



1-1-2012

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Recommended Citation

Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75 (2000).
Available at: <http://scholarship.law.nd.edu/ndjlepp/vol14/iss1/5>

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DEVELOPING A PHILOSOPHY OF LAWYERING

NATHAN M. CRYSTAL*

Almost all significant ethical decisions that lawyers face in the practice of law involve discretion. For some of these decisions, no rules or standards guide lawyers. A lawyer's decisions as to type of practice, location, and organizational form (solo practice, law firm, corporation, or government office) are examples of standardless discretionary decisions. Even decisions involving clients to which rules of professional conduct¹ apply typically provide lawyers either with unlimited discretion or with discretion guided only by general standards. Consider, for example, a lawyer's decision about whether to represent a client,² or how to counsel a client (if at all) about nonlegal considerations that might affect a client's decision.³

Because discretion is so pervasive in the practice of law, lawyers develop, either thoughtfully or haphazardly, a general approach for making these decisions. I use the term "philosophy of lawyering" to refer to the basic principles that a lawyer uses to deal with the discretionary decisions that the lawyer faces in the practice of law.⁴

For a number of years scholars of the legal profession have debated the merits of various philosophies of lawyering. The beginning point for this debate has been called "neutral partisanship" or the "dominant view" of the lawyer's role. Under a philosophy of neutral partisanship, lawyers zealously represent their

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1. In this article I use the current version of the American Bar Association's Model Rules of Professional Conduct. More than 40 states have adopted the Model Rules, although most states have approved some variations from the ABA's Model Rules. For a listing of the states that have adopted the Model Rules, the dates of their adoption, and a summary of variations from the ABA's Model Rules, see *LAWYERS MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA)* 1:3 (1998). New York's Code of Professional Responsibility is based in form on the ABA's 1969 Code, but actually is a medley of the Code, the Model Rules, and provisions unique to New York. California has adopted its own Rules of Professional Conduct that vary considerably from the ABA's Model Rules.

2. See *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 6.2 cmt. 1 (1997).

3. See *id.* Rule 2.1.

4. See *infra* notes 57-63 and accompanying text.

clients without moral responsibility for their actions. The only restraints on neutral partisans are specific legal and professional obligations.

Critics of neutral partisanship have proposed a number of alternative philosophies. In broad terms, these alternative philosophies draw their inspiration from moral values or from social or professional norms.⁵ William Simon's *The Practice of Justice*⁶ is the most recent comprehensive presentation of a philosophy of lawyering. Despite this extensive debate, no philosophy of lawyering has been able to gain consensus within the profession, and none appears likely to do so.

This state of affairs has created an individual and professional conundrum. The discretionary nature of practice demands that lawyers adopt a philosophy of lawyering. Yet, the lack of professional consensus means that lawyers receive little guidance as to how to go about developing such a philosophy.

Part I of this paper describes the wide range of discretionary decisions that lawyers face. Part II presents the concept of a philosophy of lawyering and summarizes the major scholarly efforts to present and defend different philosophies of lawyering. Part III offers a mechanism by which the organized bar can provide institutional support for lawyers to develop philosophies of lawyering without at the same time mandating a choice among different philosophies. The approach has four central elements: (1) bar application statement of a philosophy of lawyering; (2) annual certification and revision of a lawyer's philosophy of lawyering; (3) required notification to clients of a lawyer's philosophy of lawyering; (4) disciplinary actions against lawyers for flagrant violation of the terms of their philosophy of lawyering. I conclude with responses to criticisms that I expect to be leveled against my proposal.

I. DISCRETION IN THE PRACTICE OF LAW

Almost all significant ethical decisions that lawyers face related to the practice of law involve discretion. I use the term "discretion" loosely to refer to a relative degree of freedom to decide how to act, as opposed to decisions based on specific rules.⁷ The rules of ethics requiring written contingent fee

5. See *infra* notes 71-94 and accompanying text.

6. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998).

7. The modern critique of legal formalism has called into question the proposition that rules can ever determine results. See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990). The validity of this critique is

agreements⁸ or prohibiting commingling of funds are two examples of specific rules that are designed to eliminate discretion.⁹ Within the general category of discretion, distinctions can be drawn based on the degree of discretion that lawyers possess. Sometimes lawyers have very broad discretion that is unrestricted by a standard. Lawyers' choice of area of practice and their amount of pro bono work are examples. In other situations, lawyers have weaker discretion, restricted by or "grounded" in a general standard.¹⁰ The conflict of interest rules provide an example.¹¹

The first decision that a lawyer faces in connection with a legal matter is whether to represent the potential client. Rules of professional conduct provide lawyers broad, largely unrestricted discretion in the decision to undertake representation. The comment to Model Rule 6.2 provides: "A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant."¹² The rule and its comments recognize two narrow qualifications to this broad grant of discretion. The rule states: "A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause."¹³ The comment provides that "[a]ll lawyers have a responsibility to assist in providing pro bono publico service."¹⁴ Rule 6.1, which deals with pro bono work, however, is itself aspirational and discretionary rather than mandatory.¹⁵

While a lawyer's decision about who to represent is largely unrestricted by rules, the institutional context in which lawyers practice may limit or eliminate their discretion to accept or reject cases. For example, associates in law firms are generally required to handle matters assigned by their employers. A firm may tolerate occasional complaints or refusals to accept cases, but associates who persist in such conduct will be told to seek employment elsewhere.

not essential, however, to my argument. If the critique is correct in whole or in part, then lawyers have an even broader area of discretion than described in this article. If the critique is false, lawyers nonetheless have a substantial degree of discretion, particularly with regard to important ethical decisions.

8. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(c) (1997).

9. See *id.* Rule 1.15(a).

10. See Bruce A. Green, *The Role of Personal Values in Professional Decision-making*, 11 GEO. J. LEGAL ETHICS 19 (1997).

11. See *infra* notes 17-21 and accompanying text.

12. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 cmt. 1 (1997).

13. *Id.* Rule 6.2.

14. *Id.* Rule 6.2 cmt. 1.

15. See *id.* Rule 6.1.

Unrestricted discretion like that exercised by lawyers in choosing clients may be challenged and, over time, may become subject to restrictions. *Stropnick v. Nathanson*¹⁶ is an example of such a development. In *Stropnick*, a hearing commissioner with the Massachusetts Commission Against Discrimination sanctioned a female domestic relations lawyer under the state's public accommodations law for declining to represent a male party in divorce proceedings.

Assuming that a lawyer is willing to represent a client, the lawyer must decide whether the representation involves a conflict of interest. The two principal conflicts of interest rules are Model Rules 1.7 and 1.9. Rule 1.7 deals with conflicts of interest among current clients or when the lawyer has a personal conflicting interest, while Rule 1.9 regulates representation against former clients. Many lawyers may decide not to undertake representation against a current or former client pursuant to their general discretionary authority to refuse to handle a matter. For some lawyers, this decision may be a matter of principle; they believe that it is unseemly and disloyal to undertake representation against a current or former client. Other lawyers may base such a refusal on self-protection; they realize that if they represent a party against a current or former client, they increase the risk that they will be subject to a disqualification motion, a disciplinary charge, or a malpractice suit.

Even if a lawyer decides that she is not opposed to undertaking representation against a current or former client, either as a matter of principle or prudence, the lawyer must still analyze the application of the conflict of interest rules. A lawyer may undertake representation against a current client despite the existence of an actual or potential conflict if "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client" and each client consents after consultation.¹⁷ However, "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."¹⁸ "Consultation," as defined by the Model Rules, "denotes communication of information reasonably sufficient to

16. No. 91-BPA-0061 (Mass. Comm'n Against Discrimination Feb. 25, 1997). See Steve Berenson, *Politics and Plurality in a Lawyer's Choice of Clients: The Case of Stropnick v. Nathanson*, 35 SAN DIEGO L. REV. 1 (1998); Symposium, *A Duty to Represent? Critical Reflections on Stropnick v. Nathanson*, 20 W. NEW ENG. L. REV. 5 (1998).

17. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1997).

18. *Id.* Rule 1.7 cmt. 5.

permit the client to appreciate the significance of the matter in question."¹⁹ Lawyers must exercise discretion in deciding whether a "disinterested lawyer" would refuse to handle the matter and in determining what information is reasonably sufficient to permit the client to make an informed decision about consenting to the representation.

A lawyer may not undertake representation against a former client "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."²⁰ The generality of this standard requires the exercise of professional discretion. In particular, courts have adopted widely differing definitions of the "substantial relationship" test.²¹

During the course of representation, lawyers must counsel their clients about various issues. The Model Rules provide lawyers a wide range of discretion about the scope of advice they give: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."²² The comments elaborate on the scope of lawyers' discretion. Lawyers should not be deterred from giving advice because it may be "unpalatable" to clients.²³ Lawyers may refer to moral and ethical considerations because purely technical advice is often inadequate.²⁴ Lawyers may often need to raise issues on their own, even when clients have not asked for advice.²⁵ Even when a matter involves issues within the expertise of other professionals, a lawyer may need to help the client choose among conflicting opinions.²⁶

In litigation, decisions must be made about the objectives of representation and the means used to achieve those objectives. Decisions about objectives of representation (for example, whether to plead guilty in a criminal case or to accept an offer of settlement in a civil case) are for the client to make after consul-

19. *Id.* Terminology.

20. *Id.* Rule 1.9(a).

21. See Charles W. Wolfram, *Former-Client Conflicts*, 10 GEO. J. LEGAL ETHICS 677 (1997).

22. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1997). For an example of the wide range of discretion available to lawyers in compliance counseling, see Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 26-30 (1988).

23. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt. 1 (1997).

24. See *id.* cmt. 2.

25. See *id.* cmts. 3, 5.

26. See *id.* cmt. 4.

tation with the lawyer.²⁷ Decisions about tactical matters, the means to be used to achieve the client's objectives, are within the province of the lawyer after consultation with the client when feasible.²⁸ Thus lawyers have discretion about matters such as the formulation of legal theories, the nature and scope of discovery, witnesses and documents to introduce at trial, and objections to admissibility of evidence.²⁹

The rules dealing with false evidence illustrate the scope of lawyer discretion. A lawyer *shall not* offer evidence the lawyer "knows" is false.³⁰ However, a lawyer *may* refuse to offer evidence that the lawyer "reasonably believes is false."³¹ Because lawyers will rarely know when evidence is false,³² the discretionary rule will apply in almost all cases.

In some cases, particularly ones in which there is substantial public interest, lawyers may face decisions about whether to engage in trial publicity on behalf of their clients. Model Rule 3.6 regulates extrajudicial statements by lawyers, but the rule imposes only modest restrictions on such communications. Lawyers are prohibited from making extrajudicial statements only when those statements have "a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."³³ In addition, lawyers have a right to reply to prejudicial pretrial publicity to the extent necessary to mitigate such publicity.³⁴ Thus the wisdom, timing, and content of extrajudicial statements are largely within lawyers' discretion.³⁵

A lawyer's discretion with regard to tactical matters is, of course, restricted, not unbounded. A client can discharge a lawyer if the client does not approve of the way the lawyer is han-

27. *See id.* Rule 1.2(a).

28. *See id.*

29. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32(3) cmt. e (Proposed Final Draft No. 1, 1996).

30. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1997).

31. *Id.* Rule 3.3(c).

32. Most courts and the Restatement have taken the view that the test for knowledge is whether the lawyer has a "firm factual basis" for believing the evidence is false. *See, e.g.,* United States v. Long, 857 F.2d 436, 445 (8th Cir. 1988); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 180 cmt. c (Tentative Draft No. 8, 1997). Some courts have suggested an even higher standard of beyond a reasonable doubt. *See, e.g.,* Shockley v. State, 565 A.2d 1373, 1379 (Del. 1989).

33. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1997).

34. *See id.* Rule 3.6(c).

35. *See* Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627 (1996) (discussing factors that lawyers should consider in their discretionary decisions to engage in extrajudicial statements).

dling the case.³⁶ Lawyers who fail to exercise their discretion reasonably may also be subject to malpractice liability.³⁷

The rules of professional conduct assume that lawyers normally deal with clients who are competent to make decisions when receiving advice from their lawyers. Many lawyers, however, regularly represent clients who have marginal capacity. Such incapacity can result from substance abuse, mental retardation, or youth. The Model Rules give lawyers a broad degree of discretion for dealing with such clients, providing that lawyers should attempt to maintain a normal client-attorney relationship as far as reasonably possible.³⁸ If the lawyer concludes that a client "cannot adequately act in the client's own interest," the lawyer may take such steps as the lawyer considers appropriate to protect the client's interest.³⁹ The comments note: "Evaluation of these considerations is a matter of professional judgment on the lawyer's part."⁴⁰

One of the most difficult decisions a lawyer can face in practice deals with revelation of confidential information to prevent a client from committing a wrongful act or to rectify the consequences of a client's wrong. Unlike the rules discussed previously, Model Rule 1.6 provides lawyers with a quite restricted area of discretion to reveal confidential information. Rule 1.6 allows a lawyer to reveal confidential information "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."⁴¹ Under the rule, a lawyer does not have discretion to reveal confidential information to prevent a horrible injustice, such as punishment of an innocent person, because the revelation would not prevent the client from committing a criminal act.⁴² The rule also does not allow a lawyer to reveal confidential information about a client's past criminal conduct even if the client's crimes have ongoing harmful ramifications.⁴³ Rule 1.6 would, however,

36. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(3) (1997).

37. See generally RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* (4th ed. 1996).

38. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1997).

39. *Id.* Rule 1.14(b).

40. *Id.* Rule 1.14 cmt. 3.

41. *Id.* Rule 1.6(b)(1).

42. See *id.* The *Leo Frank* case is the most famous example of such a situation. For a discussion of the *Frank* case, see NATHAN M. CRYSTAL, *AN INTRODUCTION TO PROFESSIONAL RESPONSIBILITY* ch. 1 (1998). See also Symposium, *Executing the Wrong Person: The Professionals' Ethical Dilemmas*, 29 *LOY. L.A. L. REV.* 1543 (1996).

43. Lawyers Frank Armani and Francis Belge faced such a situation in the famous "buried bodies" case. For a discussion of the case, see RICHARD ZITRIN

allow a lawyer to reveal confidential information if the client threatened to kill someone. The comments to Rule 1.6 emphasize the discretionary aspects of the lawyer's decision to reveal confidential information. The comments point out that it is often difficult for the lawyer to "know" whether the client intends to carry out a threat.⁴⁴ Because the exercise of discretion requires lawyers to weigh a number of factors, the lawyer's decision to reveal or not to reveal confidential information should not be reexamined.⁴⁵

Many states do not follow Model Rule 1.6 and instead provide lawyers with a greater degree of discretion to reveal confidential information. More than half of the states have returned to the formulation of the confidentiality rule found in the Code of Professional Responsibility, giving lawyers discretion to reveal confidential information to prevent clients from committing crimes.⁴⁶ In addition, the American Law Institute has adopted a rule that would allow a lawyer to reveal confidential information to the extent the lawyer reasonably believes necessary "to prevent reasonably certain death or serious bodily harm to a person," without regard to whether the client was committing a criminal act.⁴⁷

The rules dealing with withdrawal from representation also provide lawyers with a substantial amount of discretionary authority. Lawyers have the power to withdraw "if withdrawal can be accomplished without material adverse effect on the interests of the client."⁴⁸ In addition, lawyers may permissibly withdraw in six situations, the broadest of which occurs when "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent."⁴⁹ The rules also authorize lawyers to withdraw when "the representation . . . has been rendered unreasonably difficult by the client."⁵⁰ A lawyer's power to withdraw is, of

& CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* ch. 1 (1999).

44. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 12 (1997).

45. See *id.* Rule 1.6 cmt. 13; *id.* Scope para. 8 ("lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination").

46. See SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY, Appendix A to Model Rules on Ethical Rules on Client Confidences (Thomas D. Morgan & Ronald D. Rotunda eds., 1999).

47. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 117A (Proposed Final Draft No. 2, 1998).

48. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1997). For a criticism of this provision, see CRYSTAL, *supra* note 42, at 82-83.

49. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(3) (1997).

50. *Id.* Rule 1.16(b)(5).

course, restricted in those cases when the matter is pending before a tribunal where court approval is required.

The degree to which lawyers become involved in pro bono service⁵¹ and other professional activities is largely a matter of unrestricted discretion. The Model Rules do not speak to the lawyer's obligation regarding professional self-regulation except in a very limited way: "A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."⁵² A similar rule applies to reporting misconduct of judges.⁵³ As the comments recognize, application of the obligation to report requires the exercise of discretion:

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.⁵⁴

The previous discussion does not by any means exhaust the areas of professional life in which lawyers have discretion. For example, lawyers' commercial activity is largely a matter of professional discretion. The rules dealing with legal fees provide that lawyers should charge "reasonable" fees,⁵⁵ but aside from this general standard and a few isolated rules dealing with contingent fee methods, the amounts of fees are a matter of professional discretion. Similarly, the rules dealing with advertising prohibit lawyers from engaging in false or misleading advertising,⁵⁶ but the decision of whether to advertise and the methods for communicating information about professional services are discretionary. The basic point is clear: decisions of professional responsibility, particularly the important ones, are overwhelmingly discretionary.

51. *See id.* Rule 6.1.

52. *Id.* Rule 8.3(a).

53. *See id.* Rule 8.3(b).

54. *Id.* Rule 8.3 cmt. 3.

55. *Id.* Rule 1.5(a).

56. *See id.* Rule 7.1.

II. THE CONCEPT OF A PHILOSOPHY OF LAWYERING

Recall that the phrase "philosophy of lawyering" refers to the basic principles that a lawyer uses to deal with discretionary decisions. A philosophy of lawyering operates at three interrelated levels: the personal, the practice, and the institutional. When I refer to the personal level of a philosophy of lawyering, I mean the relationship between the lawyer's professional career and the lawyer's private life.

For most lawyers, the fundamental issue at the personal level is seeking some accommodation between competing goals of professional advancement and family life. In addressing this issue lawyers need to consider questions like the following:

What type of practice do I see myself going into: civil litigation, corporate law, prosecution or defense of criminal cases, legal services? Large or small organization? What area of the country or the world?

What types of ethical problems am I likely to encounter in this type of practice?

What level of income do I aspire to have? Will the practice that I plan to undertake meet my economic aspirations?

What kind of personal life do I wish to have? Will the demands of the type of practice that I envision allow me to have the kind of personal life I desire?

Do I have enough information about the type of practice that I envision to answer these questions? If not, how am I going to get this information? If the type of practice that I contemplate will not allow me to meet either my income or personal desires, are there alternatives that I should consider?

In the practice of law, rules of professional conduct sometimes provide clear answers to questions of how a lawyer should act. For example, a lawyer may not ethically prepare a will for a client when the lawyer will receive a substantial bequest, unless the lawyer is related to the client.⁵⁷ Contingent fee agreements with clients must be in writing.⁵⁸ As Part I shows, however, the demanding questions of professional responsibility do not admit of such black-or-white answers. Lawyers often must make difficult judgments governed only by general standards in a context that involves the lawyer personally: Should I agree to handle this multimillion dollar case against a company that my firm did

57. *See id.* Rule 1.8(c).

58. *See id.* Rule 1.5(c).

some work for three years ago? Should I accept this malpractice case against one of my classmates when I think the case has merit, when the client has not been able to find another lawyer to take the case, and when the statute of limitations is about to run? How should I respond to a request for production of documents worded in such a way that I could, arguably, deny the existence of what was requested—even though I know what the other side wants? Resolving hard questions not only requires close attention to the rules of ethics and other standards of professional behavior, but also means that lawyers must develop an approach to handling such issues. This approach is the *practice component* of a philosophy of lawyering.

While the personal level of a philosophy of lawyering refers to the relationship between a lawyer's private life and the lawyer's professional role, the *institutional level* refers to the relationship between the lawyer's private and professional life and the broader institutional issues facing the profession as a whole.⁵⁹ The profession has faced and continues to face a number of significant and controversial issues, such as the effectiveness of the disciplinary process,⁶⁰ the adequacy of current mechanisms for delivery of legal services,⁶¹ the actual or perceived decline in professionalism,⁶² and relationships with other professionals through multidisciplinary practice.⁶³ The institutional level of a lawyer's philosophy of lawyering will identify and explain the lawyer's commitment to resolution of these broader issues.

How should lawyers develop a philosophy of lawyering? One way is to search for role models. Biographies of many prominent lawyers⁶⁴ or fictional portrayals of attorneys⁶⁵ can provide guidance for lawyers in their quest for a philosophy of lawyering.

59. See Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985).

60. See ABA Comm'n on Evaluation of Disciplinary Enforcement, *Lawyer Regulation for a New Century* (1992).

61. See, e.g., Deborah L. Rhode, *The Delivery of Legal Services by Nonlawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990).

62. See, e.g., Conference of Chief Justices, *A National Action Plan on Lawyer Conduct and Professionalism* (1998) [hereinafter *National Action Plan*] (discussing institutional and individual roles in promoting lawyer professionalism).

63. See ABA Comm'n on Multidisciplinary Practice, *Report to the House of Delegates* (visited Dec. 1, 1999) <<http://www.abanet.org/cpr/mdpfinalreport.html>>.

64. See, e.g., JOHNNIE L. COCHRAN, JR. & TIM RUTTEN, *JOURNEY TO JUSTICE* (1996); VIRGINIA G. DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* (1998); ARTHUR L. LIMAN & PETER ISRAEL, *LAWYER: A LIFE OF COUNSEL AND CONTROVERSY* (1998); PHILIPPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* (1993); EVAN THOMAS, *THE MAN TO SEE: EDWARD BENNETT WILLIAMS* (1991); KEVIN TIERNEY, *DARROW: A BIOGRAPHY* (1979).

In addition to the examples of other lawyers, a substantial body of literature has developed, justified, and critiqued various philosophies of lawyering. In broad terms, philosophies of lawyering can be divided into three categories. The traditional view of the lawyer's role can be characterized as a *client-centered philosophy*. Professor Murray Schwartz set forth two principles that he argued accurately described the essence of client-centered lawyering.⁶⁶ First, lawyers act as zealous partisans on behalf of their clients, doing everything possible to enable their clients to prevail in litigation or to obtain their clients' objectives in nonlitigation matters, except to the extent that rules of professional conduct or legal principles clearly prohibit the lawyer's conduct. Under a client-centered philosophy, if doubt exists about the propriety of an action, the lawyer is justified in proceeding. Only clear violations of law or rules of ethics, like bribing witnesses, are prohibited. Schwartz referred to this idea as the Principle of Professionalism. Second, when acting in this professional role, lawyers are neither legally nor morally accountable for their actions. Schwartz called this concept the Principle of Nonaccountability.⁶⁷ Similarly, Professor William Simon has referred to two principles of conduct—neutrality and partisanship—as forming the core of what he called the "Ideology of Advocacy."⁶⁸ Following Simon, many writers now use the term "Neutral Partisanship" to refer to the standard conception of the lawyer's role. A more colloquial way of putting these ideas is that lawyers are "hired guns."

One can criticize a client-centered philosophy of lawyering for its incompleteness. This approach to lawyering provides attorneys with guidance on most difficult questions of professional ethics (what I have called the practice level): If I have discretion to act, do what is in my client's interest. A client-centered philosophy could also be applied at the personal and institutional levels, but even lawyers who are most committed to this philosophy in their practices would almost certainly find it intolerable when applied to their personal and institutional lives.

65. See, e.g., HARPER LEE, *TO KILL A MOCKINGBIRD* (1960). For a critical view of Atticus Finch, see Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473 (1994).

66. See Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978); Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543.

67. See DAVID LUBAN, *LAWYERS AND JUSTICE* 7 (1988) (relying on Schwartz's principles as the basis for a normative evaluation of the adversary system).

68. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 34-39.

While quite a few lawyers in fact subordinate their family lives to the practice of law, I doubt many of them would be willing to adopt this approach as a matter of principle. Similarly, I doubt many lawyers would agree that when serving on bar committees or other law reform organizations they should abandon ideas of the public interest or common good in favor of seeking "reform" which favors their clients' interests. Of course, situations may arise in which the interests of a lawyer's clients conflict with law reform proposals. Such a conflict may force the lawyer to recuse himself from the reform activity.⁶⁹ But nonparticipation because of a conflict with client interests is very different from continued participation to promote client interests.⁷⁰

The most fundamental attack on the concept of a client-centered philosophy of lawyering is that it is morally unsound.⁷¹ This philosophy requires lawyers in the course of representation of clients to engage in conduct that violates conventional morality:

[The critics] claim that lawyers routinely do things for clients that harm third parties and would therefore be immoral, even in the lawyers' eyes, if done for themselves or for non-clients. Such actions constitute "role-differentiated behavior" in the sense that the actors, if asked to justify themselves, would claim that their role as a lawyer required them to "put to one side [moral] considerations . . . that would otherwise be relevant if not decisive." A lawyer's role-differentiated behavior could involve helping a client pursue a morally objectionable aim, or using a hurtful or unfair tactic to give a client an advantage. Specific examples might include invoking the statute of frauds to help a client avoid paying a debt he really owes, attacking an honest person's veracity in order to discredit him as

69. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.4 cmt. (1997).

70. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (arguing that private legislatures like the American Law Institute and the National Conference of Commissioners on Uniform State Laws are subject to interest group politics often through the participation of lawyers).

71. Another thread of the critique of client-centered lawyering is that this philosophy ignores the importance of truthful resolution of legal disputes. In 1975, Judge Marvin Frankel noted that a litigator "is not primarily crusading after truth, but seeking to win." Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1039 (1975). See also MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980). Judge Frankel went on to propose a rule of professional ethics designed to force lawyers to give greater weight to the truth. See Frankel, *supra*, at 1057-58. For a critique of Judge Frankel's views, see MONROE H. FREDMAN, *UNDERSTANDING LAWYERS' ETHICS* 26-33 (1990).

a witness, taking advantage of an opponent's misunderstanding of the applicable law in settlement negotiations, or suggesting that a corporate client lay off some of its workers until the Justice Department comes to see the merits of the company's merger proposal. Off duty, lawyers would presumably not think it appropriate to avoid repaying a debt, impugn a truthful person's honesty, take advantage of another's mistake, or exploit workers. On duty, the philosophers say, lawyers routinely do such things for their clients.⁷²

These criticisms of the philosophy of neutral partisanship have generated a number of responses. One type of response is empirical: neutral partisanship does not accurately describe the behavior of lawyers.⁷³ Some empirical studies (although limited in number and scope) of the behavior of criminal defense lawyers, lawyers in small communities, lawyers in nonlitigation activities, and lawyers in large law firms cast doubt on the claim that neutral partisanship accurately describes the behavior of most lawyers. Indeed, some of these studies suggest that the problem with the way lawyers conceive of their role is the opposite of neutral partisanship; lawyers are not sufficiently zealous in representing their clients because they are concerned about protecting their reputations, preserving relationships with other lawyers, judges, or officials, or advancing their own interests.⁷⁴

In addition, some scholars argue that neutral partisanship can be defended on moral grounds. Even lawyers who appear to be acting as neutral partisans may find such representation morally justified because the representation advances some higher principle—freedom of speech or due process of law, for example. An ACLU lawyer who defends the Nazi Party's right to march in a Jewish neighborhood may do so, not because he is

72. Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1532-33. In PAUL G. HASKELL, *WHY LAWYERS BEHAVE AS THEY DO* (1998), Professor Haskell offers 23 examples of morally questionable behavior that are either clearly or arguably permissible for lawyers. The moral critique of the role of neutral partisanship is developed in ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 90-155 (1980); LUBAN, *supra* note 67; Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Simon, *supra* note 68; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

73. See Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 120-129 (1990) (reviewing LUBAN, *supra* note 67); Schneyer, *supra* note 72.

74. See Schneyer, *supra* note 72, at 1544-50. For a response to the criticism that neutral partisanship does not accurately describe lawyer behavior, see LUBAN, *supra* note 67, at 393-403.

acting as a neutral partisan, but because he considers protecting the principle of free speech more important than restricting dissemination of their immoral views.⁷⁵ Further, many lawyers find moral value to the preservation of the attorney-client relationship. Professor Stephen Pepper has presented the most comprehensive defense of neutral partisanship on the basis of moral principle. He argues that the lawyer's amoral role is morally justified because the role assists clients in exercising autonomy. For lawyers to assert moral control over their clients would undermine that autonomy.⁷⁶

The critics of neutral partisanship have offered an alternative philosophy, which can be referred to as a *philosophy of morality*.⁷⁷ Under this philosophy lawyers are morally accountable for the actions that they take on behalf of their clients and must be prepared to defend the morality of what they do.

Adoption of a philosophy of morality has a number of practical lawyering consequences. Lawyers would decline representation in more cases than they would under a client-centered philosophy, those cases in which the lawyer concluded that the representation was morally indefensible. Lawyers would withdraw from representation more frequently, for example, in cases in which clients demanded that lawyers pursue goals or tactics that the lawyer found to be morally unsound. Lawyers would take a broader view of their obligations as counselors, at a minimum raising moral issues with their clients and often trying to convince their clients to take what the lawyer considered to be

75. See Ellmann, *supra* note 73, at 126; Schneyer, *supra* note 72, at 1562-64.

76. See Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613. For criticisms of this view and Professor Pepper's response, see Symposium on the Lawyer's Amoral Ethical Role, 1986 AM. B. FOUND. RES. J. 613. See also Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

77. Probably the most comprehensive development of a philosophy of morality can be found in LUBAN, *supra* note 67. A number of other scholars have also offered their views on how moral values can be incorporated into the lawyer's role. See generally THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994). See also GOLDMAN, *supra* note 72, at 138 (lawyers should only aid clients in exercising their moral rights); Leslie Griffin, *The Lawyer's Dirty Hands*, 8 GEO. J. LEGAL ETHICS 219 (1995) (calls for lawyers' conduct to be judged by common morality). Professor Serena Stier contends that the standard conception of the lawyer's role, in which professional conduct and morality are separate spheres, is fundamentally flawed. See Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551 (1991). She argues for an "integrity thesis" in which professional conduct and morality are integrated rather than distinct. See *id.*

the morally correct action. In situations in which lawyers had professional discretion about how to act, or in which the rules were unclear, a lawyer acting under a philosophy of morality would take the action that the lawyer believed to be indicated by principles of morality, even if this action was not necessarily in the client's interest.⁷⁸

One difficulty with a philosophy of morality is that the sources of moral values are extensive and varied. Professor Luban bases his theory of morality on principles of moral philosophy. Other lawyers may turn to religion for the source of their values.⁷⁹ Some scholars, drawing on the work of Carol Gilligan, have attempted to develop a philosophy of lawyering based on an ethic of care.⁸⁰

Other critics of client-centered lawyering have sought to develop approaches based on social values or norms rather than principles of morality. The major advantage of a *philosophy of social value* is that it is grounded in norms expressed in social institutions. Such values are likely to be seen as more objective and justified than moral values, which are often viewed as individual, subjective, and controversial. It should be noted that the philosophies of morality and social value are not inconsistent because social values often embody moral principles. For example, Professor Robert Gordon advocates a vision of law as a public profession and describes ways in which lawyers could implement that ideal in the conditions of modern practice.⁸¹ Professor Bradley Wendel strives to develop a set of public values of lawyering derived from the "social function of lawyers and from the traditions and practices of the legal profession."⁸² Professor Timothy Terrell and Mr. James Wildman examine the factors that have caused a crisis of professionalism for lawyers.⁸³ They argue that the true foundation of professionalism must be found in a commitment to the rule of law.⁸⁴ Terrell and Wildman identify six values that they believe lie at the core of professionalism:

78. See LUBAN, *supra* note 67, at 160, 173-74.

79. See Symposium, *The Relevance of Religion to a Lawyer's Work: An Interfaith Conference*, 66 FORDHAM L. REV. 1075 (1998).

80. See, e.g., Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992).

81. See Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990).

82. W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 7 (1999).

83. See Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism"*, 41 EMORY L.J. 403 (1992).

84. See *id.* at 423.

1. An Ethic of Excellence;
2. An Ethic of Integrity: A Responsibility to Say "No";
3. A Respect for the System and Rule of Law: A Responsibility to Say "Why";
4. A Respect for Other Lawyers and Their Work;
5. A Commitment to Accountability;
6. A Responsibility for Adequate Distribution of Legal Services.⁸⁵

The most comprehensive statement of a philosophy of lawyering based on social values is found in the work of Professor William Simon.⁸⁶ He argues that the basic principle that should govern lawyer conduct is the following: "[T]he lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice."⁸⁷ Simon uses the term "justice" not in some abstract or philosophical sense, but rather as equivalent with "legal merit" of the case.⁸⁸ In deciding the legal merit of the case, the lawyer must exercise contextual or discretionary decisionmaking.⁸⁹ Simon identifies two dimensions to this approach. First, in deciding to represent a client, a lawyer should assess the "relative merit" of the client's claims and goals in relation to other clients that the lawyer might serve. Simon recognizes that financial considerations play a significant role in lawyers' decisions to represent clients, but he calls on lawyers to take into account relative merit in addition to financial considerations.⁹⁰ Second, in the course of representation, Simon calls on lawyers to assess the "internal merit" of their clients' claims. Simon rejects the view that lawyers should assume complete responsibility for determining the outcome of cases: "Responsibility to justice is not incompatible with deference to the general pronouncements or enactments of authoritative institutions such as legislatures and courts. On the contrary, justice often, perhaps usually, requires such deference."⁹¹ However, when procedural defects exist, the lawyer's obligation to do justice requires the lawyer to assume responsibility for promoting the substantively just outcome: "[T]he more reliable the relevant procedures and institutions, the less direct responsibility the law-

85. *See id.* at 424-31.

86. Simon has developed his ideas in William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Simon, *supra* note 68. Simon expands and deepens these views in SIMON, *supra* note 6.

87. SIMON, *supra* note 6, at 9.

88. *Id.* at 10.

89. *See id.* ch. 6.

90. *See* Simon, *supra* note 86, at 1092-93.

91. SIMON, *supra* note 6, at 138. *See also* Simon, *supra* note 86, at 1096-97.

yer 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."⁹² Simon's theory has, of course, been subjected to extensive criticism, even among scholars who, like Simon, are critics of neutral partisanship.⁹³

Numerous combinations and variations of the general approaches outlined above could be developed. For example, one could imagine a philosophy of lawyering that seeks to combine elements of neutral partisanship and social responsibility. Under such a philosophy, a lawyer would act in accordance with the tenets of neutral partisanship when representing clients, but would become a social and moral activist in her institutional role. Similarly, some lawyers could adopt the view that morality may be taken into account in the practice of law, but they could differ on the extent to which moral considerations become relevant.⁹⁴

III. THE PROBLEM AND A PROPOSAL

A. *The Problem*

My survey of the scope of lawyer discretion under the Model Rules and of the various philosophies of lawyering available to guide lawyers in the exercise of that discretion has, I think, established two propositions. First, given the wide range of discretionary decisions that lawyers face, they need a philosophy of lawyering to assist them in making such decisions. Second, none of the available philosophies of lawyering has commanded (or appears likely to command) sufficient support within the academic community or the profession as a whole to be accepted institutionally. While critics of neutral partisanship have argued that this philosophy represents the prevailing ethic of the profession, if these critics are correct, it is because neutral partisanship is *de facto* rather than *de jure* the prevailing philosophy.⁹⁵ The Model Rules themselves certainly do not support the proposition

92. SIMON, *supra* note 6, at 140. See also Simon, *supra* note 86, at 1098.

93. See Symposium, 51 STAN. L. REV. 867 (1999).

94. Compare Monroe H. Freedman, *Must You be the Devil's Advocate?*, LEGAL TIMES, Aug. 23, 1993, at 19, with Michael E. Tigar, *Setting the Record Straight on the Defense of John Demjanjuk*, LEGAL TIMES, Sept. 6, 1993, at 22, and Monroe H. Freedman, *The Morality of Lawyering*, LEGAL TIMES, Sept. 20, 1993, at 22.

95. Professor Fred Zacharias agrees that the Code and the Model Rules authorize lawyers to incorporate moral factors in their representation of clients, but he argues that the ethos of the practice has developed to limit the exercise of objective judgment. He proposes a number of institutional changes that can help reintroduce objectivity into the lawyer's role. See Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995).

that lawyers should act as neutral partisans. The preamble to the Model Rules states:

Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.⁹⁶

As discussed in Part I, numerous rules of professional conduct are inconsistent with the concept of the lawyer as only a neutral partisan.⁹⁷

The combination of lawyers' need for a philosophy of lawyering and the lack of institutional direction produces undesirable consequences. Because the profession is unable to develop a consensus on an appropriate philosophy of lawyering, lawyers are left to their own devices in developing their philosophies. A few lawyers may do so thoughtfully, but most will simply muddle through, developing an ad hoc philosophy of lawyering. Given the present structure of the profession, however, an ad hoc philosophy of lawyering will often become de facto a philosophy of neutral partisanship.⁹⁸ The economics of the profession favor neutral partisanship. Clients pay lawyers' fees, and lawyers are not compensated for protecting or even taking into account other interests. Moreover, psychologically, a number of factors point lawyers in the direction of neutral partisanship.⁹⁹

In addition to the adverse impact on lawyers, the absence of philosophical direction is harmful to clients. Approaches to lawyering vary widely depending on factors such as practice setting

96. MODEL RULES OF PROFESSIONAL CONDUCT Preamble para. 8 (1997).

97. See *id.* Rule 1.2(a) (scope of representation); *id.* Rule 1.16(b) (standards for permissive withdrawal); *id.* Rule 2.1 (advisor); *id.* Rule 4.4 (respect for rights of third persons); *id.* Rule 6.1 (voluntary pro bono service); *id.* Rule 6.2 (accepting appointments); *id.* Rule 6.4 (law reform activities affecting client interests).

98. See Zacharias, *supra* note 95.

99. See Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547 (1998).

and client sophistication.¹⁰⁰ By word of mouth, some clients may gain a sense of the general approach of lawyers they hire. A few lawyers may take the trouble to explain to their clients their general approach or philosophy of representation. Clients, however, are entitled to more than word of mouth or the luck of the draw. Clients are entitled to receive from their lawyers a clear expression of the lawyer's philosophy of representation.

The professionalism movement represents, in my view, an effort by the organized bar to respond to lawyers' need for guidance in the exercise of discretion. The movement suffers, however, from two fundamental flaws: vagueness of the meaning of professionalism and lack of enforcement. What the bar means by professionalism is uncertain. For example, the Action Plan of the Conference of Chief Justices states:

Professionalism is a much broader concept than legal ethics. For the purposes of this report, professionalism includes not only civility among members of the bench and bar, but also competence, integrity, respect for the rule of law, participation in pro bono and community service, and conduct by members of the legal profession that exceeds the minimum ethical requirements. Ethical rules are what a lawyer *must* obey. Principles of professionalism are what a lawyer *should* live by in conducting his or her affairs. Unlike disciplinary rules that can be implemented and enforced, professionalism is a personal characteristic.¹⁰¹

To the extent the bar attempts to make professionalism standards more specific, however, it creates another problem: favoritism of one approach to lawyering over others.¹⁰² In addition, advocates of professionalism have declined to create a mechanism for enforcement of professionalism standards—but if no enforcement mechanism exists, how do we expect lawyers to take professionalism seriously?

B. *A Proposal*

In this section, I offer a proposal to deal with the problem I have identified in the previous section. The proposal has four

100. See Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101 (1996).

101. See *National Action Plan*, *supra* note 62, at 2. See also MICHAEL J. KELLY, *LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE 5-7* (1994) (listing eleven variations on the meaning of professionalism).

102. See Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995).

components: (1) bar application statement of a philosophy of lawyering; (2) annual certification and revision of a lawyer's philosophy of lawyering; (3) required notification to clients of a lawyer's philosophy of lawyering; (4) disciplinary actions against lawyers for flagrant violation of the terms of their philosophy of lawyering.

1. Bar Application Statement of a Philosophy of Lawyering

All applicants for admission to the bar will be required as part of their bar application to file a statement of their philosophy of lawyering. The instructions will state that there is no one correct philosophy of lawyering. Applicants may adopt a philosophy articulated by someone else or may craft their own philosophies. Applicants may choose to have different philosophies depending on the type of practice or the sophistication of the client, or they may decide to have a unitary philosophy that applies regardless of the type of practice.¹⁰³ The three essential components of such a statement are an articulation of general principles that form the basis of the philosophy of lawyering, a statement of justification for those principles, and the application of those principles to several major discretionary decisions that lawyers are likely to face in the practice of law.

How should bar admission officials treat these statements? There are several possibilities. One is that bar officials will do nothing with the statements; as discussed below, other regulatory mechanisms exist. If resources are sufficient, bar officials could do a limited screening of the statements to identify statements that are not seriously prepared or express a philosophy of lawyering not within the range of professional discretion. Statements that are not seriously prepared could be returned to applicants for resubmission. Some statements might express a philosophy of lawyering beyond the realm of reasonable professional discretion. In such cases, the committee could call the applicant in for an interview to discuss the applicant's philosophy. For reasons developed more fully below, the committee would not, however, have the power to reject an applicant based on the applicant's philosophy of lawyering, although applicants could be warned that adherence to such a philosophy could lead to disciplinary action in the future. For example, suppose an applicant stated that his philosophy of lawyering was founded on opposition to the federal income tax and that he would devote his practice to developing legal challenges to the constitutionality and enforcement of the federal income tax laws. The committee might warn

103. See SIMON, *supra* note 6, at ch. 7.

the applicant that some challenges are likely to be found to be unethical either because they are fraudulent or involve frivolous claims.

I offer the following as a discussion draft of the instructions for such a statement.

Write a statement of your philosophy of lawyering not to exceed ten double-spaced pages. In preparing your statement you may draw and quote from philosophies of lawyering articulated by lawyers and scholars, but you are not bound to follow any particular philosophy of lawyering. There is no single correct philosophy of lawyering and within a very broad range you are free to adopt a philosophy of lawyering that you consider to be sound. The Committee on Character and Fitness will not reject your application because it or any of its members disagree with your philosophy of lawyering. The Committee reserves the right in extreme cases to call an applicant in for an interview if the Committee concludes that the statement reflects a philosophy of lawyering outside the range of professional discretion, the implementation of which would be likely to lead to disciplinary action against the applicant after admission to the bar.

Your statement must include the following: (1) a statement of the basic principles that are the foundation of your philosophy of lawyering; (2) justification for your use of these principles; and (3) explanation of how you would apply your principles to the following types of problems that you may face in practice:

- (a) Choice of type of practice;
- (b) Decision to take or decline cases;
- (c) Scope of counseling a client regarding exercise of the client's legal rights;
- (d) Exercise of professional discretion on behalf of a client (e.g. deciding whether to cross-examine a witness);
- (e) Withdrawal from representation because the lawyer concludes that the client is acting immorally;
- (f) Preventing the client from doing harm to others (e.g. disclosing the client's intention to commit a wrongful act);
- (g) Acting on behalf of a client in ways that will harm others;
- (h) Participation in pro bono, law reform, and other professional activities to improve the law.

To guide applicants, the bar application could give several examples of different philosophies of lawyering.

2. Annual Certification and Revision of a Lawyer's Philosophy of Lawyering

Each year when lawyers pay their annual bar dues, they will be required to certify their continued commitment to their philosophy of lawyering or to make such revisions in their statement as they consider appropriate. The annual review and certification serves two purposes: First, it operates as a mechanism to remind lawyers of their continuing commitment to a philosophy of lawyering. Second, it gives lawyers an opportunity to revise their statements to take into account their experiences and changes in their thinking about what it means to be a lawyer. Should lawyers be allowed to revise their statements whenever they wish, rather than only annually? While a philosophy of lawyering must be dynamic, if a philosophy can be revised at any time, it ceases to become a set of principles and instead becomes an ad hoc accommodation to the current set of pressures that the lawyer may be facing. A right to revise annually seems to be a reasonable compromise between the need for change and commitment to principle.

3. Required Notification to Clients of a Lawyer's Philosophy of Lawyering

Lawyers should be required to notify their clients in some appropriate fashion of their philosophy of lawyering. Notification can be accomplished in many ways. Lawyers can give new clients a copy of their philosophy of lawyering as part of a brochure describing the lawyer and his practice when the client first contacts the lawyer. Lawyers can post their philosophies of lawyering on their web pages. A summary of the lawyer's philosophy can be included or referred to in the lawyer's engagement agreement with a reference to the source of a more complete statement of the lawyer's philosophy.

To implement this requirement of client notification, a new section (f) should be added to Model Rule 1.2. The following is a draft of a proposed section:

A lawyer shall provide a client with a statement of the lawyer's philosophy of lawyering prior the lawyer's engagement.

Appropriate commentary should be added to explain the scope of the statement and to offer examples of ways in which the statement could be supplied to clients.

4. Disciplinary Actions against Lawyers for Flagrant Violation of the Terms of their Philosophy of Lawyering

Lawyers' statements of their philosophy of lawyering constitute representations by them of the principles that they will use to deal with difficult issues of professional responsibility. A lawyer who flagrantly fails to honor these principles could be found guilty of misconduct under Model Rule 8.4 by engaging in conduct involving deceit or misrepresentation.

In summary, the proposal I have made in this part is designed to require lawyers to develop a philosophy of lawyering, to inform clients of their philosophy, and to create an institutional structure for enforcement of lawyers' philosophies, while recognizing that a variety of legitimate philosophies of lawyering can exist.

C. *Some Criticisms and Responses*

I expect substantial criticism of my proposal. In this section I offer my responses to some of the criticisms that I anticipate being made. First, one might argue that this proposal amounts to touchy-feely nonsense. The practice of law is a tough competitive business and only an academic who doesn't know anything about the practice of law would come up with an idea like this. However, the core of this criticism is a philosophy of lawyering grounded largely in neutral partisanship. If this is what the lawyer believes, the lawyer should be willing to stand behind it by articulating and defending this philosophy of lawyering.

Next, some may argue that if lawyers truly need a philosophy of lawyering, they can develop one on their own without being required to do so by the bar. This position is in essence an argument for the status quo. Any lawyer who believes that the current state of the profession is sound should reject my proposal. The existence of the professionalism movement and substantial scholarly work on the malaise within the profession¹⁰⁴ indicate, however, that the profession is suffering from some fundamental problems.

Even if one accepts that the profession is suffering from fundamental problems, it does not follow that my proposal is the best or even an effective way to deal with those problems. It seems to me, however, that any proposal must focus on both the

104. See MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); Eugene R. Gaetke, *Renewed Introspection and the Legal Profession*, 87 KY. L.J. 903 (1998-99).

need for lawyers to have a broader philosophical approach to lawyering while at the same time admitting that a wide diversity of lawyering styles exist and can be justified. My proposal responds to both of these factors. In addition, my proposal does not require the creation of any new regulatory bureaucracy, nor does it operate substantively. The core of my proposal is disclosure regulation, allowing clients to scrutinize lawyers' philosophies of lawyering.

Next, it might be claimed that given the factors that tend to favor neutral partisanship, acceptance of this proposal will tend to exacerbate the bias in favor of neutral partisanship. The thrust of this argument is that the only way that philosophies other than neutral partisanship can develop is under-the-table. Lawyers can be concerned about the morality of lawyering or substantive justice, but only if they do so surreptitiously.

I think this argument is factually incorrect and morally reprehensible. The leaders of the bar and the lawyers who are most admired in the profession are not exemplars of neutral partisanship. These lawyers bring good judgment and a strong sense of values to their representation of private clients. Moreover, these lawyers typically exhibit a strong commitment to professional and social issues.¹⁰⁵ There is no reason to believe that young lawyers when they develop their philosophies of lawyering will not turn to the standards of lawyers who are widely admired. Moreover, it is morally reprehensible to argue that alternatives to neutral partisanship can only be developed by lawyers who don't have the courage to state and justify their principles and only by deceiving clients, judges, and other lawyers about the lawyer's values.

Next, one might claim that lawyers won't treat the requirement seriously. Prepared statements will proliferate on places like the internet and lazy lawyers will simply adopt such statements without much thought. I question the accuracy of this criticism. I think that lawyers will take seriously statements that they must file with bar admission officials, make available to their clients, and face potential discipline for violating.

I do anticipate that recommended statements of general philosophies of lawyering or of particular aspects of the lawyer's role will develop. Indeed, a number of professional organizations have already developed such standards.¹⁰⁶ I welcome such

105. See, e.g., ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* (1946).

106. See, e.g., ABA Task Force on Lawyer Business Ethics, *Statement of Principles*, 51 *BUS. LAW.* 745 (1996); American Academy of Matrimonial Lawyers, *The Bounds of Advocacy*, 9 *J. AM. ACAD. MATRIMONIAL LAW.* 1 (1992).

models. If a lawyer wishes to adopt a philosophy prepared by such an organization because it represents a philosophy that the lawyer considers sound, a lawyer should be free to do so.

Finally, one might argue that putting power in the hands of admission or disciplinary authorities is dangerous and has the potential for free speech abuse. In a comprehensive study of the history and implementation of the moral character requirement for bar admission, Professor Deborah Rhode questions the wisdom of having this condition for bar admission. Among the criticisms she makes are the following: First, bar admission officials do not have the resources for adequate investigation into moral character, and the inquiries they do conduct are only minimally helpful in determining the moral character of applicants. Second, because of the vagueness of the moral character concept, the admission process is left to the subjective judgment of bar officials. Her study indicates a lack of consensus among these officials as to the types of conduct that warrant investigation or denial of admission. Third, review of character has First Amendment implications, inhibiting freedom of expression by some individuals and deterring others from applying for bar admission. Wide ranging inquiry into the activities of bar applicants also raises privacy issues. Professor Rhode concludes that the bar would be better off abandoning the moral character requirement for bar admission and instead using its limited resources in disciplining lawyers for actual misconduct.¹⁰⁷

Since my proposal calls for a new bar admission requirement akin to moral character, I take Professor Rhode's criticisms seriously. I recognize that creating a new bar admission requirement poses the risk of abuse by bar officials and creates free speech concerns. I propose to deal with these concerns by strictly limiting the power of character and fitness officials over such statements. Officials would not be allowed to reject applicants because of their philosophical statements. Officials would have the power to return statements to applicants if the statements were incomplete or showed evidence that they were not seriously prepared. The committee could call applicants in for interviews to discuss their statements if the committee believed that the statement reflected a philosophy of lawyering that in the opinion of the committee was beyond the realm of professional discretion. A committee could give an informal warning to an appli-

107. See Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985). See also Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67 (1984).

cant that adherence to such a philosophy could lead to disciplinary action in the future.

It is not crucial to my proposal that statements of philosophies of lawyering be filed with bar admission officials. Disclosure could simply be made to clients rather than to the bar. Despite the risks associated with making statements part of the bar admission process, I think this aspect of the proposal is important for several reasons. First, it sends a message to lawyers that the bar considers statements of philosophies of lawyering to be important. Second, it makes the development of a philosophy part of the professional process rather than simply a matter of the relationship between lawyer and client. This step signifies that applicants have both professional as well as client obligations. Finally, while I recognize the risks of bar scrutiny of these statements, I think the bar should have the opportunity to discuss with an applicant what it means to be a lawyer when a statement reflects views that may be seriously misguided.

CONCLUSION

The organized bar has been searching for some time for a way to deal with what it considers to be a serious erosion of professionalism. At the same time individual lawyers are in need of guidance on how to deal with the wide range of discretionary decisions they face in the practice of law. The proposal I offer attempts to respond to both of these concerns without at the same time directing lawyers to practice in only one way.

