for all negligent or fraudulent misrepresentations. This, however, is not the current state of the common law. [FN87] There are substantial doctrinal differences between a lawyer's liability for negligent misrepresentation and fraudulent misrepresentation.

The need to protect the lawyer-client relationship from unwarranted outside interference forms the basis of these differences. [FN88] If the lawyer acts ***436** fraudulently there is not the same potential for interference with the lawyer-client relationship that can be created by imposing a duty to avoid negligent conduct toward a nonclient. [FN89] Liability in fraud situations is, therefore, much clearer. [FN90]

In addressing negligent misrepresentation claims, the Restatement of the Law Governing Lawyers identifies the situations in which a lawyer owes a duty of care to a nonclient and explains the rationale for such limited liability as follows:

Lawyers regularly act in disputes and transactions involving nonclients who will foreseeably be harmed by inappropriate acts of lawyers. Holding lawyers liable for such harm is sometimes warranted. Yet it is often difficult to distinguish between harm resulting from inappropriate lawyer conduct on the one hand and, on the other hand, detriment to a nonclient resulting from a lawyer's fulfilling the proper function of helping clients through lawful means. Making lawyers liable to nonclients, moreover, could tend to discourage lawyers from vigorous representation. Hence, a duty of care to nonclients arises only inlimited circumstances[and] must be applied in light of those conflicting concerns. [FN91]

The barrier to recovery is particularly strong in cases involving opposing parties in litigation or persons in arm's-length business transactions. [FN92]

The Restatement identifies four instances in which a lawyer owes a duty of care to a nonclient. [FN93] Though further defined by the text of the Section, the general categories identified are: 1) Dealings with a prospective client; 2) Situations in which a lawyer invites the nonclient to rely on the lawyer's opinion; 3) Matters in which the primary objective of the representation is to benefit the nonclient; and 4) Cases involving fiduciaries who intend to or have breached their fiduciary duties. [FN94] Though these categories are somewhat limited, the cases decided under this theory do develop significant constraints on lawyer conduct.

The most important of these categories for purposes of this article is the duty imposed when a lawyer, or the client with the lawyer's acquiescence, ***437** invites a nonclient to rely on the lawyer's opinion or other legal services. [FN95] Allowing recovery for negligence to a nonclient who was encouraged by a lawyer to rely on her work is certainly fair. Also since the client presumably benefits from this action, there is less danger that the lawyer's obligation to use care in accomplishing the task will create a conflict with the lawyer's duty to the client.

For example, in Greycas, Inc. v. Proud, [FN96] a lawyer for a borrower was held liable to the lender for negligently furnishing a letter stating that the machinery had no liens against it. The lawyer had not searched the records and had relied solely on the word of his client, who was a relative of the lawyer, that the machinery was not encumbered. [FN97] When the borrower was unable to repay the loan and the collateral provided no protection, the jury awarded the lender over $800,000 from the lawyer. [FN98]

For the reasons described above, the court devoted great care to analyzing whether liability in this case would undercut the attorney's duty of loyalty to his client. Judge Posner wrote that "merely labeling a suit as one for negligent misrepresentation rather than professional negligence will not make the problem of indefinite and perhaps excessive liability go away." [FN99] However, as have the majority of courts when faced with this question, the court found a duty of care to the nonclient based on the lawyer's actions of providing the information for the guidance of a discrete group. [FN100]

Recognition of limited negligent misrepresentation claims will not eliminate deceptive actions by attorneys. Nonetheless, expansion of lawyer ***438** liability to those not in privity with the lawyer will narrow the range of options likely to create significant moral problems. [FN101]

There are no parallel limitations on lawyer liability when the basis is fraudulent misrepresentation. The underlying principle here is that "[l]awyers are subject to the general law." [FN102] Under this legal theory, lawyers have been held liable to clients [FN103] as well as nonclients. [FN104]

For example, in Jeska v. Mulhall, the buyers sued the seller's lawyer for stating that the property was "a lot of property for the money" knowing that the seller had no transferable interest. [FN105] The appeals court reversed the dismissal of the action and rejected the lawyer's claims that this was a nonactionable statement of

opinion. [FN106] The court quoted liberally from Holland v. Lentz, [FN107] which stated:

> [S]tatements of opinion regarding quality, value or the like, may be considered as misrepresentations of fact where the parties are not on equal footing and do not have equal knowledge or means of knowledge To whom, with what knowledge and in what context a defendant makes a statement bears on whether a statement of opinion is a "mere opinion of value" or an actionable "misrepresentation of fact." [FN108]

This cause of action also puts constraints on the efforts of lawyers to use partial truth. The Restatement (Second) of Torts makes clear that a "representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation." [FN109]

***439** I do not wish to overstate the power of these causes of action or suggest that they will eliminate all troubling lawyer behavior. In fact, one could argue that since the Model Rules have incorporated the test for fraud to determine if there is a Rule 4.1 violation, [FN110] the availability of civil relief adds little protection for third parties. However, I think this misses a key point. The courts have expanded the liability of lawyers for misleading conduct beyond that provided in professional rules. The limits on the negligent misrepresentation claims, though substantial, have a principled basis.

Given the overworked nature of most lawyer disciplinary boards, [FN111] the ability of nonclients to file civil actions with significant potential damages should act as a constraint on lawyer behavior. Also, a young associate in today's legal culture suggesting a course of action not in the short-term interest of a powerful client would likely prefer to cite liability of the law firm as the basis for the suggestion rather than solely one's own sense of morality. [FN112]

These causes of action establish norms on what type of behavior will not be tolerated in legal representation. Perhaps law schools and law firms should devote more time to covering these doctrines. If they did, lawyers would have a better sense of the exposure they face when treading too close to the line.

I recognize that this analysis runs the risk of being perceived as too rules based with not enough focus on character, which is what some think is needed to change the legal culture. However, as Deborah Rhode has written:

> [A]t least some of the problems involved in Enron and subsequent corporate scandals involved a failure to focus on what was legal or on the gaps in what the law required. Moreover, good rules can prescribe as well as prohibit; they can encourage individuals to behave in a socially defensible ways by framing the interests at issue in terms of accepted moral values. Regulation is no ***440** substitute for internalized norms, but it can foster their development and reinforce their exercise. [FN113]

Having spent time both in the trenches and in law school classes, I have become an incrementalist on issues of this sort. Increased attention to tort exposure can only have a salutary impact on lawyer behavior and, in the world of modern practice, will bring about at least some protection for innocent third parties. [FN114]

2. Consumer Protection Acts (CPA)

State consumer protection acts, to the degree that they apply to lawyers, can significantly impact a lawyer's conduct. [FN115] Most such statutes bar "unfair and deceptive" conduct. [FN116] This standard is far broader than that which constitutes fraud. Also, typically a successful claimant under the act can claim multiple damages and attorneys fees. [FN117]

These laws represent efforts by lawmakers, rather than the organized bar, to impose norms reflecting the general public's view of appropriate behavior. However,

if courts, when interpreting the laws, interfere with coverage of lawyers, the statutes will be an ineffective source of regulation.

Courts are split over whether, and how broadly, these laws apply to lawyers. [FN118] A small number of states fully include lawyers in CPA coverage. [FN119] Others exclude lawyers, usually reasoning that the CPA is not designed to ***441** regulate the "learned professions." [FN120] Predictably, a middle position, one covering lawyers only when acting in the business aspects of practice, has emerged. [FN121] With its long history of judicial interpretation of the CPA and legislative change in response to court decisions, New Hampshire presents an interesting study of this controversy.

New Hampshire's consumer protection statute was adopted in 1970 and provides that it shall be unlawful for anyone in the conduct of trade or commerce to use unfair or deceptive acts or practices. [FN122] The New Hampshire Supreme Court was presented with the question of whether this act covered lawyers in 1986 in Rousseau v. Eshleman. [FN123] The specific question presented was whether lawyers were covered by the act since the statute exempts from coverage "trade or commerce otherwise permitted under laws as administered by any regulatory board acting under statutory authority." [FN124]

Attorney Eshleman claimed that since the New Hampshire Supreme Court regulated the conduct of lawyers, the CPA did not cover lawyer conduct. [FN125] In a 3-2 decision, the majority analyzed the case based on what I believe is an overly simplistic analogy. [FN126] The Court reasoned that because doctors and plumbers were "presumably" exempt because they are licensed, lawyers, regulated as they are by the Supreme Court's Professional Conduct Committee, were exempt from the act's coverage. [FN127]

***442** The dissenters disagreed with this broad reading of the exemption clause. [FN128] However, they did not urge full CPA coverage for attorneys and suggested coverage only for those actions constituting the business of law, such as fee setting and advertising. [FN129] They reasoned that applying the CPA's strict liability standard to professional judgments would alter the standard for malpractice and make a lawyer responsible for any mistake even if based on sound research and judgment. [FN130]

By the time Rousseau returned to the Court on a motion for rehearing, one of the judges in the majority had retired. [FN131] The new appointee, Justice Thayer, concurred in the refusal to rehear the case, but wrote to show his agreement substantively with the dissent. [FN132] Based on this opinion, the Rousseau case's exemption of lawyers looked ripe to be overruled.

However, when the next CPA case, a matter not involving a lawyer, was presented to the court, it abandoned the broad exemption for all professionals, but at the same time did not overturn the Rousseau case as to attorneys. [FN133] This created a situation where the Rousseau case, decided as it was by analogy to the broad exemptions presumably enjoyed by other professionals, now stood alone for the proposition that only lawyers with their special, court-supervised system of regulation were exempt.

Eight years later, the court was directly confronted with another case involving a lawyer. [FN134] The court, rather than harmonizing the law to allow CPA claims against lawyers as it had for other professionals, went back and ruled that the first Rousseau case was correct and granted again a broad exemption to all regulated industries. [FN135] The legislature, which had not amended the law ***443** throughout this unsettled period, stepped in almost immediately to overrule this last case and applied the CPA to lawyers. [FN136]

The CPA and other similar statutes that outlaw deception and provide enhanced damages and attorney fees will alter legal practice by imposing a tangible deterrent

to dishonest conduct. [FN137] Also, since the legislature reflects views outside those of the organized bar, such statutes may be more aggressive and thus better able to control questionable lawyer behavior.

As the New Hampshire cases show, court-created exclusion of lawyers from coverage can make such laws irrelevant. Also, even limitations on coverage to the business aspects of lawyering may restrict the scope of the law so it does not play a meaningful role in the most controversial areas of lawyer conduct. In our example, the lack of disclosure of the imminent inheritance, even if "deceptive," would likely not be deemed to relate to business aspects of law, such as setting fees and advertising. Thus, it would be exempt from CPA coverage in states with such a limitation.

In most states, legislatures can set some limits on lawyer conduct through statutes of this sort. [FN138] Such actions by legislatures will engage them in the debate about lawyer conduct and could eliminate some troubling lawyer conduct.

3. Court Control of Discovery Abuses

Much of this article has focused on lawyer conduct during negotiation. Much troubling lawyer conduct also occurs in the discovery process. It may be useful, therefore, to look at court sanctions for discovery and other litigation abuses. This will allow us to look at a different "lawmaker"-courts acting pursuant to their rulemaking authority and inherent power to control ***444** litigation. [FN139] If courts can constrain many of the unacceptable options by imposing a burden on their use, these options become less viable.

Modern discovery rules have gone a long way towards making a trial "less a game of blindman's b[l]uff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." [FN140] Yet as any practitioner knows, the system has not reached this aspiration, in part, due to the "gaming" of discovery. [FN141]

A study of discovery abuses found conflicting views on the efficacy of judge control of such abuses. [FN142] Professor Robert Nelson held focus groups with large firm and plaintiff's lawyers, judges, and in-house counsel as part of the ABA Section on Litigation's "Beyond the Rules" project. He wrote:

> Some of our informants argued that external sanctions imposed by the courts were the only effective mechanism for discouraging problematic behavior. Various lawyers offered testimonials to instances in which judges threatened, but ultimately did not execute, penalties for litigation misconduct. Other lawyers disagreed, citing the fact that judges become involved in a tiny fraction of the litigation process and do not have the resources to effectively police advocates. [FN143]

The judges interviewed, while recognizing that abuses clearly existed, felt that they could not devote the time necessary to actively manage discovery. [FN144]

Few would dispute that there are not enough judicial resources to control all discovery abuse. However, the imposition of sanctions can and does affect behavior by increasing the "cost" of selecting such an option. The cost can be fines payable by the attorney and not recoverable from the client, exclusion of evidence, and discipline. [FN145] Additionally, the potential of being named in a ***445** reported opinion critical of one's conduct should limit the options attorneys will consider.

The plaintiff's lawyers interviewed in Nelson's study pointed out another important constraint on discovery abuse. They asserted that it is often more advantageous not to seek sanctions, but to "establish a record of delay and avoidance by defense lawyers, with the goal of undermining defense credibility before the judge." [FN146] The perception by the trial judge that opposing counsel is less than honest and is causing delay and extra work for the judge can yield significant benefits in contested rulings throughout the case. [FN147] A competent

lawyer, even if not moved by the moral issues presented, should be able to understand the cost of this perception to his client and to himself in future proceedings. [FN148]

The First Circuit demonstrated the consequences for discovery abuses in Klonoski v. Mahlab. [FN149] Plaintiff, the decedent's husband, filed a wrongful death action and consortium claim based on alleged medical malpractice during childbirth. [FN150] Defendant sought to cross-examine the plaintiff at the close of his case with a previously undisclosed letter the wife had written to her sister describing problems in their marriage. [FN151] If defendant could show that the marriage was failing, the jury likely would reduce any damage award.

According to the defendant's attorney, the letter had been obtained just a few days before trial. [FN152] Plaintiff's lawyer objected since this document had not been produced despite a request that defendant produce the names of any person known to possess information related to "marital discord between Dr. and Mrs. Klonoski." [FN153]

The First Circuit vacated the defendant's verdict based on the trial judge's refusal to bar the use of the letter. [FN154] It stated:

> ***446** The purpose of the discovery rules is to provide for the "fullest possible" pretrial disclosure of admissible evidence to "reduce the possibility of surprise" and to "insure a fair contest." As we have discussed, . . . absent some unusual extenuating circumstances not present here, the appropriate sanction when a party fails to provide certain evidence to the opposing party as required in the discovery rule is preclusion of that evidence from the trial. We have recently condemned trial by ambush tactics and for this reason vacated a verdict returned for the defendant.

(citations omitted). [FN155]

The decision, in addition to vacating the judgment employed a harsh, and somewhat sarcastic, characterization of the conduct. The Court wrote:

> We cannot help being impressed by the exquisite timing of the injection of the letters into the trial. Dr. Klonoski, the last witness in the plaintiff's case, had finished his direct testimony. The plaintiff's case had been completed. Cross-examination started with some innocuous questions. This was followed by what clearly were questions setting up Dr. Klonoski for the introduction of the letters. Whether by design or accident, the timing could not have been better for the defendants. [FN156]

This demonstrates another technique courts can use to impose tangible costs to control lawyer conduct - that is publicly commenting on the actions of a lawyer. Practitioners know that court admonitions are to be avoided and that the short-term benefit to a client is not worth the damage to reputation, especially in smaller legal communities. [FN157] The danger of such published admonitions should be enough to deter much undesirable and unfair lawyer conduct.

***447** D. Moral Judgments

This article began by asking what role, if any, a lawyer's moral beliefs should have in client representation. I have argued that a lawyer should consider acting on her own notions of morality only after completion of a broadly framed legal analysis. [FN158] Yet there will certainly be situations in which the legal analysis does not resolve the moral tension.

In fact, my first three steps will not necessarily eliminate the moral question raised in my example of the tort defendant with the inheritance. The defendant, even after full discussion, may see no long-term interest justifying disclosure. If there has been no discussion of the defendant's financial situation during settlement negotiations, there may be no actionable misrepresentation under either the Rules of Professional Conduct or the common law. Also, in a state that has interpreted the

Consumer Protection Act to cover only the business aspects of law, there will be no viable claim. Finally, given the limited scope of prejudgment discovery of a defendant's assets, [FN159] defendant would likely have committed no discovery violations.

If the lawyer in my example determined there was no legal need for disclosure, but still had moral concerns, she must determine how to proceed. To make such a choice, the lawyer must analyze (a) what level of conflict between the proposed action and one's moral beliefs calls for further action and (b) what actions by the lawyer are appropriate.

The first step is important because a lawyer may not overrule a competent client based simply on his own view of the best way to resolve the situation. Also, if the lawyer feels compelled to act based on a conflict between the ***448** client's wishes and a deeply held moral principle, she should take steps that are no greater than necessary to meet the moral concerns. [FN160]

1. Conflict Between Proposed Action and Moral Concerns

The standard I recommend to determine whether further action is warranted is: Does this choice deviate substantially enough from the lawyer's moral principles that the lawyer will be materially limited in following the client's wishes? An example of this might be a lawyer who due to personal beliefs feels unable to provide information that might lead a client to make what the lawyer believes is an immoral choice. This leads to a limitation on the lawyer's duty to counsel the client. [FN161]

This approach places more significant constraints on the lawyer's independent action than that currently suggested by Contextualists. [FN162] Yet it does recognize that there may be situations during the representation when such action is warranted, a belief at odds with some in the client-centered camp. [FN163]

Lawyers applying this approach in practice will face at least two problems. The first is defining controlling moral values in the context of legal representation. [FN164] The second is a more practical problem. How, when underlying facts are critical to moral reasoning, can the lawyer be sure his assumptions are more correct than the client's position?

***449** As to the issue of identifying the applicable values, this model focuses on the conflict between the proposed action and the lawyer's personal values, rather than on a conflict with a universally recognized external norm. Such a standard may lead some to see the specter of rampant relativism. [FN165] However, I am not suggesting that lawyers simply look to their own personal opinion and preferences. Rather, I am arguing that lawyers need to engage in the best moral reflection of which they are capable.

This analysis would be simpler if lawyers had an agreed upon hierarchy of values, whose application would produce a clear notion of what is ethically preferred conduct. Such thinking is sometimes referred to as "moral geometry." [FN166] However, there is no consensus on what constitutes morality.

Bradley Wendel, after carefully surveying the literature on moral theory, concluded:

> Should we prefer the theoretical elegance of a monistic foundation for legal ethics? Perhaps some human activities can be rationalized as having one unified end, so that participants in the practice could be judged according to whether their actions furthered or hindered an agreed-upon goal. The social practice of lawyering, however, seems almost uniquely unsuited to this kind of simplification, for lawyers are the agents through whom humans construct disputes and dialogue about the basic conflicts inherent in social life. Although I do not wish to make too much of this observation, which has become somewhat cliched, it nevertheless is the case that

social life exhibits a fundamental contradiction, which can be represented as the opposition between liberty and order; individualism and collective goods; or partiality and equality. Any scheme of values, therefore that is to underlie and justify ***450** the practice of lawyering, is bound to partake of the same internal incoherence as the principles of social life upon which it is founded. [FN167]

Despite the somewhat relativist tone of this observation though, Wendel asserts that this "should be a cause for hope, not despair." [FN168] He argues that lawyers can make sense of this seeming chaos through moral reasoning and efforts to "coalesce around a set of shared values, traditions, and commitments." [FN169] This observation suggests that well-intentioned lawyers, guided by their own moral compass and the values of the communities in which they live and work, can assess moral issues.

There is another practical reason to support this approach. Many lawyers and law students either have not studied in depth the literature on moral discourse or, even if trained, have not adopted one of the competing moral theories. Paul Tremblay noted:

> [Proposals for law students to engage in greater study of metaethics and value systems] make much good sense, but are blemished by some deep problems. I do not pretend to discount the value of exploring the rich philosophical traditions that underpin moral discourse. My several concerns run in the opposite direction, and actually grow out of the sophistication needed to join these philosophical debates.
>
> There exists a serious question whether law students and lawyers have the skill and sophistication necessary to understand these theories well enough to make [a commitment to one of the competing theories]. Kant in his original texts is extraordinarily difficult to understand, and those who offer to make his teachings clearer are seldom that much more comprehensible.
>
> Even if a lawyer learned a great deal about the intricacies of the two (or more) competing theories, she still may not want to "opt in" to one camp in exclusion of the other. Sometimes, she might find the Kantian idea of dignity and autonomy far more attractive than an opposing choice grounded in consequentialist notions of efficiency or best interests. At other times, she might find herself relying on the utilitarian idea of using scarce resources ***451** efficiently, even if doing so fails to afford sufficient respect to individual plights. [FN170]

Like Wendel, Tremblay does not see this as an insoluble problem. [FN171] He proposes that lawyers engage in the deliberative process, known as casuistry, when confronted with moral dilemmas. [FN172] This is a "case-based approach in which an argument is developed by comparing the case at hand with paradigm cases in which it is reasonably clear what course of action should be taken." [FN173]

This analysis may be particularly useful for lawyers and law students because it does not claim to reach certainty in its conclusions. As Tremblay has written:

> The paradigm cases represent the source of shared sentiments. Most ethical dilemmas or quandaries consist of stories or circumstances where multiple, competing ethical principles or moral theories seem to apply, and how to rank or prioritize the conflicting norms is not readily apparent. In some of these stories and circumstances, the dilemma or conflict will be insoluble, for incomparability reasons.In those cases, despite the angst experienced by the agent who must proceed amidst the uncertainty, there is no available right answer and her actions cannot be criticized. Of course, not all dilemmas or conflicts are so insoluble-if they were, ethical conversation would have no purpose. Ethical conversation and debate assumes that some issues are subject to reasoned analysis. Casuistry offers a coherent, practical method for that analysis. It permits the same kind of inductive, analogy-driven scrutiny that legal scholars employ when using common law precedent to decide on a right answer in a difficult legal dispute. Law students perform that process regularly in substantive law courses; they might then be shown a similar process in ethics contexts. [FN174]

My own experience in the field of bioethics, an applied ethical discipline,

suggests that this approach may be very useful to meet the danger of relativism and the problem presented by the complexity of formal moral theory identified above. As a member of a hospital ethics committee, I have observed intelligent individuals from medical and lay backgrounds, often without an agreed upon set of principles, reason their way through the thorny ethical dilemmas. This ***452** gives me hope that lawyers and law students can successfully engage in a similar analysis. [FN175]

Lawyers in firm meetings or with a trusted colleague or two could engage in much the same type of discussion that hospital ethics committees do. In hospitals, the health care team, patients, and families use these discussions to resolve complex disputes. Similarly, this type of structured thinking could serve the same role in law practice.

Some have argued for a more defined set of standards. Deborah Rhode has rejected the notion that lawyers are not bound by common morality and has offered an explanation for how a morally reflective lawyer would make ethical decisions. [FN176] She argues that "[l]awyers' conduct should be justifiable under consistent, disinterested, and generalizable principles.Lawyers also have responsibilities to prevent unnecessary harm to third parties, to promote a just and effective legal system, and to respect core values such as honesty, fairness, and good faith on which that system depends." [FN177] While this offers some guidance, it is clear that it does not provide significant analytical parameters to avoid the problem of subjectivity associated with much moral reasoning.

The second problem I identified above is that even if one believes that she can find sound and agreed upon moral principles, applying those principles to specific cases remains a challenge. Tremblay argues that individuals "tend to have common, shared sentiments about the good, andcan reason about the ideal." [FN178] Despite this, we as a society disagree on virtually every important moral and political issue. He posits that this is because:

> [W]hen you parse out their disagreement, it is almost invariably about facts, not values as such. People who debate complex issues rely on arguments that are grounded in assertions about what will happen, what has happened, or what accounts for what has happened. You oppose welfare expansion, and support strict workfare, because you believe that welfare recipients are lazy, and need incentives to find work. I support welfare expansion, and oppose strict workfare, because I believe that welfare recipients are oppressed, discriminated against, and need the money to survive and raise their children. You never argue that welfare recipients who really will die without the ***453** money should die. I never argue that lazy people should get money so they can sit home and buy vodka. Our values are not so different. Our views of the facts are terrifically different. [FN179]

If Tremblay is correct about this, and I think he is, lawyers must be extremely cautious about overriding client wishes. This is not only because lawyers often come from different backgrounds than their clients and will not have to live with the consequences of the choice, but also because the underlying facts are often at issue.

Factual issues were critical in my discussion with my colleague in the child abuse example I used at the beginning of the article. We shared the value that children should have the opportunity to thrive. However, based on our experiences, we differed on what would best advance the goal. I argued that placing children in our current foster care system could produce worse outcomes for the children than were likely if they remained in this stable, but somewhat dysfunctional, family. Such outcomes include separation of siblings, and frequent changes in placements, which results in school change and loss of friends and other community connections.

We differed also on what conclusions to draw from her client's unkempt house. My colleague felt this was solid evidence of parental indifference. I thought the failure of the mother to keep the house reasonably clean showed us nothing about the mother's attitude towards her children. Rather, this might be the best this

stressed, working, single mother could do while trying to meet her kids' other needs.

I could not help but reflect on the difference in our life situations. At the time of our discussion, I was struggling to adjust to life with my second son, and coping with the fatigue and disarray that comes with a new baby. My colleague, in good faith and with the best of intentions, was judging family life based on observations formed during infrequent visits with her nieces and nephews.

Despite the difficulty in determining appropriate moral values and interpreting underlying facts, there will certainly be situationswarranting action by the lawyer. But the strong presumption, once the lawyer undertakes representation, should be that the values of client choice and deference to the client's decisions will override differences of opinion unless based on clear ***454** conflicts with one's own strongly held beliefs. [FN180] As Andrew Kaufman has written:

> And so the occasions on which lawyers may have a real moral choice to make in the advice they give may not be so numerous as the protagonists on this issue would have us believe.Likewise, there are many other situations where it is perfectly appropriate for a lawyer with a strong moral position to recognize that there are other reasonable solutions to the moral dilemma and thus to defer to the client's differing moral judgment. That kind of deferring has a moral quality to it too. [FN181]

Once a lawyer has decided, even after the appropriate deference to the client, that the proposed action so substantially conflicts with his moral principles that he will be limited in the representation, the lawyer must still decide what steps are available to him. It is to that final step that we now turn.

2. Actions Available to the Lawyer

A lawyer in an existing client-lawyer relationship [FN182] faced with an option that is lawful, selected by the client, and deviates substantially enough from her moral principles is presented with a range of choices. Scholars have suggested that potential options range from following the client's will [FN183] to "betrayal of [the] client's projects." [FN184]

***455** Analyzing the options from the least intrusive on client choice to the most challenging, the first issue presented is whether the lawyer should counsel the client on moral implications. Under my approach, this is an easy question. It is certainly appropriate and, in light of the moral conflict the lawyer may face, likely will be necessary to engage in such a conversation. Even under the client-centered model, which emphasizes taking neutral actions that do not influence client's choice, there is little question that the lawyer could raise his concerns once he concludes the action is morally wrong. [FN185]

Advocates of greater client collaboration [FN186] view this analysis as in effect, too little and too late. Some have argued:

> [C]lient -centered counselors' moral discourse comes into play only when the lawyer feels the client wants to do something that is "morally wrong." Morality (in and out of the law office) is not generally a matter of choosing whether to do something that is "morally wrong"; more often it is a choice between something that is better and something that is worse. It may not be often that the client will make a choice that the lawyer feels is "morally wrong," but clients constantly are faced with issues that have moral implications. We feel that those moral implications should be considered during the decision-making process. [FN187]

I, too, believe it is entirely appropriate for the lawyer to raise moral considerations with his client. [FN188] The purpose of this article is not to limit the discretion the lawyer has to engage in moral discourse; [FN189] rather, I have tried to ***456** identify an approach for acting on moral issues when the lawyer believes this to be warranted.

A more dramatic option is for the lawyer to inform the client that she will withdraw from representation unless the client agrees to a different course of action. Actual withdrawal can have substantial consequences for the client, such as delay in achieving client goals and the additional expense of hiring new counsel and bringing her up to speed. [FN190] Even the threat of withdrawal can have serious consequences since the client will often feel compelled or pressured to comply with the lawyer's wishes or face the consequences described above. In light of this, lawyers who undertake "representation ordinarily should see it through to the contemplated end of the lawyer's services." [FN191]

Despite this policy, which is based in contract and fiduciary law principles, the Model Rules allow a lawyer to withdraw in a broad range of circumstances. [FN192] There are two primary provisions of the withdrawal rule for a lawyer who has moral qualms about a proposed, lawful client action. [FN193] The first is "withdrawal [which] can be accomplished without material adverse effect on the interests of the client." [FN194] The second is withdrawal when "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." [FN195]

There likely will be few situations in which there will be no material adverse impact on a client. Nonetheless, this is a question of fact. The Restatement offers a helpful suggestion for lawyers seeking to withdraw under this section and notes:

> A lawyer wishing to withdraw can ameliorate those effects [cost of new counsel] by assisting the client to obtain successor counsel and foregoing or refunding fees. But other material adverse affects might be beyond the withdrawing lawyer's power to mitigate. Delay necessitated by the change of counsel might materially prejudice the client's matter. An equally qualified ***457** lawyer might be unavailable or available only at material inconvenience to the client. [FN196]

Even if the client will suffer harm, the lawyer can still withdraw under the other provisions of the rule. [FN197]

Model Rule 1.16(b)(4) grants a lawyer broad discretion to withdraw when the client's actions are inconsistent with the lawyer's moral beliefs. The current provision provides that a lawyer may withdraw from representing a client if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." [FN198] This section was amended in 2001 and was drafted to narrow the attorney's discretion. [FN199] The prior provision permitted withdrawal if "the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." (emphasis added to highlight deleted language). [FN200]

The Reporter's explanation of the changes states that:

> Allowing a lawyer to withdraw merely because the lawyer believes that the client's objectives or intended action is "imprudent" permits the lawyer to threaten to withdraw in order to prevail in almost any dispute with a client, thus detracting from the client's ability to direct the course of the representation. Nevertheless, the Commission believes that a lawyer ought to be permitted to withdraw when the disagreement over the objectives or means is so fundamental that the lawyer's autonomy is seriously threatened. [FN201]

***458** Despite the narrowing of the language, the current rule authorizes withdrawal based on firmly held moral beliefs. [FN202]

Given the limited standard I have suggested before the lawyer is to act on his moral beliefs, there may be a more fundamental reason for the lawyer to seek withdrawal. Rule 1.16 (a)(1) requires a lawyer to withdraw if "the representation will result in violation of the rules of professional conduct." [FN203] Under my approach the lawyer's moral beliefs will likely limit the actions the lawyer can take. Thus, he has a "personal interest" within the meaning of the rules governing

conflicts of interest. [FN204] Having identified such a personal interest, the lawyer cannot continue with the representation unless he reasonably believes that he will still be able to provide competent representation and the client consents to the limited representation. [FN205]

I will use the example of the tort defendant about to inherit a substantial sum of money to illustrate this point. Assume, consistent with step 1, the client after full and thorough counseling has chosen not to disclose. Also, assume the lawyer, after full analysis of steps 2 and 3, has concluded that silence in settlement negotiations is lawful. At this point, she may be confronted with a moral question. I use the term "may be confronted" because the participants in the continuing legal education seminars in which I have used this hypothetical resolved the values and fact questions quite differently.

I generally start these sessions by giving a few more details than I have previously provided on the case: (1) The plaintiff was gravely injured while purchasing a used washing machine at the defendant's home. (2) She will likely not be able to return to work. (3) Her three children are dependent upon her for a substantial portion of their yearly income, and the family has no major assets or savings. (4) Her husband is a paper mill worker, with few transferable skills, whose plant recently closed. (5) The defendant has some colorable defenses. (6) There is no outward evidence of the defendant having significant income or assets. (7) Defendant within one month will be getting a multi-million dollar inheritance. (8) Defendant has suggested to the lawyer that he ***459** would like to use some of the inheritance to fund services for homeless individuals.

Based on these facts, a minority of the participants with whom I have spoken, [FN206] took absolutist positions, some on each side. One group argued that it is immoral not to reveal this information since the injured plaintiff and her family would be left destitute due to the defendant's negligence. While all in this group mentioned the ability of the defendant to pay damages, some cited the unearned nature of the defendant's newfound wealth as a factor in their decision. None felt the other proposed usage of the money was relevant.

This group also looked to the value of candor since, even if there was no specific discussion of the ability of defendant to pay damages, they felt defendant's counsel had to know this would be a factor in plaintiff's thinking. Interestingly, two lawyers in this camp, without being familiar with William Simon's work on justice, suggested that failure to disclose in such a situation was wrong because it would undercut the major values of the tort system, which are deterrence, compensation, and equitable dispute resolution.

As one would expect, the second group argued that unless the plaintiff's lawyer specifically asked about ability to pay or the defendant's lawyer in some way misled the plaintiff, there was no moral or legal issue for the lawyer. This group would let their clients decide whether to disclose, without feeling any need to counsel the client about the plaintiff's situation and the equities. Their decision was based upon a strong belief in client confidentiality, the duty of "zeal," and allegiance to the adversary system. As one lawyer put it, "I would sleep soundly after the settlement knowing I well served my client, though it might not be the sleep of angels." It is interesting that no one based their position on the defendant's "charitable plan."

A significant majority of the lawyers involved in these sessions identified a much more complex problem. They asked questions designed to determine the underlying facts of the incident, the ability of the plaintiff's lawyer to find out this information on his own, the overall level of cooperation of each party in the proceeding, and the details of the statements made in the negotiation.

It is useful to examine why these four were the important factors for participants. First, the lawyers were interested in the merits since whether the

***460** lower settlement amount was "unjust" in their eyes depended upon the actual value of the case. The question of whether the unknown facts rendered the process of settlement defective did not loom large for this group. Unless the settlement was inadequate, few felt any need to consider disclosure, absent misleading statements.

Second, the participants looked to the ability of plaintiff's lawyer to find out the facts since many felt that if the adversary system provided any basis for the party to protect herself, this was the best option. [FN207] Since most in this group viewed the adversary process favorably and were grappling only with its limits, this is not surprising. Much of the conversation turned on discovery and informal factual investigation issues.

I initially was surprised at how great a factor the cooperation of opposing counsel was. I wondered how the conduct of the plaintiff's lawyer affects the justice the settlement would provide to the plaintiff herself. Professor Freedman has argued that this factor can be highly relevant using the case of a divorce lawyer for a husband with funds who seeks to withhold as much information as possible from the less affluent wife. [FN208] Freedman points out that if the wife's lawyer is a "bomber," disclosure may prompt escalation of the already unfairly high demands. [FN209] Whether one agrees with this position, it was clear that for many of the participants, and especially the trial lawyers in the groups, this was a key factor in the overall moral calculus. Being fair was a consideration, but not if such a gesture would be met without reciprocity.

The final factor, the nature of the disclosures made in the settlement talks, related mostly to the legal issues previously discussed. There was significant concern on the part of these lawyers about their reputations for honesty. This analysis is consistent with prior empirical research, which found that lawyers ***461** were concerned about "duties to other professionals, and in particular opposing counsel." [FN210]

After discussion of these factual questions, the participants in all sessions attempted to determine if the proposed action, to not disclose relevant information, was immoral. There was a great deal of disagreement among the participants on this question based on differences in their beliefs on what limits were appropriate on the adversary system.

For those who determined that nondisclosure was inconsistent with their moral standards, the question remained whether their belief was significant enough that they felt compelled to do something. Some concluded that they could not in good conscience help the defendant. These lawyers felt limited in their representation either by their inability to complete the settlement under the agreed upon terms or by their inability to adequately counsel a client with whom they had such fundamental disagreements. Others, though uncomfortable with the result, felt that after weighing all the facts they could defer to the client's decision.

For those who found that they could not follow the client's wishes, most saw threatening or seeking to withdraw as the best option. They seemed to understand the power of this step. None proposed the more extreme action to "sabotage" the client's plans by disclosing over the client's objection. [FN211]

Given my argument that withdrawal is the most extreme action for a morally conflicted lawyer, one further point must be considered. What if the withdrawal is unsuccessful? There may be situations in litigation when approval of a tribunal is required and may be withheld. [FN212] In such situations, "regardless of the reason for seeking to withdraw as counsel, and regardless of whether the withdrawal is mandatoryor permissive, a lawyer is required to continue the representation if so ordered by a court." [FN213] Despite the moral dilemma this creates for the lawyer, the legal and ethical principles governing the practice of law require the lawyer to honor his or her commitment to the client.

***462** V. Conclusion

One of my goals was to describe an approach that would demystify for practitioners the academic literature on lawyers' moral responsibility. I came to this project with some trepidation since the legal literature on this point is thoughtful, provocative, and something that should be considered by all lawyers. Yet, I do not see the debate percolating down effectively to those in the practicing bar. More importantly, I do not see the culture in most practice settings encouraging lawyers to explore their own moral beliefs, especially when the result is contrary to the interests of a firm's more powerful clients.

I sought also to analyze whether more effective client counseling and a fuller understanding of the constraints placed on lawyers by the Rules of Professional Conduct and other sources of law would decrease the incidence of moral conflict. I conclude such steps have had a significant impact, [FN214] but the potential for moral conflict continues to be present.

I join the call for duly appointed or elected lawmakers to broaden the situations in which the law holds lawyers accountable for harm to third parties. [FN215] "Expansion of [these legal] duties, while no doubt complicated by the sustaining original obligation to one's client, would have the salutary effect of overcoming the persistent tendency of lawyers to support, genuinely and in good faith, the positions of their client, even in the face of apparent injustice to others." [FN216] Using democratic institutions to further substantive justice, rather than relying on individual lawyer's notions of morality seems to me to be more fair to lawyers and clients and more principled for society at large.

I began my research hoping my four-step approach would better enable lawyers to address the moral issues they confront. Knowing the defined area in ***463** which one's morals impact decisions in practice should reduce some of the uncertainty lawyers often feel in practice. Reducing uncertainty and discomfort should increase satisfaction with practice. I think this may be enough for many lawyers.

However, given the increasing pressures in modern practice, others will return for alumni weekends wearing that look of despair all too familiar to those of us who teach Professional Responsibility. My reflection on this issue has caused me to rethink how I counsel my students. While I will still teach the limits on and possibilities for lawyer action, I also plan to help my students look at what practice options and law-related careers will best match both their aspirations and belief system. [FN217]

I think choosing a professional setting that comports with one's moral beliefs, is the most effective way to be satisfied in practice. Academics should not give up their battle to enhance moral reasoning in practice. However, for those entering the work world, the ability to live one's ideals can only happen in a setting, be it a firm, public practice, or other professional arena, that operates in a manner consistent with one's values. [FN218]

[FNa1]. Professor of Law, Franklin Pierce Law Center. I am grateful to Dean John Hutson for his encouragement and financial support and to Andrew Matisziw and Barry Shanks for their research assistance. Thanks also to my faculty colleagues who read multiple drafts of my article and provided helpful and often pointed critiques: Richard Hesse, Kimberly Kirkland and Chris Johnson. Special thanks to Susan Covert for her invaluable editorial assistance.

[FN1]. This topic was the focus of the Professional Responsibility Section panel at the annual meeting of the American Association of Law Schools in Washington, D.C. on January 4, 2003. The papers on which that discussion was based have been compiled and published in Symposium, Client Counseling and Moral Responsibility, 30 Pepp. L. Rev. 591 (2003). The articles in the Symposium, written by leaders of the major schools of thought in the area, constitute a wonderful primer. Given the clarity and accessibility of these materials, I will cite liberally to this source. Readers

seeking greater depth and background on this issue can find a fuller annotation of the literature in the articles themselves.

[FN2]. See, e.g., "[Significant reform in regulation of the profession must be taken] to change a legal culture that is almost comically at odds with the profession's pompous self-image. [M]any of the most highly paid corporate attorneys in America all but ignore the spirit of tax, corporate, and securities laws. Instead, they are often linguistic Houdinis who specialize in hypertechnical arguments as to why their client's rat poison meets the five-part test for being apple pie." Mike France, Close the Lawyer Loophole, Bus. Wk., Feb. 2, 2004, at 70.

[FN3]. Since a Professional Responsibility course is required by the ABA for accreditation and virtually all Professional Responsibility texts provide some coverage of this scholarship, most law students likely have been exposed to the debate. See e.g., Geoffrey C. Hazard, Jr., Susan P. Koniak, Roger C. Cramton, The Law and Ethics of Lawyering 20-39 (3rd ed., Foundation Press 1999); Nathan M. Crystal, Professional Responsibility: Problems of Practice and the Profession 21-26 (3rd ed., Aspen Publishers 2004).

[FN4]. See Mark C. Suchman, Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation, 67 Fordham L. Rev. 837, 838 (1998). In 1995, the ABA's Section on Litigation convened a task force of socio-legal scholars to study if large firm lawyers considered "ethics beyond the rules." Over a series of months, the academics held focus groups with judges, large-firm litigators, plaintiffs' lawyers, and in-house counsel. Id. at 838. One researcher noted that the litigators, when asked about conduct beyond that required by the ethical rules:

> [S]pent the bulk of their time talking about duties to other professionals, and in particular, to opposing counsel. At times, discussions also touched on duties to clients and duties to the legal system. Duties to third-party nonprofessionals and duties to the general welfare, however, received virtually no attention from these informants.
>
> Id. at 846.

[FN5]. See Michael J. Kelly, Lives of Lawyers 2-4 (U. of Mich. Press 1996); Kimberly Kirkland, Ethics in Large Law Firms: the Principle of Pragmatism, U. Mem., L. Rev. (forthcoming 2005)(manuscript pp.1-3, on file with the author).

[FN6]. See Susan P. Koniak, When the Hurlyburly's Done: The Bar's Struggle with the SEC, in Enron: Corporate Fiascos and Their Implications 834 (Nancy B. Rapoport & Bala G. Dharan eds., Foundation Press 2004).

[FN7]. See Robert F. Cochran, Jr., Three Approaches to Moral Issues in Law Office Counseling, 30 Pepp. L. Rev. 591, 592 (2003).

[FN8]. Id. at 593. Cochran also describes the collaborative approach, which predictably takes the middle ground and asserts that the lawyer should be an aggressive and full partner with the client in resolving the moral questions presented in client representation. Under this model as in the client-centered model, the client retains the final say on the legal action. However, the collaborative approach rejects the notion, found in some client-centered writing, that the lawyer should remain neutral and detached. Id. at 598.

[FN9]. Id. at 596.

[FN10]. Id.

[FN11]. Deborah L. Rhode, Ethics in Counseling, 30 Pepp. L. Rev. 591, 604 (2003).

[FN12]. Id. at 616.

[FN13]. See Robert M. Bastress & Joseph D. Harbaugh, Interviewing, Counseling, and

Negotiating 26-27 (Aspen 1990);

[FN14]. Crystal, supra note 3 at 21.

[FN15]. Id.

[FN16]. Id.

[FN17]. Cochran, supra note 7, at 597.

[FN18]. Crystal, supra note 3, at 22.

[FN19]. Cochran, supra note 7, at 592; See also Anthony Kronman, The Lost Lawyer (Harvard Univ. Press 1993).

[FN20]. Cochran, supra note 7, at 594.

[FN21]. See id. at 594-96.

[FN22]. David Luban, Lawyers and Justice: An Ethical Study 174 (Princeton Univ. Press 1988).

[FN23]. Paul R. Tremblay, Client-Centered Counseling and Moral Activism, 30 Pepp. L. Rev. 591, 618 (2003).

[FN24]. Id.

[FN25]. Cochran, supra note 7, at 596.

[FN26]. William H. Simon, The Practice of Justice: A Theory of Lawyers' Ethics (Harvard Univ. Press 1998).

[FN27]. Id. at 138.

[FN28]. Id. at 50.

[FN29]. Cochran, supra note 7, at 594 n.13.

[FN30]. David Luban, a leading Contextualist scholar, presents a case, based on Zabella v. Pakel, 242 F.2d 452 (7th Cir. 1957), in which a rich man who owes a debt to a low-income person has a legally valid statute of limitations defense. Luban, supra note 22 at 47-48. Luban argues that raising the defense would lead to an immoral result. Id. He further argues that a lawyer faced with a conflict between a settled moral principle, such as that one who is able to should repay his debts, and the technical and unfair use of the law urged by the client, should decline to assist the client. See id. at 155.

[FN31]. Professor Simon uses the example from the prior footnote, but argues that it is the need to respect the statute, not general notions of morality that compel the lawyer not to assert the defense. Simon notes that there are two possible principles underlying the statute: repose or preventing use of evidence made unreliable by the passage of time. He argues, if the lawyer reasonably believes the latter is the proper purpose behind the statute, he or she should not plead the defense because "[f]or whatever difficulty the courts might have in determining this type of claim, there is no difficulty for the lawyer in determining the merits of this particular claim once the client has admitted the validity of the debt."(emphasis in the original). Simon, supra note 26, at 33. Given the fact that in this example there is no textual or other reason given why repose is not an equal or at least valid purpose behind the statute, this analysis seems to lend some support to Cochran's criticism of Simon's view, which is that it will "cloak the lawyer's moral judgment in legal jargon, giving it the authority of law." Cochran, supra note 7, at 594

n.13.

[FN32]. Cochran, supra note 7, at 595.

[FN33]. See Kirkland, supra note 5, at 28; Simon, supra note 26, at 165.

[FN34]. See Cochran, supra note 7, at 598.
In those cases in which the lawyer represents a poor client against a rich opponent, there is probably little need for the poor client to worry about the interests of the rich opponent-the rich opponent will have plenty of lawyers to look out for his interests. But when the lawyer represents the wealthy client against an (often unrepresented) poor party, the lawyer's exclusive focus on client autonomy is likely to result in injustice.
Id.

[FN35]. See Suchman, supra note 4, at 846; see also Robert Pack, Dilemmas in Attorney-Client Confidentiality, Washington Lawyer 23 at 44 (January 2004) (quoting Professor David Wilkins: "In the modern competitive, cut-throat marketplace for legal services, the presumption that the lawyers are able to say no to the clients and have power over the clients no longer applies in the context of large multinational corporations.").

[FN36]. See Rhode, supra note 11, at 612-13.

[FN37]. This approach will not be applicable to those without an identifiable client to whom some deference is owed. For example, prosecutors have the "responsibility of a minister of justice and not simply that of an advocate." ABA Model Rules of Prof'l Conduct R. 3.8 (2003) [hereinafter Model Rules].

[FN38]. Under my approach, counseling the client about moral issues, as opposed to taking action based on a conflict between client wishes and lawyer values, need not wait until the final step. See infra sections IV A and IV D 2; see also Model Rules R. 2.1 (2003).

[FN39]. See generally Bastress & Harbaugh, supra note 13; Roger S. Haydock & Peter B. Knapp, Lawyering: Practice and Planning (2d ed., West 2003).

[FN40]. See Bastress and Harbaugh, supra note 13, at 237.

[FN41]. See Haydock, supra note 39, at 92.

[FN42]. Getting parties to focus on interests rather than on positions is a fundamental aspect of successful mediation. Interests are defined as something that is truly important to one of the parties. Examples of interests are financial well-being or maintaining privacy. Positions on the other hand are described as solutions to specific grievances. Wanting $10,000 to settle a lawsuit is a position. Jennifer E. Beer, The Mediator's Handbook (3rd ed., New Society Publishers 1997).

[FN43]. David A. Binder, Paul Bergman, Susan C. Price, Paul R. Tremblay, Lawyers as Counselors: A Client-Centered Approach 302 (2nd ed., West 2004).

[FN44]. See Bastress and Harbaugh, supra note 13, at 61-62.

[FN45]. Id. at 239.

[FN46]. Id; see also Haydock & Knapp, supra note 39, at 87-90.

[FN47]. Richard Wasserman, Lawyers as Professionals: Some Moral Issues, 5 Hum. Rts. 1,16 (1975) ("The lawyer can both be overly concerned with the interest of the client and at the same time fail to view the client as a whole person entitled to be treated certain ways.").

[FN48]. I have chosen this example, that of an uninsured tort defendant, to avoid the relational complexities imposed when an insurance company retains a defense lawyer to represent a defendant. This situation, often called the insurance triangle, is described in Public Service Mutual Insurance Co. v. Goldfarb, 425 N.E.2d 810 (N.Y. 1981).

[FN49]. Whether the client or the lawyer (in consultation with the client) will be the ultimate decision maker on a specific decision is governed by ABA Model Rules 1.2 and 1.4. Rule 1.2 is less than clear and sets up a somewhat unhelpful dichotomy between objectives, which are client decisions, and the means by which they are pursued. See Model Rules R. 1.2(a) (2003). Comment 1, though, makes clear that the client has "the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." Id. at cmt. 1. The Restatement has adopted the "view that the client defines the goals of the representation and the lawyer implements them." Restatement (Third) of the Law Governing Lawyers, ch. 2 topic 3, (2000)[hereinafter cited solely as "Restatement"].

[FN50]. See, e.g., State ex rel. Neb. State Bar Ass'n v. Addison, 412 N.W.2d 855 (Neb. 1987) (finding a lawyer's failure to disclose that the defendant had an excess coverage insurance policy of which the plaintiff was unaware to be a violation of the disciplinary rules).

[FN51]. See, e.g., Brown v. County of Genesee, 872 F.2d 169 (6th Cir. 1989) (declining to overturn a settlement without misrepresentation or fraudulent conduct).

[FN52]. Nancy A. Welsh, Making Deals in Court-Connected Mediation: What's Justice Got To Do With It, 79 Wash. U. L.Q. 787, 815 (2001); see also Bastress and Harbaugh, supra note 13, at 239.

[FN53]. See Model Rules R. 2.1 cmt. 2 ("Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant").

[FN54]. The rules governing lawyer conduct vary from state to state and are generally set by the highest court of each state, sometimes in conjunction with the bar association and the legislature. Federal Courts have the power to adopt their own sets of rules, and generally follow the rules of the state in which they sit. Despite the promulgation of model rules and codes by the American Bar Association beginning in 1908, states vary significantly in the rules they have adopted. Charles W. Wolfram, Modern Legal Ethics 50 (West 1986). In order to use a manageable set of rules for this article, I will rely on the ABA Model Rules of Professional Conduct as amended through August 2003. For a concise overview of the sources of the law regulating lawyers see Restatement ß 1 (2000).

[FN55]. Model Rule 8.4(a) provides that it is "professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct." Model Rules R. 8.4(a).
While a lawyer may "discuss the legal consequences of any proposed course of conduct" and "may counsel and assist a client to determine the validity, scope, meaning or application of the law," the lawyer may not assist a client with conduct the lawyers knows is criminal or fraudulent. Model Rules R. 1.2(d).

[FN56]. Model Rule 4.1(a) states that a lawyer, in the course of representing a client, "shall not knowingly make a false statement of material fact or law to a third person." Model Rules R. 4.1(a).

[FN57]. The question of whether any such withdrawal must be accompanied by a disavowal of certain prior representation, known as a noisy withdrawal, is a matter

of some dispute. See ABA Comm. on Ethics and Prof'l Responsbility, Formal Op. 366 (1992) (Holding, in a sharply divided opinion, that if a lawyer's withdrawal from further representation is insufficient to prevent the client from using the lawyer's work product to accomplish an unlawful purpose "disavowal of her opinion may be the only way of making her withdrawal effective.").

[FN58]. Some have suggested that the change in 1983 to the "black-letter rule" format of the Model Rules from the more aspirational Model Code has made the rules less of an independent moral force. The changes certainly were motivated, in part, by the desire for a more targeted and precise system of lawyer discipline, with less reliance on ambiguous prohibitions, such as old Canon 9's mandate that lawyers avoid "the appearance of impropriety." See generally Restatement ß 5 cmt. c. But see Monroe H. Freedman & Abbe Smith, Understanding Lawyers' Ethics 8-10 (2d ed., LexisNexis 2002) (arguing that change to the Model Rules improperly undercut the lawyer's duty to his or her client and imported duties to those outside the relationship).

[FN59]. See Model Rules, Pmbl. • 8.

[FN60]. For purposes of this section, I will assume that the client does not intend to commit a fraud and use the lawyer's services in accomplishing the fraud. Under those facts, Model Rule 4.1 (b) would require disclosure if necessary to avoid assisting in a fraudulent act by the client, unless prohibited by Rule 1.6, which addresses confidentiality. This question was always a complex one. In August 2003, the ABA adopted changes to Rule 1.6, which permit much broader disclosure of client fraud if the lawyer's services were used and therefore alter the 4.1(b) analysis. In light of this, I will leave that topic for another article. Note also, that in such a situation Rule 1.2 (d) would bar the lawyer from assisting the client in this act, but the text of that rule does not require the affirmative disclosure that might now be required by Rule 4.1 (b). See also footnote 50.

[FN61]. Model Rules R. 4.1 cmt. 1. The ABA added this language in 2002 to clarify the vague language in the previous comment. The pre-2002 comment one stated that "[m]isrepresentations can also occur by failure to act." The current comment states "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." See also ABA Report to the House of Delegates, No. 401 (Feb. 2002); Model Rules R. 4.1, Reporter's Explanation of Changes.

[FN62]. Id.

[FN63]. See ABA Ann. Model Rules of Prof'l Conduct 411 (5th ed. 2003) [hereinafter Ann. Model Rules].

[FN64]. Id.

[FN65]. 412 N.W.2d at 856 (Neb. 1987) (decided under DR 7-102(A)(5), which is virtually identical to Model Rule 4.1(a)).

[FN66]. Id.

[FN67]. Id. at 856. For a factually similar case finding the attorney liable for fraud, see Slotkin v. Citizens Casualty of New York, 614 F.2d 301 (2d Cir. 1980).

[FN68]. See Model Rules R. 1.6.

[FN69]. ABA Comm. on Ethics and Prof'l Responsbility, Formal Op. 387 (1994).

[FN70]. Id.

[FN71]. See Model Rules R. 1.6.

[FN72]. 212 F.Supp.2d 435 (D. Md. 2002).

[FN73]. Id. at 450-51.

[FN74]. Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 609-610 (6th ed., Aspen 2002).

[FN75]. Koniak, supra note 6, at 847.

[FN76]. See generally annotations following Rule 8.4 in Ann. Model Rules, supra note 56, at 189-90.

[FN77]. Model Rules R. 8.4 (c).

[FN78]. See In re Conduct of Gallagher, 26 P.3d 131 (Or. 2001) (holding lawyer had a duty under 8.4(c) not to disburse a check he knew was incorrectly drawn by the opposing party); ABA Comm. on Ethics and Prof'l Responsbility, Informal Op. 1518 (1986) (ruling that counsel must notify opposing counsel of inadvertent omission of contract provision).

[FN79]. Restatement ß 5 cmt. c.

[FN80]. Id.

[FN81]. Id.

[FN82]. There is language in some cases suggesting a stricter standard. The Fourth Circuit said, "the system can provide no harbor for clever devices to divert the search, mislead opposing counsel, or cover up what is necessary for justice in the end. It is without note, therefore, that we recognize that the lawyer's duties to maintain the confidences of a client and advocate vigorously are trumped ultimately by a duty to guard against the corruption that justice will be dispensed on an act of deceit." United States v. Shaffer Equipment Co., 11 F.3d 450, 457-58 (4th Cir. 1993) (dealing with the lawyer's duty of candor to the court under Rule 3.3).

[FN83]. See, e.g., Brown v. County of Genesee, 872 F.2d 169 (6th Cir. 1989) (vacating the trial court's decision to modify a settlement agreement).

[FN84]. See, e.g., Petrillo v. Bachenberg, 655 A.2d 1354 (N.J. 1995) (holding seller's lawyer had duty to purchaser not to misrepresent the contents of a material document and awarding damages).

[FN85]. See, e.g., Childs v. Argenbright, 927 S.W.2d 647 (Tex. App. 1996) (upholding order imposing sanctions on attorney for pre-trial discovery abuses in divorce); United States v. Lundwall, 1 F.Supp.2d 249 (S.D.N.Y. 1998) (refusing to dismiss an obstruction of justice indictment for conduct in a civil case).

[FN86]. See Susan P. Koniak, The Law Between the Bar and the State, 70 N.C. L. Rev. 1389, 1410-15 (1992) (discussing the divergence of the "bar's law," meaning the ethical rules and the "state's law"); Ted Schneyer, From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers, 35 S. Tex. L. Rev. 639, 643-45 (1994).

[FN87]. See Symposium, The Lawyers Duties and Liabilities to Third Parties, 37 S. Tex. L. Rev. 957 (1996).

[FN88]. Restatement ß 51 cmt. b.

[FN89]. See Restatement ß 56 cmt. f.

[FN90]. Id.

[FN91]. Id.

[FN92]. Id. at cmt. c.

[FN93]. Id. at ß 51 (1)-(4).

[FN94]. Id.

[FN95]. There is one substantial limitation on the scope of this theory. The text of the section limits liability if the nonclient, under state law, is "too remote from the lawyer to be entitled to protection." Id. at ß 51(2)(b). This will be determined by looking at whether the state has: 1) Rejected any duty to members of a class of unknown recipients, as in Alpert v. Shea Gould Climenko & Casey, 559 N.Y.S.2d 312 (N.Y. App. Div. 1990); 2) Adopted a limited duty to the persons who were intended to benefit from the work, as does the Restatement (Second) of Torts ß 552; or 3) Adopted a duty to those who the lawyer should have foreseen would rely on the opinion, as in Molecular Technology Corp. v. Valentine, 925 F.2d 910 (6th Cir.1991).

[FN96]. 826 F.2d 1560 (7th Cir. 1987), cert. denied, 484 U.S. 1043 (1988); See also cases cited in Reporter's Note to Restatement ß 51 cmt. c.

[FN97]. Greycas, 826 F.2d at 1562.

[FN98]. Id. at 1561-62.

[FN99]. Id. at 1564.

[FN100]. Id. at 1564-65.

[FN101]. While I was preparing this article, I received the Current Report section of the ABA/BNA Lawyers' Manual on Professional Conduct (Volume 20, No.3 2/11/2004). Of the twelve cases discussed in that edition, five addressed liability to nonclients.

[FN102]. Restatement ß 56 cmt. b.

[FN103]. See, e.g., McKinnon v. Tibbetts, 440 A.2d 1028 (Me. 1982) (holding lawyer liable for falsely claiming to be pursuing client's case).

[FN104]. See, e.g., Chase Manhatten Bank v. Perla, 411 N.Y.S.2d 66 (N.Y. App. Div. 1978) (finding lawyer liable if he made false assertions about distributions of proceeds from house sale).

[FN105]. 693 P.2d 1335, 1337 (Or. Ct. App. 1985).

[FN106]. Id.

[FN107]. 397 P.2d 787 (Or. 1964).

[FN108]. Jeska, 693 P.2d at 1337 (citations omitted).

[FN109]. Restatement (Second) of Torts ß 529, cited in Restatement ß 98 cmt. b, reporter's notes.

[FN110]. See Ausherman, 212 F.Supp. at 451.

[FN111]. See ABA Comm. on Evaluation of Disciplinary Enforcement (1992), available at http://abanet.org/cpr/mckay_report.html.

[FN112]. See, e.g., Freedman & smith, supra note 58, at App. B. For an interesting treatment of a related example, see the discussion among experts for various law schools and several experienced practitioners which centered on whether a lawyer could take advantage of a crucial tactical error made by an opponent in a divorce action. Much of the practitioner's reasoning recounted on these pages turned on the question of whether the action would amount to fraud, and whether the resulting decree should have been set aside. See id. at B-391-93. Contrast that with the observation of a nationally known ethics professor that he "would alert the other lawyer [despite not believing this to be fraud] because that's where my values are." Id. at B-394-95.

[FN113]. Deborah L. Rhode & Paul D. Paton, Lawyers, Ethics, and Enron, in Corporate Fiascos, supra note 6, at 650.

[FN114]. In order to make this topic manageable, I have not analyzed other torts, such as intentional infliction of emotional distress. See Restatement ß 56 cmt. g, which contains an effective overview of the cases. Though this tort, like others seeking damages for emotional harm, is not recognized in all jurisdictions and has a high burden of proof for the plaintiff, there are cases listed in the annotation finding lawyer's conduct to have violated the law. Similarly, Restatement ß 57 cmt. d discusses wrongful use of civil proceedings.

[FN115]. See generally Restatement ß 56 cmt. j.

[FN116]. Richard A. Hesse and Mitchell M. Simon, Serving the Needs of Both the Consumer of Legal Services and the Profession Through the Application of Consumer Protection Statutes to Lawyers, 3 Loy. Consumer L. Rev. 116, 122-23 (1991).

[FN117]. Restatement ß 56 cmt. j.

[FN118]. See Hesse and Simon, supra note 116.

[FN119]. See, e.g., Brown v. Gerstein, 460 N.E.2d 1043 (Mass. App. Ct.), writ denied, 464 N.E.2d 73 (Mass. 1984) (including professional services in the meaning of "trade or commerce"); Banks v. D.C. Dept. of Consumer Regulatory Affairs, 634 A.2d 433 (D.C. Cir. 1993)

[FN120]. See, e.g., Jamgochian v. Prousalis, 2000 WL 1610750 (Del. Super. Ct. 2000) (implying a "learned professional" exemption); Frahm v. Urkovich, 447 N.E.2d 1007 (Ill. App. Ct. 1983) (excluding the practice of law from the statute's definition of "trade or commerce"); Vort v. Hollander, 607 A.2d 1339 (N.J. Super. Ct. App. Div.), cert. denied 617 A.2d 1221 (N.J. 1992) (granting a "learned professional" exemption); Santa Clara County Counsel Attorneys Ass'n v. Woodside, 869 P.2d 1142, 1151 (Cal. 1994) (acknowledging that the California Supreme Court has absolute authority in controlling lawyers).

[FN121]. See, e.g., Suffield Dev. Assoc. Ltd. P'ship v. Nat'l Loan Investors L.P., 802 A.2d 44 (Conn. 2002) (holding only entrepreneurial aspects of the practice of law are covered); Reed v. Allison & Perrone, 376 So.2d 1067 (La. Ct. App. 1979) (including legal advertising within the meaning of "trade or commerce"); Short v. Demopolis, 691 P.2d 163 (Wash. 1984) (entrepreneurial aspects of law fall within the CPA); DeBakey v. Staggs, 605 S.W.2d 631 (Tex. Civ. App. 1980) (finding that statute has "learned professional" exemption, but allowing consumers to proceed for misrepresentation and unconscionable acts).

[FN122]. N.H. Rev. Stat. Ann. ß 358-A:2 (2003).

[FN123]. 519 A.2d 243 (N.H. 1986), rehearing denied, 529 A.2d 862 (N.H. 1987).

[FN124]. N.H. Rev. Stat. Ann. ß 358-A:3(I) (2003).

[FN125]. Rousseau, 519 A.2d at 245.

[FN126]. Id.

[FN127]. Id.

[FN128]. Id. at 246-47.

[FN129]. Id. at 247. See also Eriks v. Denver, 824 P.2d 1207 (Wash. 1992) (finding failure to disclose conflict only actionable if for business purposes, such as increasing profit from the case); Beverly Hills Concepts, Inc. v. Schatz and Schatz, 717 A.2d 724 (Conn. 1998) (holding no CPA claim due to a law firm's negligent conduct).

[FN130]. Rousseau, 519 A.2d at 247-52.

[FN131]. See Rousseau v. Eshleman, 529 A.2d 862 (N.H. 1987).

[FN132]. Id. at 865.

[FN133]. Gilmore v. Bradgate, 604 A.2d 555, 557 (N.H. 1992) (holding that the "reasoning behind the Rousseau decision, if relevant at all, is applicable only within the context of attorneys, whose individual conduct and practice is subject to a comprehensive regulatory and disciplinary framework under the jurisdiction of this court.").

[FN134]. Averill v.Cox, 761 A.2d 1083 (N.H. 2000).

[FN135]. Id. at 1087.

[FN136]. N.H. Rev. Stat. Ann. ß 358-A:3 (2003). It is interesting that the Legislature in its zeal to insure lawyers were subject to CPA actions, included all professionals. It exempted only select industries, including insurers and security dealers. There is still debate about whether lawyers are covered only for actions in the business of law, rather than actions in the actual practice since that portion of the ruling was based on a different section of the statute.

[FN137]. See, e.g., Heintz v. Jenkins, 514 U.S. 291 (1995)(holding Fair Debt Collection Practices Act applies to lawyers who regularly, though litigation, collect consumer debts); Duncan v. Handmaker, 149 F.3d 424 (6th Cir. 1998)(addressing coverage under Fair Credit Reporting Act).

[FN138]. But see Santa Clara Co., 869 P.2d at 1151 (reaffirming the California Supreme Court has absolute authority in controlling lawyers).

[FN139]. See Restatement ß 105, introductory note.

[FN140]. U.S. v. Proctor and Gamble Co., 356 U.S. 677, 682 (1958).

[FN141]. See generally Charles W. Sorenson, Jr., Disclosure Under FRCP 26(a) - "Much Ado About Nothing?" 46 Hastings L.J. 679 (1995).

[FN142]. Robert L. Nelson, The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation, 67 Fordham L. Rev. 773, 790 (1998).

[FN143]. Id.

[FN144]. Id. at 794-95 ("For judges, discovery disputes are an annoyance on which

they spend relatively little time and are best dealt with by jawboning and case management rather than sanctions") Id. at 794..

[FN145]. See Restatement ß 110 cmts. e and g, reporter's notes.

[FN146]. Nelson, supra note 142, at 797.

[FN147]. Id.

[FN148]. Id.

[FN149]. 156 F.3d 255 (1st Cir. 1998), cert. denied, 526 U.S. 1039 (1999).

[FN150]. Id. at 257.

[FN151]. Id. at 260-61.

[FN152]. Id. at 261.

[FN153]. Id. at 272.

[FN154]. Id. at 276. The Court of Appeals held that the reason for the reversal was the trial judge's incorrect legal ruling that this letter need not have been disclosed as within the impeachment exception to Fed. R. Civ. P. 26(a)(3), rather than any arbitrary refusal by the judge to require compliance with the pretrial order.

[FN155]. Id. at 271.

[FN156]. Id.

[FN157]. I have only analyzed in this section a sample of the potential external sources of control of lawyer conduct. It would take much more space and time than I have to survey fully all such sources of law. However, there is one additional source of law that should be mentioned in the discovery context because of the severe consequences for its violation - i.e., criminal law. For example, a lawyer considering whether to destroy documents needs to consider obstruction of justice and similar statutes. See Restatement ß 118 cmt. c. In addition to criminal sanctions, document destruction can lead to a "spoliation" claim, contempt of court, and imposition of an unfavorable evidentiary inference. Id.; See also Nelson, supra note 142, at 788 (Destruction or failure to disclose documents "can create huge problems for a client later in the litigation[and] "can do more damage to a client's case than the documents themselves.").

[FN158]. One might consider this analogous to the principle of constitutional adjudication that one should not reach a constitutional question unless "absolutely necessary." Burton v. U.S., 196 U.S. 283, 293 (1905). I recognize that some may see. this analogy as seriously flawed believing that ethical analysis should be in the forefront of legal thinking. See Deborah L. Rhode, In the Interest of Justice: Reforming the Legal Profession 67 (Oxford Univ. Press 2000) (arguing that attorneys should "act on the basis of their own principled convictions, even when they recognize that others in good faith hold different views").

[FN159]. Although some states may have different rules, the general rule is that the plaintiff is not entitled to discovery of a defendant's assets until judgment is issued. The theory behind this rule is that the economic status of the defendant is not yet relevant. See e.g., Sawyer v. Boufford, 312 A.2d 693 (N.H. 1973); 23 Am. Jur. 2d Depositions and Discovery ß 40 (1983). If attachment of assets is sought, some of this information may be discoverable.

[FN160]. See, e.g., Model Rules R. 1.6 cmt. 12 (limiting the scope of disclosure to

only that necessary when a lawyer chooses to reveal client confidences as authorized by the rule).

[FN161]. See Model Rule R. 1.4. See also Model Rule R. 1.7 cmt. 8 ("The critical questions are the likelihood that a difference in interest will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.").

[FN162]. See generally Rhode, supra note 113.

[FN163]. See generally Freedman & Smith, supra note 58 (arguing that the lawyer has the moral choice as to whom he represents, but that once the representation is undertaken the client is entitled to make the important decisions).

[FN164]. There is an underlying question as to whether one believes that, when fulfilling the lawyer's special role within the legal system, lawyers should be bound, as much as possible, by the same moral rules that generally apply to others in society. The notion that lawyers are not governed by principles of common morality, but only by the specialized rules of the profession, is called "role morality" and is supported by many provisions of the ABA's Model Code and Rules. For example, as demonstrated in section IV (B), our rules of ethics permit, and may indeed mandate, actions that many would find to violate the common duty of honesty and fairness. See. id. at 10, but see Luban, supra note 22, at 104 (questioning how "being admitted to the bar and taking a retainer [can] turn wrong into right").

[FN165]. See, e.g., Rob Atkinson, A Dissenter's Commentary on the Professionalism Crusade, 74 Tex. L. Rev. 259, 303 (1995) (criticizing as "demonstrably erroneous[the] premise that conscientious lawyers agree on the way to be a good person and a good lawyer, or that a single kind of lawyering is right and all others wrong").

[FN166]. Bradley Wendel has written that "Moral geometry, whether consequentialist or deontological, offers a significant advantage for practical reasoning.If Kant is right, we can never be faced with conflicting obligations only if we think carefully about which obligation can be derived from the categorical imperative. If law and economics theorists are right, we never do harm by doing good, because overall wealth maximization is always justified, provided the distribution of resources is optimal.The appeal of monisitic accounts of professional responsibility is therefore apparent." W. Bradley Wendel, Value Pluralism in Legal Ethics, 78 Wash. U. L.Q. 113, 140-41 (2000).

[FN167]. Id. at 212.

[FN168]. Id.

[FN169]. Id.

[FN170]. Paul R. Tremblay, Symposium: Teaching Values in Law Schools: Shared Norms, Bad Lawyers, and the Virtues of Casuistry, 36 U.S.F.L. Rev. 659, 688-89 (2002).

[FN171]. Id. at 691-92.

[FN172]. Id. at 692.

[FN173]. Id. at 691.

[FN174]. Id. at 691-92.

[FN175]. See, e.g., Martin Benjamin, Between Subway and Spaceship: Practical Ethics at the Onset of the Twenty-first Century, 31 Hastings Center Rpt. 24 (2001).

[FN176]. Rhode, supra note 158, at 66-67.

[FN177]. Id. at 67.

[FN178]. Paul R. Tremblay, Client-Centered Counseling and Moral Activism, 30 Pepp. L. Rev. 591, 618 (2003).

[FN179]. Id. at 618-19.

[FN180]. One could argue that using this standard adds little to the lawyer's existing duties since in such a situation, the lawyer may not continue with the representation due to a conflict between the client's interests and the lawyer's own interests. See Model Rules R. 1.7. This analysis would consider the lawyer's moral beliefs to be external factors to be considered in the same manner as a financial interest.

[FN181]. Andrew L. Kaufman, A Commentary on Pepper, Am. B. Found. Res. J. 651 (1986).

[FN182]. Though I have focused this article on lawyers with an existing client, it is worth looking briefly at whether the moral considerations are different prior to the acceptance of a client's case. Model Rule 1.2(b) makes clear that a lawyer's representation of a reprehensible client "does not constitute an endorsement of the client's views." While this rule is designed to encourage lawyers to represent all clients in need of representation, there is no mandate in the Model Rules to represent any specific client. See Model Rules R. 6.2 cmt. 1. In fact, Monroe Freedman, a leader of the client-centered school, believes lawyers are morally accountable for decisions to accept a particular client or cause. Freedman & Smith, supra note 58, at 87; but see Michael E. Tigar, Setting the Record Straight on the Defense of John Demjanjuk, Legal Times, September 6, 1993, reprinted in Freedman & smith, supra note 58, at 399-402.

[FN183]. Freedman & Smith, supra note 58, at 87.

[FN184]. Luban, supra note 22, at 174.

[FN185]. See Cochran, supra note 7, at 596 n.26, citing Bastress and Harbaugh, supra note 13, at 334-35; Binder et al., supra note 37, at 294-95.

[FN186]. See supra note 8 for a description of the collaborative approach.

[FN187]. Cochran, supra note 7, at 597 note 26, citing Thomas L. Shaffer & Robert F. Cochran, Jr., Lawyers, Clients and Moral Responsibility (1994).

[FN188]. Having urged a broad approach to assessing client interest and looked at the complex relationship between legal constraints and moral issues, I find myself in full agreement with Comment 2 to Rule 2.1 of the Model Rules. This section wisely refuses to draw too bright a line between moral concerns and legal issues. It provides that "[a]lthough 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." Model Rules of Prof'l Conduct R. 2.1 cmt. 2 (2002).

[FN189]. Adopting a collaborative approach merely encourages the lawyer and client to resolve moral issues together through moral discourse. The client makes the ultimate decision, but the lawyer is actively involved in the process. The Comments to the Model Rules provide that "[i]t is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice." Model Rules 2.1 cmt. 2 (2002).

[FN190]. Restatement ß 32 cmt. h (ii).

[FN191]. Id. at cmt. c.

[FN192]. See Model Rules R. 1.16.

[FN193]. Id.

[FN194]. Model Rules R. 1.16 (b)(1).

[FN195]. Model Rules R. 1.16 (b)(4).

[FN196]. Restatement ß 32 cmt. h (ii).

[FN197]. The Restatement seeks to limit this principle somewhat. It provides, based solely on fiduciary principles, without any case or rule citations, that "the lawyer may not withdraw when [there is]a significant disproportion between the detrimental effects that would be imposed on the client by the contemplated withdrawal as against detrimental effects that would be imposed on the lawyer." Id.

[FN198]. Model Rules R. 1.16 (b)(4).

[FN199]. Model Rules R. 1.16, cmt. b.

[FN200]. Model Rules of Prof'l Conduct R. 1.16(b)(3) (pre 2002), reprinted in Thomas D. Morgan & Ronald Rotunda, 2003 Selected Standards on Professional Responsibility 223 (Foundation Press 2003).

[FN201]. ABA Report of the House of Delegates, No. 401 (Feb. 2002); Model Rules R. 1.16 (reporter's explanation of changes).

[FN202]. See, e.g., Red Dog v. State, 625 A.2d 245 (Del. 1993) (authorizing lawyer for client who wished to accept the death penalty to seek to withdraw due to lawyer's beliefs on the death penalty).

[FN203]. Model Rules R. 1.16(a)(1).

[FN204]. See Model Rules R. 1.7(a)(2).

[FN205]. Model Rules R. 1.7(b)(1) and (4). See also Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987) (holding that a district court is vested with broad power and responsibility to supervise the professional conduct of the attorneys appearing before it).

[FN206]. This data is based on several educational seminars I have conducted. The audiences ranged from lawyers just admitted to practice to members of large firms and public interest organizations. Unfortunately, at the time I conducted these sessions, I did not keep adequate records to use the results for in-depth empirical research.

[FN207]. William Simon has suggested that defects in the process are very relevant to the lawyer's role. He has written that: "[T]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substantive justice of the resolution; the less reliable the procedures and institutions, the more direct responsibility she needs to assume for substantive justice." Simon, supra note 26, at 140.

[FN208]. A Gathering of Legal Scholars to Discuss "Professional Responsibility and the Model Rules of Professional Conduct," 35 U. Miami L. Rev. 639, 652 (1981), cited in Simon, supra note 26, at 141-42.

[FN209]. Id. at 652-53. Professor Simon has suggested that this may be a reason to delay disclosure as long as the case is disposed of "justly." Id.

[FN210]. Suchman, supra note 4, at 846.

[FN211]. See David Luban, Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephan Ellman, 90 Colum. L. Rev. 1004, 1036-41 (1990).

[FN212]. See Model Rules R. 1.16(c).

[FN213]. ABA Ann. Model Rules of Prof'l Conduct 269 (5th ed. 2003); but see State v. Jones, 923 P.2d 560 (Mont. 1996) (holding that while an attorney may not have agreed with his client's decision to decline what the attorney considered to be a favorable plea agreement, this does not constitute cause for withdrawal).

[FN214]. William Simon has written that: "The developments in professional regulation most compatible with the Contextualist view have been invariably undertaken by other institutions-courts, regulatory agencies and specialized bar associations. While the courts in their roles as ethical regulators have been inclined to adopt the national bar's codes more or less wholesale, they have taken different tacks in other contexts. In applying criminal and tort norms against fraud and assisting in illegal activities and in liberalizing the discovery system, several courts have enlarged (or rediscovered) lawyer duties to nonclients under relatively contextual norms." Simon, supra note 26, at 196.

[FN215]. See Rhode, supra note 11, at 614 ("The massive misconduct revealed in Enron et al. involved failures of counseling, but the solution is not simply better counseling education. Changes are needed in regulatory structures and reward systems. Lawyers, managers, accountants, and those who oversee them must be subject to greater accountability").

[FN216]. Tremblay, supra note 23, at 625-26.

[FN217]. See, e.g., Patrick J. Schiltz, On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession, 52 Vand. L. Rev. 871 (1999); Susan Saab Fortney, Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements, 69 UMKC L. Rev. 239 (2000).

[FN218]. See generally Andrew M. Pearlman, A Career Choice Critique of Legal Ethics Theory, 51 Seton Hall L. Rev. 829 (2001).