

Saint Louis University Law Journal

Volume 51
Number 4 *Teaching Professional Responsibility
and Legal Ethics (Summer 2007)*

Article 17

7-17-2007

Using the Concept of “A Philosophy of Lawyering” in Teaching Professional Responsibility

Nathan M. Crystal

University of South Carolina School of Law, nathan@law.sc.edu

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>

 Part of the [Law Commons](#)

Recommended Citation

Nathan M. Crystal, *Using the Concept of “A Philosophy of Lawyering” in Teaching Professional Responsibility*, 51 St. Louis U. L.J. (2007).

Available at: <https://scholarship.law.slu.edu/lj/vol51/iss4/17>

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

USING THE CONCEPT OF “A PHILOSOPHY OF LAWYERING” IN TEACHING PROFESSIONAL RESPONSIBILITY

NATHAN M. CRYSTAL*

INTRODUCTION

Lawyers face many decisions in connection with the practice of law. The most important and most difficult decisions require the exercise of sound professional judgment and discretion.¹ To guide them in the exercise of judgment, lawyers need to develop what I call a “philosophy of lawyering,” a principle-based approach for making difficult professional decisions.² Law school courses on ethics and professional responsibility can be enriched, deepened, and made more relevant to students if teachers help students begin to develop their own philosophy of lawyering to deal with the difficult questions they will face in the practice of law. In this article I offer suggestions for how this can be done.

I. THREE DIMENSIONS OF DECISIONS OF PROFESSIONAL RESPONSIBILITY

Lawyers encounter issues of professional responsibility at three interrelated levels: the practice level, the personal level, and the professional or institutional level. The *practice level* refers to ethical issues involving the representation of clients. For example, lawyers must decide the fees that they will charge, how to resolve conflicts of interests, when to disclose confidential

* Class of 1969 Professor of Professional Responsibility, University of South Carolina School of Law.

1. I draw a distinction between a lawyer’s ethical obligations specified by the Model Rules of Professional Conduct, a lawyer’s legal obligations determined by the law governing lawyers and other applicable law, and a lawyer’s exercise of professional judgment. When the Model Rules of Professional Conduct and applicable law do not provide clear answers to issues of professional responsibility, as is often the case, lawyers must exercise professional judgment.

2. I have presented the concept of a philosophy of lawyering in my article, Nathan Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J. L. ETHICS & PUB. POL’Y 75 (2000) [hereinafter Crystal, *Developing a Philosophy of Lawyering*], and in my book, NATHAN CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* (3d ed. 2004) [hereinafter CRYSTAL, *PROFESSIONAL RESPONSIBILITY*]. See also W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 113 (2000) (arguing that the foundational values of legal ethics are plural and often incommensurable, resulting in the need for lawyers to exercise professional judgment).

information to prevent harm to others, and whether their duties to a tribunal override their obligations of loyalty and zealous representation of clients.

At the *personal level* lawyers must decide the relationship between their private lives and their professional commitments. Many lawyers face the dilemma of balancing advancement of their professional careers with the needs of their families. Lawyers must also decide how their personal or religious values relate to their obligations as lawyers. Two of the most important personal decisions a lawyer makes are choice of area of practice and selection of law firm or other organization in which the lawyer will conduct that practice.

Finally, at the *professional level* lawyers must decide the extent of their involvement in and position on issues facing the profession as a whole rather than the lawyer individually.³ At the professional level, lawyers face two varieties of issues—issues of professional involvement and issues of professional structure. The amount of time that a lawyer decides to devote to pro bono activities and the nature of that commitment is an issue of professional involvement. The lawyer's position with regard to how the profession should respond to the clearly demonstrated need for greater delivery of legal services is an issue of professional structure.⁴

These three dimensions of professional responsibility are overlapping rather than distinct. For example, a lawyer's selection of a particular area of practice profoundly affects the types of ethical issues the lawyer will face.⁵ Similarly, lawyers who are strongly committed to family values may find that they are less willing and less able to devote time to professional issues.

II. THE EXTENT OF DISCRETION IN DECIDING ISSUES OF PROFESSIONAL RESPONSIBILITY

Clear rules govern some issues of professional responsibility. For example, the Model Rules of Professional Conduct provide that lawyers who enter into contingent fee agreements with their clients must have written agreements signed by their clients that comply with certain requirements

3. Some lawyers may decide to devote their time to political, social, or community activities rather than strictly professional activities. I use the term "professional level" broadly to include such efforts.

4. See DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004).

5. Professor Monroe Freedman has argued that decisions regarding area of practice and whether to undertake representation of a client are fundamental moral decisions. Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111 (1995). In a visit to the University of South Carolina Law School a number of years ago, he emphasized this obligation with the following quip, which I have paraphrased: "If you don't want to represent clients who lie, who cheat, or who kill for money, then you shouldn't go into corporate practice."

specified in the Rules.⁶ Lawyers who receive client money must not commingle those funds with money belonging to the lawyer.⁷

Most issues of professional responsibility, however, are not governed by clear rules. Instead, lawyers possess "discretion" on how to resolve these issues. 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.⁸ A distinction should be drawn between two forms of discretion. Sometimes lawyers have "broad discretion," discretion that is unrestricted by a standard. Lawyers' choices of areas of practice and the amount of pro bono work they decide to do are examples. In other situations, lawyers have "restricted discretion," limited or "grounded" in a general standard.⁹ The conflict of interest rules provide an example.¹⁰

It is not my purpose in this article to examine the exercise of discretion by lawyers in depth. A more nuanced analysis of discretion must take into account the institutional structure in which lawyers practice.¹¹ Some law firms have an institutional commitment to pro bono activities by members of the firm. By contrast, other firms, either formally or informally, may discourage pro bono activities. Lawyers who practice in such firms do not have broad discretion regarding pro bono participation even though the rules of the profession may grant them such discretion.

It is also not my purpose here to catalogue and characterize all of the discretionary decisions that lawyers face. However, discussion of a few examples of lawyer discretion is worthwhile to establish the pedagogical need for assisting students in dealing with these decisions.¹²

6. MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2007).

7. *Id.* at R. 1.15(a).

8. 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 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.

9. Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 37-38 (1997) (distinguishing between different types of discretion).

10. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2007) (dealing with concurrent conflicts of interest); *id.* at R. 1.9 (dealing with former client conflicts of interest); see also *infra* Part II.B.

11. See, e.g., Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665 (1994).

12. For other examples, see Crystal, *Developing a Philosophy of Lawyering*, *supra* note 2, at 76-84 (2000).

A. Confidentiality

Model Rule 1.6 governs the scope of a lawyer's ethical duty of confidentiality.¹³ The rule broadly prohibits lawyers from revealing any information relating to the representation of a client, subject to certain exceptions.¹⁴ Several of the exceptions deal with disclosure of confidential information to prevent or to rectify wrongdoing by a client.¹⁵ In almost all situations, however, the lawyer's decision whether to disclose confidential information is discretionary with the lawyer. Comment 15 explains:

Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule.¹⁶

B. Conflicts of Interest

Model Rule 1.7 provides standards for lawyers to use in deciding whether they face a concurrent conflict of interest and, if so, whether the conflict is consentable by the affected clients.¹⁷ Common examples include representation of multiple plaintiffs or defendants in civil cases, representation of co-defendants in criminal cases, and representation of multiple clients in business ventures.¹⁸ The Rule provides lawyers with restricted or grounded discretion¹⁹ to decide whether to undertake representation involving a concurrent conflict.²⁰ The Rule leaves lawyers with broad discretion whether to accept representation that does not involve a conflict under the Rule.²¹ For example, if it is ethically permissible for a lawyer to undertake representation

13. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007).

14. *Id.* at R. 1.6 cmt. 15.

15. *Id.* at R. 1.6(b)(1)–(3).

16. *Id.* at R. 1.6 cmt. 15. The comment goes on to state that other rules may require disclosure, for example Model Rule 3.3(c) requires lawyers to reveal false testimony that has been offered by the lawyer, the lawyer's client, or a witness called by the lawyer. *Id.* at R. 3.3(c).

17. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2007).

18. For an examination of the ethical propriety of multiple representation in these situations, see CRYSTAL, PROFESSIONAL RESPONSIBILITY, *supra* note 2, at 294–323 (2004) (discussing multiple plaintiffs or defendants in civil cases); *id.* at 139–53 (discussing multiple representation of co-defendants in criminal cases); *id.* at 461–73 (discussing multiple representation in business ventures).

19. See *supra* text accompanying note 9.

20. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2007).

21. *Id.*

of multiple clients in a business venture, should a lawyer exercise his discretion to do so, or should the lawyer only agree to represent one of the parties? Given the risks of multiple representation in criminal cases, should a lawyer ever exercise her discretion to represent multiple clients in a criminal case? How does a lawyer go about making these discretionary decisions? The rules of ethics provide almost no guidance.

C. *Limitations on Zealous Representation*

A number of rules act as limitations on zealous representation. These rules can be broadly justified on utilitarian grounds—if the interest of the system of justice or of third parties in being free of certain conduct outweighs the interest of the client in having the lawyer engage in the conduct, the conduct should be prohibited or regulated in some fashion.²² Some rules limiting zealous representation are nondiscretionary. Thus, Model Rule 4.2 prohibits a lawyer from communicating with a person who is represented by counsel in the matter about the subject matter of the representation without the consent of that person's lawyer unless the communication is authorized by law.²³

Other rules provide lawyers with broad discretion. When the ABA amended the Model Rules in 2002, it added Rule 4.4(b) and its accompanying comments to deal with the problem of misdirected communications and inadvertently produced documents.²⁴ Rule 4.4(b) requires a lawyer to notify the sender if the lawyer receives a document and either knows or reasonably should know that the document was inadvertently produced.²⁵ The comments, however, go on to provide lawyers with broad discretion regarding other steps to take:

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.²⁶

III. THE NEED FOR A PHILOSOPHY OF LAWYERING

The Model Rules of Professional Conduct do not provide answers to lawyers on how to resolve the discretionary decisions they face related to the practice of law. In many instances, such as choice of practice area, the Model Rules are completely silent. In situations in which the Model Rules speak, they often provide lawyers with broad or restricted discretion on how to act.

22. See CRYSTAL, PROFESSIONAL RESPONSIBILITY, *supra* note 2, at 337–460.

23. See MODEL RULES OF PROF'L CONDUCT R. 4.2 (2007).

24. See *id.* at R. 4.4(b).

25. *Id.*

26. See *id.* at R. 4.4 cmt. 3.

I use the term “philosophy of lawyering” to mean a principle-based approach that lawyers can use to resolve the wide range of discretionary decisions that they will face related to the practice of law. As discussed above, issues of professional responsibility arise at three interrelated dimensions—the personal, the practice, and the professional.²⁷ At the personal dimension lawyers must decide the relationship between their personal and family lives and their work. Some lawyers may decide that the personal side of their life is primary while work is secondary. Others may strive for a balance between personal life and work. However, some may decide to dedicate themselves to their professional careers, either sacrificing or largely eliminating a personal life.

Chart 1: Relationship Between Personal Life and Practice

Personal Life Primary	Balanced Life	Practice Primary
-----------------------	---------------	------------------

The relationship between a lawyer’s personal life and practice life does not necessarily remain static. Early in their careers some lawyers may make their commitments to practice primary, but this commitment may change if they marry or have children, as they age, or as they face the various vicissitudes of life. The categories I describe are, of course, to some degree subjective. What one lawyer views as a balanced life may be considered to be devotion to practice by another lawyer. Each lawyer must decide for himself or herself what these terms mean; each lawyer should listen to the views of family, friends, and colleagues to determine whether the lawyer’s self-perceptions are accurate. My goal here is to help lawyers, especially young lawyers, think hard about the relationship between their personal and their practice lives and to offer a framework and terminology for considering that relationship.

At the professional dimension, some lawyers may choose to largely remove themselves from involvement in professional or community activities, such as service on bar committees, pro bono work, or community participation. Other lawyers may decide to dedicate a substantial amount of their time to professional work. Still others may be involved in professional activities to a significant degree, but not to the level of those who are dedicated to such efforts.

²⁷. *See supra* Part I.

Chart 2: Degree of Involvement in Professional Activities

Removed	Involved	Dedicated
---------	----------	-----------

Once again, these terms are subjective—to be personally defined by each lawyer, taking into account the views of significant others.

Most courses on professional responsibility devote the vast majority of their time to issues in the practice dimension—lawyer-client relations, confidentiality, conflicts of interest, and so on. I use the term “philosophy of practice” to refer to that part of a lawyer’s overall philosophy of lawyering that focuses on the lawyer’s philosophy in making discretionary decisions in the practice dimension. The literature on professional responsibility has developed a number of approaches to guide lawyers in making practice decisions.²⁸ The traditional approach to resolving questions of professional ethics when the rules are unclear could be labeled a *client-centered philosophy*. Under a client-centered approach, lawyers must take any action that will advance the client’s interest so long as the action does not clearly violate a rule of ethics or other law (the principle of professionalism).²⁹ Moreover, lawyers are not morally accountable for any actions that they take on behalf of clients in their professional role (the principle of nonaccountability).³⁰ Professor William Simon, one of the leading critics of client-centered lawyering, has characterized this philosophy as an “ideology of advocacy,” involving two principles of conduct—neutrality and partisanship.³¹ 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.”

Critics of neutral partisanship have argued that a client-centered philosophy is morally unsound because it requires lawyers, in the course of representing clients, to engage in conduct that violates conventional morality.³²

28. In this article I provide only a sketch of broad themes. The literature is rich and deep. For a more extensive discussion, see CRYSTAL, PROFESSIONAL RESPONSIBILITY, *supra* note 2, at 20–32.

29. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978) [hereinafter Schwartz, *The Professionalism and Accountability of Lawyers*]; Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 544 (1983) [hereinafter Schwartz, *The Zeal of the Civil Advocate*].

30. Schwartz, *The Professionalism and Accountability of Lawyers*, *supra* note 29, at 673; Schwartz, *The Zeal of the Civil Advocate*, *supra* note 29, at 544 (1983); see also DAVID LUBAN, LAWYERS AND JUSTICE 7 (1988) (relying on Schwartz’s principles as the basis for a normative evaluation of the adversary system).

31. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36–37 (1978).

32. See Ted Schneyer, *Moral Philosophy’s Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1532–33 (1984). The moral critique of the role of neutral partisanship is

The critics of neutral partisanship have offered an alternative philosophy that could be called a *philosophy of morality*.³³ 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 under a client-centered philosophy, turning down cases in which the lawyers concluded that the representation was morally indefensible.³⁴ Lawyers would withdraw from representation more frequently, for example, in cases in which clients demanded that lawyers pursue goals or tactics that the lawyers found to be morally unsound.³⁵ 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 the morally correct action.³⁶ 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.³⁷

Other critics of a client-centered philosophy have sought to develop approaches based on social or professional values or norms rather than principles of morality. The major advantage of such a philosophy, which could be called a *philosophy of institutional values*, is that norms expressed in an institutional form 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

developed in ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 90–155 (1980); LUBAN, *supra* note 30; Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Simon, *supra* note 31, at 30; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

33. Probably the most comprehensive development of a philosophy of morality can be found in LUBAN, *supra* note 30. 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). Other commentators have focused on the relationship between religious values and lawyering styles. *See* Russell G. Pearce, *Foreword: The Religious Lawyering Movement: An Emerging Force in Legal Ethics and Professionalism*, 66 FORDHAM L. REV. 1075 (1998).

34. LUBAN, *supra* note 30, at 160.

35. *Id.* at 173–74.

36. *Id.* at 173.

37. *Id.* at 160, 173–74. For a discussion of the difficulty of incorporating a philosophy of morality into the actual practice of lawyers, where morality is often vague and uncertain, see Paul R. Tremblay, *Moral Activism Manqué*, 44 S. TEX. L. REV. 127 (2002). Professor Tremblay has argued that lawyers should handle discretionary decisions by employing casuistry, decision-making based upon comparison of paradigm cases. Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489, 492 (1999) [hereinafter Tremblay, *The New Casuistry*].

institutional values are not inconsistent because institutional values often embody moral principles.

The most comprehensive statement of a philosophy of lawyering based on institutional values is found in Professor Simon's work. He argues for the following basic principle: "[T]he lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice."³⁸ Simon uses the term "justice" not in some abstract or philosophical sense, but rather as equivalent with the "legal merit" of the case.³⁹ In deciding the legal merit of the case, the lawyer must exercise contextual or discretionary decision-making.⁴⁰ Simon identifies two dimensions to this approach. First, in deciding whether 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.⁴¹ 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.⁴² Second, in the course of representation, Simon calls on lawyers to assess the "internal merit" of their clients' claims.⁴³ He rejects the view that lawyers should assume 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."⁴⁴ When procedural defects exist, however, 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 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."⁴⁵

Professor Brad Wendel has also argued for a philosophy of institutional value, which he calls the "authority of the law."⁴⁶ A lawyer following this

38. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 9 (1998).

39. *Id.* at 10.

40. *Id.* at 138–69.

41. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1092 (1988).

42. *Id.* at 1092–93.

43. *Id.* at 1091.

44. SIMON, *supra* note 38, at 138; *see also* Simon, *supra* note 41, at 1096–97.

45. SIMON, *supra* note 38, at 140; *see also* Simon, *supra* note 41, at 1097–98. While Professor Simon focuses on decision-making by lawyers, Professor Deborah Rhode has argued for structural change in the legal profession to promote justice. *See* DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000).

46. *See* W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004) [hereinafter Wendel, *Civil Disobedience*]; *see also* W. Bradley Wendel, *Legal Ethics and the Separation of*

approach accepts that he or she is a quasi-public official who has an obligation to show respect for the law rather than to treat the law instrumentally or override the law because of the lawyer's own view of morality.⁴⁷ Under this approach, if an uncertain issue arises, the lawyer would ask which interpretation appears to be the best, most persuasive legal analysis of the issue, and would follow this conclusion unless the lawyer decides to engage in civil disobedience and accepts the consequences.⁴⁸

Other scholars have sought to ground an institutional philosophy in the norms of the legal profession. Professor Timothy Terrell and Mr. James Wildman examine factors that have caused a crisis of professionalism for lawyers.⁴⁹ They argue that the true foundation of professionalism must be found in a commitment to the rule of law.⁵⁰ Terrell and Wildman identify six values that they believe lie at the core of professionalism:

- An ethic of excellence
- An ethic of integrity; a responsibility to say “no”
- A respect for the system and rule of law; a responsibility to say “why”
- A respect for other lawyers and their work
- A commitment to accountability
- A responsibility for adequate distribution of legal services⁵¹

Any discussion of philosophies of practice would be incomplete if it did not take into account the fact that lawyers' own interests and values profoundly affect their views of practice. Many discretionary decisions that lawyers face can have substantial economic consequences. For example, how aggressively should a lawyer counsel a client to accept a settlement that the lawyer believes to be desirable but which the client is reluctant to accept? Other discretionary decisions can involve the risk of professional discipline or damage to the

Law and Morals, 91 CORNELL L. REV. 67, 75–85 (2005) (criticizing lawyers in the Office of Legal Counsel of the Justice Department who drafted the “torture memos” for failing to respect the law).

47. Wendel, *Civil Disobedience*, *supra* note 46, at 382–88.

48. *Id.* at 403–05; *see also* W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 7 (1999) (arguing for a set of public values of lawyering derived from the “social function of lawyers and from the traditions and practices of the legal profession”).

49. Timothy P. Terrell & James H. Wildman, *Rethinking “Professionalism”*, 41 EMORY L.J. 403 (1992).

50. *Id.* at 423.

51. *Id.* at 424–31; *see also* Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990) (advocating a vision of law as a public profession and describing ways in which lawyers could implement that ideal in the conditions of modern practice); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 21 (2005) (arguing that lawyers should exercise “professional conscience” rather than engaging in neutral partisanship or exercising personal moral judgments).

lawyer's reputation. Some lawyers may choose to adopt a philosophy of acting in their own interest when confronted with discretionary decisions.

Chart 3: Philosophies of Practice

Lawyer Self Interest	Client Centered	Morality	Institutional Value
----------------------	-----------------	----------	---------------------

These four categories are not meant to be exclusive. Lawyers could articulate and defend more complex philosophies of practice that combine the features of several philosophies. For example, some scholars have challenged the claim that neutral partisanship accurately describes the behavior of most lawyers.⁵² Professors Stephen Ellmann and Ted Schneyer argue that the rules of ethics already grant lawyers considerable discretion to take into account moral considerations in their representation: "Lawyers have considerable freedom to reject cases, to limit their representation so as to exclude repugnant objectives or tactics, and to urge their own moral views upon clients whether or not the clients have requested such enlightenment."⁵³ In particular, Model Rule 2.1 states that in giving advice to their clients, lawyers "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,"⁵⁴ and Model Rule 1.16(b)(4) allows lawyers to withdraw when "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."⁵⁵ Some lawyers might, therefore, choose to employ what could be called a modified client-centered approach. Under this approach lawyers would normally act as neutral partisans, but in unusual or rare cases lawyers would turn to moral values either in their counseling role or in their decision whether to continue the representation.

52. See Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116 (1990) (reviewing DAVID LUBAN, *LAWYERS AND JUSTICE* (1988)); Schneyer, *supra* note 32, at 1544–50.

53. Ellmann, *supra* note 52, at 121; see also Schneyer, *supra* note 32, at 1564–66; cf. Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995). 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. *Id.*

54. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007).

55. *Id.* at R. 1.16(b)(4).

The following chart combines the discussion of approaches to each of the dimensions of professional responsibility.

Chart 4: Possible Philosophies of Lawyering

Dimension	Philosophy	Philosophy	Philosophy	Philosophy
Personal	Personal Life Primary	Balanced	Committed to Work	
Practice	Lawyer Self- Interest	Client- Centered	Moral Values	Institutional Values
Professional	Removed	Involved	Dedicated	

This approach provides students with a framework for characterizing, comparing, and ultimately evaluating the philosophies of lawyering of lawyers that the students encounter or observe. For example, in a summer clerkship a student might experience two lawyers with quite different philosophies. One lawyer's philosophy might involve a balanced personal/work life, client-centered lawyering, and dedication to professional involvement. Another lawyer might be committed to his work, self interested in his practice philosophy, and removed from professional activities.

Philosophies of lawyering provide lawyers with a set of values they can use in deciding how to act when confronted with discretionary decisions, but they are not specific enough to help a lawyer in choosing among several alternative courses of action all of which appear to be consistent with the lawyer's general philosophy. For example, suppose a lawyer has adopted a client-centered philosophy. Suppose the lawyer is representing a client in a litigation matter, and the opposing side inadvertently produces documents that may be privileged.⁵⁶ The client-centered philosophy directs the lawyer to act in a way that maximizes the client's interests,⁵⁷ but what are the client's interests and what course of action maximizes those interests? In order to assist the lawyer in making specific decisions, a general philosophy of lawyering must be supplemented by *practical reasoning*.⁵⁸ Practical reasoning requires the lawyer to identify the options available (consistent with the lawyer's general philosophy) for dealing with the decision that must be made, to analyze the advantages and disadvantages of each option, and to choose (or

56. For a discussion of this issue, see CRYSTAL, PROFESSIONAL RESPONSIBILITY, *supra* note 2, at 364–72 (Problem 4-3).

57. *See supra* p. 1241.

58. *See* R. Jay Wallace, *Practical Reason*, The Stanford Encyclopedia of Philosophy, Winter 2003, <http://plato.stanford.edu/archives/win2003/entries/practical-reason/>.

to assist the client in choosing) the option that appears to maximize the net benefits or minimize the net costs.⁵⁹

I turn now to how this framework can be incorporated into teaching professional responsibility.

IV. INCORPORATING THE CONCEPT OF A PHILOSOPHY OF LAWYERING INTO TEACHING PROFESSIONAL RESPONSIBILITY

Essential to the development of a philosophy of lawyering is the exercise of sound professional judgment in making decisions. David Luban and Michael Millemann have argued that development of professional judgment requires active participation by students in making decisions under the tutelage of a mentor who possesses good judgment.⁶⁰ The student's involvement can take either of two forms: (1) trial and error by the student subject to criticism by the mentor or (2) demonstration by the mentor in which the student imitates the mentor's exercise of judgment.⁶¹ Luban, Millemann, and other scholars argue that instruction in sound judgment can be best presented in a clinical setting, where the student must make real-life decisions.⁶²

While I agree that clinical courses offer an excellent opportunity to discuss issues of professional responsibility and to help students in developing sound judgment,⁶³ I also think that clinical courses have severe limitations. First, in the vast majority of law schools, professional responsibility is taught primarily, if not exclusively, in traditional rather than clinical classes. To leave instruction in professional judgment to clinical courses risks ignoring development of this fundamental professional attribute for most law students. Second, in clinical courses students typically handle relatively few matters.⁶⁴ The issues of professional judgment that arise are limited in number. If the clinical course includes a seminar on professional responsibility, the instructor can use the experiences of the class to broaden the areas of judgment discussed in the course, but nonetheless the treatment of judgment remains limited by the experiences of the students. For these reasons, in my opinion, it is important that traditional courses on professional responsibility find ways of incorporating development of professional judgment into their fabric. In the remainder of this article I offer ways in which this can be done through: (1) student papers, which can take a wide variety of forms, (2) problems that

59. *Id.*

60. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 59 (1995).

61. *Id.*

62. *Id.* at 64–66; see also Tremblay, *The New Casuistry*, *supra* note 37, at 512–41.

63. For several years I taught a professional responsibility course that was integrated with clinical courses at the University of South Carolina.

64. Deborah Jones Merritt & Jennifer Cihon, *New Course Offerings in the Upper-Level Curriculum: Report of an AALS Survey*, 47 J. LEGAL EDUC. 524, 536 (1997).

require students to exercise professional judgment, (3) analysis of cases in which the decisions of the lawyers are subject to critical scrutiny, and (4) alternative methodologies to demonstrate and evaluate the exercise of professional judgment.

A. *Student Papers*

Papers provide an excellent vehicle for students to observe the decision-making of other lawyers, to critically evaluate their decisions, and to determine whether the philosophy of the lawyer being observed is compatible with the student's values. If the instructor is teaching a seminar on professional responsibility, at least one paper is usually a standard requirement. It would be quite easy, therefore, to have one of the papers focus on development of a philosophy of lawyering. Even in large courses, the instructors could assign a paper to help students develop their own philosophy of lawyering. In my course on professional responsibility, which typically has sixty to eighty students, I often offer students the option of doing a one or two-hour extra credit paper on the development of a philosophy of lawyering. On occasion, I have required all students in the course to write a paper, which counts for one-third of their grade in a three-credit course. My experience has been that students understand the importance of this project to their professional development and do not find the requirement either unreasonable or burdensome.

Many types of papers can be assigned to assist students in developing a philosophy of lawyering. I discuss three: lawyer interview papers, lawyer biography papers, and leading scholar papers.

1. Lawyer Interview Papers

My first choice for a student paper would be the lawyer interview paper. The lawyer interview paper enables students to examine the actual decisions that a lawyer has made covering the full range of choices related to the practice of law, including personal, practice, and professional decisions. In this article I discuss a number of other ways in which students can begin to develop a philosophy of lawyering, but many of these other approaches present only a partial picture of the lawyer's philosophy, typically the lawyer's philosophy of practice.⁶⁵ Ideally, the lawyer the student selects for the interview will be a lawyer that the student knows and admires—for example, a friend, family member, or employer. If the instructor's school has an organized program in which members of the bar mentor students, that program provides another way in which students can select interviewees.

65. A paper on the lawyering philosophy of a lawyer who is the subject of a biography or autobiography can also offer the possibility of examining a complete philosophy of lawyering, depending on the scope of the biography or autobiography. *See infra* pp. 1250–51.

Here are possible instructions for a lawyer interview paper:

Instructions for Lawyer Interview Paper

One way to begin thinking about developing a philosophy of lawyering is to look for role models. The goal of the lawyer interview paper is for you to start to think systematically about the various discretionary decisions you will face in connection with the practice of law, to learn how your interviewee approached a number of these decisions, and to critically evaluate the decisions that the interviewee made to see whether they could provide a satisfactory model for you in the practice of law.

1. *Selection of interviewee.* You may choose any lawyer admitted to practice as the subject of your interview. The interviewee may be a family member, friend, employer, or mentor assigned to you by the school's mentoring program. If you have difficulty selecting an interviewee, please let me know. If either you or the interviewee would prefer that the interviewee remain anonymous, you may eliminate the lawyer's name and other personal identifying information from the paper. You should provide the interviewee with the attached information sheet about the project.

2. *Purpose of interview.* The purpose of the interview is for you to gather detailed information from the interviewee about specific decisions that the lawyer has faced related to the practice of law. You will then use this information to describe and reflect on the lawyer's philosophy of lawyering. To the extent permitted by rules of confidentiality,⁶⁶ ask your interviewee to identify specific issues of professional responsibility that the interviewee encountered, to explain why the issue was difficult, and to discuss how the interviewee resolved the issue and why.⁶⁷ Your interview and paper should discuss a broad range of specific issues, such as the following:

- choosing a type of practice
- deciding to take or decline cases
- counseling a client regarding the exercise of the client's legal rights
- exercising strategic or tactical judgment on behalf of a client (e.g., deciding whether to call or to cross-examine a witness)
- withdrawing from representation because the lawyer concludes that the client is acting immorally
- preventing the client from doing harm to others (e.g., disclosing the client's intention to commit a wrongful act)
- acting on behalf of a client in ways that will harm others
- participating in pro bono, law reform, and other professional activities to improve the law

66. The instructor should draft a letter or set of instructions that students can give to interviewees with regard to confidentiality.

67. It is possible that a student interview may identify a possible violation of the rules of professional conduct by the interviewee. Depending on the circumstances, the instructor may have a duty to report the violation to appropriate disciplinary authorities. See MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2007).

3. *Paper*. The paper should be fifteen to twenty pages, double spaced with 1 inch margins. The paper should be organized as follows:

Summary of paper

I. Description of Lawyer. Description of interviewee's childhood, age, academic background, practice experience, nature of practice, etc.

II. Interview. Discussion of specific decisions related to the practice of law that the lawyer has faced, the decisions the lawyer made, the basis of each decision, and the lawyer's evaluation of those decisions.

III. Description of the Lawyer's Philosophy of Lawyering. Based on your interview and the material we have discussed about philosophies of lawyering, describe the philosophy used by your interviewee. What is the relationship between the interviewee's personal and family life and his or her work? What approach or approaches has the lawyer used in dealing with difficult questions of professional responsibility that he or she has faced in practice? To what professional or institutional activities does the lawyer devote his or her time? What principles inform the lawyer's thinking about these issues? You should not expect your interviewee to follow one of the pure types of philosophies that we have discussed in the course. Your interviewee, like many lawyers, may adopt a philosophy that modifies in significant respects one of the types that we have considered.

IV. Analysis and Conclusion. Analyze what you think are the strengths and weaknesses of your interviewee's philosophy of lawyering and the extent to which you would follow such a philosophy in the practice of law.

2. Lawyer Biography Papers

Instead of interviewing a practicing lawyer, students can write a paper on the philosophy of lawyering of a lawyer reflected in a biography or autobiography. Instructors can suggest a number of possible subjects for such a paper, for example:

- CLARK M. CLIFFORD, *COUNSEL TO THE PRESIDENT: A MEMOIR* (1991)
- JOHNNIE L. COCHRAN WITH TIM RUTTEN, *JOURNEY TO JUSTICE* (1996)
- MORRIS DEES, *A LAWYER'S JOURNEY: THE MORRIS DEES STORY* (2001)
- WILLIAM HENRY HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* (1973)
- LAURA KALMAN, *ABE FORTAS* (1990)
- WILLIAM M. KUNTSLER WITH SHEILA EISENBERG, *A MAN OF THE SIXTIES: MY LIFE AS A RADICAL LAWYER* (1994)
- ARTHUR L. LIMAN WITH PETER ISRAEL, *LAWYER: A LIFE OF COUNSEL AND CONTROVERSY* (1998)

- ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* (1946)
- LOUIS NIZER, *REFLECTIONS WITHOUT MIRRORS: AN AUTOBIOGRAPHY OF THE MIND* (1978)
- VICTOR RABINOWITZ, *UNREPENTANT LEFTIST* (1996)
- MARY BETH ROGERS, *BARBARA JORDAN: AMERICAN HERO* (1998)
- GERRY SPENCE, *THE MAKING OF A COUNTRY LAWYER* (1996)
- EVAN THOMAS, *THE MAN TO SEE: EDWARD BENNETT WILLIAMS* (1991)
- KEVIN TIERNEY, *DARROW: A BIOGRAPHY* (1979)
- MICHAEL E. TIGAR, *FIGHTING INJUSTICE* (2002)
- LAWRENCE E. WALSH, *THE GIFT OF INSECURITY: A LAWYER'S LIFE* (2003)
- JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* (1998)

In writing the paper, students can be directed to consider the following questions: (1) What were the major decisions that the lawyer faced during the lawyer's career? (2) What decisions did the lawyer make? (3) What values were the basis of these decisions? (4) Based on your review of the lawyer's decision-making, how would you describe the lawyer's philosophy of lawyering? (5) Critically evaluate the lawyer's philosophy of lawyering and explain whether the lawyer's philosophy is acceptable to you.

3. Leading Scholar Papers

During the last twenty-five years, a number of scholars have argued forcefully for different philosophies of lawyering.⁶⁸ Students could be assigned to write a paper on the philosophy of lawyering of a scholar who has written extensively on these issues. The paper would involve a literature review of the scholar's work as it relates to the concept of a philosophy of lawyering, description and analysis of how the scholar's approach would resolve specific issues of professional responsibility, and critical evaluation of whether the student finds the scholar's approach compatible with the student's values. It is quite easy to prepare an extensive list of scholars who could be the subject of such a paper.

V. ANALYSIS OF PROBLEMS

Instructors of professional responsibility commonly use the problem method.⁶⁹ Problems can be used to teach the substantive issues raised by the problem, but they can also be used to help students to develop their own

68. *See supra* notes 28–55 and accompanying text.

69. Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409, 411 (1998).

philosophy of lawyering, particularly to develop their philosophy of practice. I offer as an example of how this can be done in one of the problems from my book on professional responsibility:

Problem 1-2 Reporting Misconduct by Another Lawyer

You are the only associate recently hired by a solo practitioner, Norman Wilson. You were hired about a year ago after a lengthy job search. You feel extremely fortunate to have the job because the market for lawyers in your area has been very tight; a number of your classmates still do not have a position.

One of the matters on which you have worked is *Sylvia v. United Truck Lines*, an automobile accident case in which the firm represented the plaintiff, Sylvia. The case settled about a month ago for \$250,000, and the file was closed. You did some legal research on the case and met with the client on several occasions regarding discovery issues. You did not participate in settlement negotiations or in disbursement of settlement funds.

Recently, you came across a research memo that you did in *Sylvia v. United Truck Lines* that was misfiled. You pulled the file of the *Sylvia* case from the firm's closed files. As you were putting the research memo into the file, you happened to notice the closing statement in the case.

The statement signed by the client showed a structured settlement in which \$100,000 was paid immediately and \$25,000 payable over each of the next six years. The statement also showed that the firm's one-third attorney fee was paid fully out of the initial payment. Thus, the client only received about \$17,000 now. The closing statement struck you as strange because you were sure that the case had been settled for a lump sum. As you thumbed through the file, you found a letter from the insurance company stating that it was enclosing its draft in the amount of \$250,000 as lump sum settlement of the case, along with its standard form general release. You are mystified about this and unsure how to proceed. What should you do? Read Model Rules 1.6, 5.2, 8.3 and comments.⁷⁰

Substantively, this problem raises a number of issues about the scope and exceptions to the duty to report misconduct by another lawyer under ABA Model Rule 8.3(a),⁷¹ the scope and exceptions to the duty of confidentiality under Model Rule 1.6,⁷² and the duty of subordinate lawyers under Model Rule 5.2.⁷³ However, I also use this problem (and many others in my book) to teach students about the importance of developing a philosophy of lawyering, more

70. CRYSTAL, PROFESSIONAL RESPONSIBILITY, *supra* note 2, at 36–37.

71. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2007).

72. *Id.* at R. 1.6.

73. *Id.* at R. 5.2.

particularly a philosophy of practice to deal with difficult, uncertain questions of professional responsibility.⁷⁴

I begin the discussion by asking a student to take on the role of the associate and to identify the nature of the problem the associate faces. The associate's review of the file indicates that the associate's employer, Norman Wilson, may have misappropriated all or a portion of the client's settlement. I then ask whether the associate has a duty to report Wilson to the appropriate disciplinary authority. This question has a substantive purpose: to focus on the limitations to the duty to report under Model Rule 8.3(a). Based on the facts given, for at least two reasons it seems reasonably clear that the associate does not have a duty to report now. First, while the associate has suspicions that Wilson has misappropriated client funds, the associate does not "know" that this misconduct has occurred.⁷⁵ In addition, the associate's information about Wilson's possible misconduct relates to the representation of Sylvia and is therefore subject to the duty of confidentiality under Model Rule 1.6.⁷⁶ Under Model Rule 8.3(c), unless an exception to the duty applies, the associate cannot report without Sylvia's consent.⁷⁷

Assuming that the associate does not have a duty to report Wilson's conduct, I then ask a student whether the associate has a duty to investigate further to determine whether Wilson has misappropriated Sylvia's settlement. While the Model Rules impose a duty on lawyers to report serious misconduct by another lawyer when the lawyer "knows" of the wrongdoing, there is no specific rule requiring a lawyer to investigate when the lawyer has serious suspicions rather than actual knowledge of wrongdoing by another lawyer.⁷⁸ Thus, the associate's decision whether to investigate is a matter of professional discretion. Students can then be asked what guidance each of the philosophies of practice would offer to them in deciding whether to investigate.

Under a client-centered philosophy, a lawyer should engage in any and all actions that will advance the client's interests so long as the action does not violate a clear rule of professional conduct or other law.⁷⁹ Thus, a client-centered philosophy would guide the associate to investigate further to determine whether Wilson misappropriated Sylvia's funds. A philosophy of morality indicates that when lawyers have discretion as to how to act, they should act in accordance with principles of conventional morality. Honesty and respect for the property rights of others are basic principles of morality. If

74. For a complete discussion of how I teach this problem and other problems in my book, see NATHAN M. CRYSTAL, *TEACHER'S MANUAL TO PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* (3d ed. 2004).

75. See CRYSTAL, *PROFESSIONAL RESPONSIBILITY*, *supra* note 2, at 39–40.

76. *Id.* at 40.

77. MODEL RULES OF PROF'L CONDUCT R. 8.3(c) (2007).

78. See CRYSTAL, *PROFESSIONAL RESPONSIBILITY*, *supra* note 2, at 39–40.

79. See *supra* text accompanying note 29.

Wilson has misappropriated Sylvia's funds, he has violated both of these principles. Thus, a philosophy of morality also directs the associate to investigate further into Wilson's conduct.

Application of a philosophy of institutional value is somewhat more complex because scholars have advanced several different philosophies that fall under this general classification. Thus, either the instructor or the student must select one or more approaches in order to apply this philosophy. For example, under Professor Simon's approach, when a procedural defect exists, a lawyer must assume greater responsibility to achieve a substantively just outcome.⁸⁰ When a lawyer turns against a client, a procedural defect obviously exists. Thus, Simon's approach appears to call for further inquiry by the associate. Similarly, the professionalism approach of Terrell and Wildman seems to require further action.⁸¹

Under a philosophy of lawyer self-interest, the associate would act or refrain from acting in a way to promote the associate's own self-interest. The philosophy of lawyer self interest would often direct the lawyer to engage in "defensive lawyering," taking steps that minimize the risk that the lawyer would be subject to professional discipline, liability for malpractice, loss of fee or other economic loss, or damage to reputation. Investigation by the associate of Wilson's conduct is unlikely to promote the associate's interest. If the associate is correct in his or her suspicions that Wilson has engaged in wrongdoing, bringing this conduct to light may result in the associate's loss of a job. Indeed, in two of the leading cases dealing with reporting of misconduct, the lawyers were fired.⁸² If the associate is incorrect in his or her suspicions and there is an honest explanation for Wilson's conduct, the associate may receive a kind remark from Wilson for identifying a file error, but the possibility of other benefits seem remote. From the perspective of self-interest, the associate may be concerned about continuing to work for Wilson if he is a crook, but that concern could be addressed by the associate's beginning to look for other job opportunities rather than running the risk associated with investigation.

One or more students can then be asked to explain whether they would engage in further investigation of Wilson's conduct, even though they do not have a professional duty to do so, and if so the reasons for their decision. Thus, the instructor is asking the students to sharpen their exercise of judgment by making a specific decision and by explaining the principles on which that decision is based.

80. *See supra* text accompanying notes 38–45.

81. *See supra* text accompanying notes 49–51.

82. *See* *Wieder v. Skala*, 609 N.E.2d 105, 106 (N.Y. 1992); *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 544–45 (Tex. 1998).

Assuming that the associate has decided to engage in some further investigation of Wilson's conduct (based on the guidance of a client-centered philosophy, a philosophy of morality, a philosophy of institutional value, or some other approach), students can then be asked to identify the options they have for further investigation. As discussed above, when confronted with alternative courses of action all of which are consistent with a particular philosophy, a lawyer must turn to practical reason to make a decision. Practical reason requires the lawyer to identify options available for making the decision, to analyze the advantages and disadvantages of each option, and to select or assist the client in selecting the option that maximizes the net benefits or minimizes the net costs involved in the decision.⁸³ Students can be asked to identify the options available to them for further investigation of Wilson's conduct. Consider the following possibilities:

- Contacting the attorney for the insurance company to verify the settlement
- Contacting the client to verify the settlement or obtain other information
- Discussing the matter with Wilson

Contacting either the insurance company or the client at this point has serious problems. First, the associate is likely to be asked why the inquiry is being made. The associate could not at this point reveal his concern that Wilson has misappropriated money, and a lie would be improper. Second, an inquiry to either the insurance company or to the client is likely to be reported to Wilson. This could easily lead to the associate's losing his or her job, even if his suspicions turn out to be correct. Finally, as a general proposition, it is more desirable to deal directly rather than indirectly with a problem. Thus, at this point the best choice seems to be for the associate to raise the issue of the settlement in *Sylvia* with Wilson.

Assuming that the associate decides to discuss the matter with Wilson, another issue of practical reasoning arises. How should the associate raise the matter with Wilson? Role play of such a meeting provides an excellent vehicle for students to develop their skills of practical reasoning.

Suppose the associate meets with Wilson to discuss the discrepancy between the insurance company's letter and the settlement statement in the *Sylvia* file. At the meeting Wilson tells the associate that the parties agreed to change the settlement; it was converted from a lump sum to a structured settlement because the client preferred receiving money over a period of time. Wilson says that he returned the insurance company's draft and received a new draft. Wilson expresses surprise that the file does not reflect this. He says that

83. See *supra* notes 58–59 and accompanying text.

he will take care of the matter, and he thanks the associate for bringing the matter to his attention.

Substantively, students can be asked how the associate's position as a subordinate lawyer under Model Rule 5.2 affects the associate's obligations. Rule 5.2(a) states that a subordinate lawyer is personally responsible for compliance with the Model Rules of Professional Conduct, even though the lawyer acted at the direction of another person.⁸⁴ Thus, the associate cannot simply accept Wilson's explanation. Model Rule 5.2(b), however, states that a subordinate is justified in acting in accordance with a senior lawyer's "reasonable resolution of an arguable question of professional duty."⁸⁵ Thus, the Model Rules emphasize that lawyers have personal responsibility but can defer to seniors on doubtful questions. The situation in Problem 1-2, however, does not raise an arguable question of professional duty. Wilson's duties are clear. The question is: What happened in *Sylvia*?

Students can be asked what actions if any they would take at this point if they were the associate. Once again the question raises an issue of professional discretion. Depending on the student's philosophy, the student could do nothing or investigate further. The nature of any further investigation requires the exercise of practical reason.

Any problem that requires the exercise of judgment or discretion by the student is amenable to the approach that I have described for this problem. Further, the methodology that I recommend does not involve a tradeoff or loss of substantive coverage. Instead, substantive coverage and the concept of a philosophy of lawyering complement each other. Substantively, students must know the scope and limitations of the rules, but when the rules are unclear or do not deal with a particular issue, the guidance of a philosophy of lawyering supplemented by practical reasoning is essential.

VI. ANALYSIS OF CASES

I have described how the concept of a philosophy of lawyering supplemented by practical reasoning can be used in the problem method. In this section I offer an example of how these ideas may be incorporated into the analysis of cases. I choose as my example the well-known case of *Spaulding v. Zimmerman*.⁸⁶

David Spaulding, a passenger in a vehicle driven by John Zimmerman, suffered severe head and chest injuries in an automobile accident with another vehicle driven by Florian Ledermann and owned by his father, John.⁸⁷ Two

84. MODEL RULES OF PROF'L CONDUCT R. 5.2(a) (2007).

85. *Id.* at R. 5.2(b).

86. 116 N.W.2d 704 (Minn. 1962).

87. See Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63, 63-64 (1998). Cramton and Knowles

individuals were killed in the accident.⁸⁸ Because Spaulding was a minor (age 20), the case was brought on his behalf by his father as his natural guardian.⁸⁹ Spaulding was represented by a young lawyer, Richard Roberts.⁹⁰ Zimmerman's insurer selected an experienced lawyer, Norman Arveson, to represent him.⁹¹ Attorney Chester Rosengren represented the Ledermanns and their insurer.⁹²

Three doctors who treated Spaulding failed to discover that he also suffered from a life-threatening aneurysm of the aorta that may have been caused by the accident.⁹³ Arveson, counsel for Zimmerman, also retained a physician, Dr. Hannah, to examine Spaulding.⁹⁴ Dr. Hannah discovered the aneurysm and reported it to Arveson about a week before the case was scheduled to go to trial.⁹⁵ The report stated:

The one feature of the case which bothers me more than any other . . . is the fact that this boy of 20 years of age has an aneurysm, which means a dilatation of the aorta and the arch of the aorta. Whether this came out of this accident I cannot say with any degree of certainty Of course an aneurysm or dilatation of the aorta in a boy of this age is a serious matter as far as his life. This aneurysm may dilate further and it might rupture with further dilatation and this would cause his death.⁹⁶

Roberts never requested a copy of Dr. Hannah's report.⁹⁷ The trial court later criticized Roberts for his failure "to use available rules of discovery."⁹⁸ Arveson did not inform Zimmerman, Spaulding, or Spaulding's father about the aneurysm.⁹⁹ Dr. Hannah also did not inform anyone of the situation, other than Arveson.¹⁰⁰ However, Arveson did make the contents of Dr. Hannah's

engaged in extensive research into the case to provide a wealth of information not found in the reported opinion. *See id.*

88. *Id.* at 63.

89. *Id.* at 64.

90. *Id.* at 68.

91. *Id.*

92. Cramton & Knowles, *supra* note 87, at 68.

93. *Spaulding v. Zimmerman*, 116 N.W.2d 704, 707–08 (Minn. 1962). Spaulding was examined by his family physician, Dr. James Cain, and by two other specialists (an orthopedist and a neurologist), who examined him at Dr. Cain's request. *Id.* at 707.

94. *Id.* at 707.

95. *Id.*

96. *Id.*

97. *Id.* at 709.

98. *Spaulding*, 116 N.W.2d at 709.

99. Cramton & Knowles, *supra* note 87, at 69.

100. *Id.* at 70.

report known to Rosengren, the lawyer representing the Ledermanns,¹⁰¹ and it appears that Dr. Hannah's report was also mentioned to one of the insurers.¹⁰²

On the day after the case was called for trial, the parties reached a settlement calling for a payment to Spaulding of \$6,500.¹⁰³ In connection with the settlement negotiations, Arveson was careful not to make any representations about the extent of Spaulding's injuries.¹⁰⁴ Roberts then filed a petition with the court seeking approval of the settlement, with copy to defense counsel.¹⁰⁵ Attached to the petition were affidavits from plaintiff's two physicians, but there was no reference to Dr. Hannah's examination or report.¹⁰⁶ The petition described Spaulding's injuries but made no mention of the aneurysm.¹⁰⁷ The court approved the settlement.¹⁰⁸

Early in 1959, about eighteen months after the settlement was approved, Spaulding was required to take a physical examination by the Army Reserve.¹⁰⁹ He went to Dr. Cain, his family physician, who had originally treated him after the accident.¹¹⁰ In the course of this examination, Dr. Cain discovered the aneurysm.¹¹¹ Dr. Cain, after obtaining another opinion, made arrangements for surgery.¹¹² While the surgery did remove the aneurysm, Spaulding suffered permanent and significant speech loss, probably as a result of the procedure.¹¹³

Spaulding then filed a petition to have the settlement vacated and the judgment reopened.¹¹⁴ The trial court granted the motion, and the Minnesota Supreme Court affirmed.¹¹⁵ The court found that the trial court did not abuse its discretion in reopening the settlement, but this decision was based on principles applicable to settlements involving minors rather than on any impropriety by defense counsel:

The principles applicable to the court's authority to vacate settlements made on behalf of minors and approved by it appear well established. With reference thereto, we have held that the court in its discretion may vacate such a settlement, even though it is not induced by fraud or bad faith, where it is

101. *Spaulding*, 116 N.W.2d at 707-08.

102. Cramton & Knowles, *supra* note 87, at 69.

103. *Spaulding*, 116 N.W.2d at 708.

104. Cramton & Knowles, *supra* note 87, at 70.

105. *Id.* at 71.

106. *Spaulding*, 116 N.W.2d at 708.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Spaulding*, 116 N.W.2d at 708.

112. *Id.*

113. Cramton & Knowles, *supra* note 87, at 71.

114. *Spaulding*, 116 N.W.2d at 708.

115. *Id.* at 711.

shown that in the accident the minor sustained separate and distinct injuries which were not known or considered by the court at the time settlement was approved.¹¹⁶

... While no canon of ethics or legal obligation may have required [defense counsel] to inform plaintiff or his counsel with respect thereto, or to advise the court therein, it did become obvious to them at the time that the settlement then made did not contemplate or take into consideration the disability described. This fact opened the way for the court to later exercise its discretion in vacating the settlement and under the circumstances described we cannot say that there was any abuse of discretion on the part of the court in so doing. . . .¹¹⁷

How might discussion of the case be approached with a view to help students develop a philosophy of lawyering? Consider the following possible questions that could be posed to the students and analysis of these questions.

1. Is This a Discretionary Decision?

Issues regarding the application of a lawyer's philosophy of lawyering only arise if the issue is one involving professional discretion. Thus, an initial issue raised by the facts of *Spaulding v. Zimmerman* is whether an attorney in Arveson's position today faces a discretionary decision. Does he or she have a legal duty or a professional obligation to inform Roberts of Dr. Hannah's report? Assuming that the court has rules of procedure similar to the Federal Rules, Roberts would be entitled to a copy of Dr. Hannah's report under Federal Rule of Civil Procedure 35, but only if Roberts requested the report.¹¹⁸ Absent such a request, it appears that Arveson would not have a legal duty under the rules of discovery to turn over the report.

What about Arveson's professional obligations? Rule 3.3 of the Model Rules of Professional Conduct deals with the lawyer's obligation of candor to the tribunal.¹¹⁹ Rule 3.3(a)(1) provides that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."¹²⁰ Arveson might well reason that he has not made a false statement

116. *Id.* at 709.

117. *Id.* at 710. The trial court had also noted that there was "no doubt of the good faith of both defendants' counsel." *Id.* at 709.

118. The Rule provides: "If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner . . ." FED. R. CIV. P. 35(b)(1) (2006). If defense counsel had listed Dr. Hannah as a testifying expert, Roberts would also be entitled to a copy of Dr. Hannah's report, but Dr. Hannah was not so designated. *See id.* at 26(a)(2)(B), 26(b)(4).

119. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2007).

120. *Id.* at R. 3.3(a)(1).

of fact to the tribunal because the petition seeking approval of the settlement was filed by Roberts and not signed by Arveson. The court, however, treated the petition as joint because both parties had an interest in having the petition approved.¹²¹ Thus, the representations of fact in the petition regarding Spaulding's injuries were attributed to defense counsel. An important lesson for students to learn from the court's treatment of the petition is that lawyers should be wary of formalistic reasoning and arguments ("I didn't sign it, your honor") when thinking about their professional obligations, particularly the obligation of candor to the tribunal.

In addition, the comment to Rule 3.3 indicates that in some situations a failure to disclose information can be the equivalent of a misrepresentation: "There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."¹²² I have argued that lawyers have a duty to disclose to the court under Rule 3.3(a)(1) and to opposing counsel under Rule 4.1(a) in certain situations, including a situation in which the failure to disclose involves a basic fact and violates principles of good faith and fair dealing:

In *Spaulding v. Zimmerman*, the court held that the settlement agreement was subject to rescission, but the court also stated that the lawyers had not acted unethically in failing to reveal the information they had about the plaintiff's health. Under the principles set forth in this Article, the court was wrong in its characterization of the lawyers' conduct. Under the facts of the case, defense counsel's failure to disclose was the equivalent of a misrepresentation. Defense counsel had a duty to disclose because plaintiff's physical condition was a basic fact about which plaintiff was mistaken, and the failure to disclose violated principles of good faith and fair dealing. Indeed, *Spaulding* is probably the clearest case for disclosure that can be imagined because of the threat to the plaintiff's life. Defense counsel should have immediately revealed this information to the plaintiff without the need for consultation with their clients. All of the factors bearing on the issue call for disclosure: the harm was serious, the case involved a duty of candor to the court because it involved a minor settlement, disclosure would not reveal any sensitive information of the defendant, defense counsel's withdrawal on the eve of trial was not feasible and would in any event have simply reaffirmed the problem of nondisclosure. Finally, any sensible philosophy of lawyering must give primacy to the value of human life.¹²³

Under this analysis, it does not matter whether Spaulding was a minor or an adult and it does not matter whether a petition was filed with the court or

121. *Spaulding v. Zimmerman*, 116 N.W.2d 704, 709 (Minn. 1962).

122. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 3 (2007).

123. Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055, 1097-98 (1999); see also MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1), 4.1(a) (2007).

whether any court action was pending. The disclosure obligation applies to opposing counsel under Rule 4.1(a). On this analysis, then, Arveson did not face a discretionary decision; he had a professional duty to disclose Spaulding's condition not only to the court, but even earlier to Roberts before the settlement was concluded.

ABA Model Rule 1.6 as amended in 2002 contains a number of exceptions to the ethical duty of confidentiality. Under Rule 1.6(b)(1) a "lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm"¹²⁴ The comments make clear that disclosure in this situation is discretionary with the lawyer.¹²⁵ Whether to make disclosure under Rule 1.6 would require the application of the lawyer's philosophy of lawyering.

In summary, whether a lawyer in Arveson's position today would have a duty to disclose Dr. Hannah's report to the court or to opposing counsel is unclear. A lawyer could take *Spaulding* at face value and conclude, as the court indicated, that no rule of ethics or legal obligation clearly requires disclosure.¹²⁶ A lawyer could read the case somewhat more broadly to impose a duty of disclosure but only in the context of a petition to approve a settlement involving a minor. Still more broadly, a lawyer could accept my analysis of the duty of disclosure and conclude that a doctor's report showing a life threatening condition of the opposing party must be disclosed regardless of the circumstances.¹²⁷

This situation is not uncommon; questions of legal duty are often unclear. Instructors could then ask students how application of a philosophy of lawyering might help them resolve this uncertainty. A lawyer applying a client-centered philosophy would probably conclude that in case of doubt, there is no duty to disclose Dr. Hannah's report. The lawyer could still counsel the client about disclosure of the report with the client making the decision.¹²⁸ A lawyer following a philosophy of morality would probably conclude that a duty to disclose exists because saving a life is a fundamental moral value. A lawyer following the philosophy of institutional value advocated by Professor Simon would probably conclude that a duty to disclose exists.¹²⁹ Due to a procedural defect—the failure of plaintiff's lawyer to request a copy of the report—defense counsel has a responsibility to promote a substantively just outcome.¹³⁰ Lawyers adhering to a philosophy of self-interest could reach

124. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2007) (emphasis added).

125. *Id.* at R. 1.6 cmt. 15.

126. *Spaulding v. Zimmerman*, 116 N.W.2d 704, 710 (Minn. 1962).

127. *See supra* text accompanying note 123.

128. *See infra* text accompanying notes 131–40.

129. *See supra* text accompanying notes 38–45.

130. *See supra* notes 37–44, 79, and accompanying text.

different outcomes, depending on how they view their own interests. For example, a lawyer who tries to minimize the risk of criticism or legal liability would need to decide whether disclosure or preserving confidentially would minimize these risks.

2. Counseling the Clients

Suppose that a lawyer in Arveson's position today concludes that he or she does not have a legal or professional duty to disclose Dr. Hannah's report either to Roberts or to the court (or at least that the existence of such a duty is unclear). A contemporary Arveson still faces a question about how to handle the report. It appears that defense counsel in the case made the decision not to disclose the report to the plaintiff on their own without any consultation with the individual defendants or the insurance carriers.¹³¹ As discussed below, Arveson faces an issue regarding the identity of his client. However, regardless of the client's identity, it is clear today that Arveson would have a professional duty to inform his client or clients of Dr. Hannah's report¹³² and to render candid advice to his client or clients about the implications of the report and how it might be handled.¹³³

Recognizing that defense counsel has a duty to counsel his client or clients regarding the report presents several questions. In order to carry out this obligation the lawyer must identify his or her client. Who is the client? The defendant Zimmerman? The insurance company? Both? The traditional view is that defense counsel employed by an insurance company represents both the insured and the insurance company.¹³⁴ In class this topic could be explored in more depth, but for the purpose of this article I will assume that defense counsel represents both the defendant and the insurer, in which case the lawyer would have an obligation to advise and counsel both regarding the report.

How should defense counsel advise his clients? The nature and scope of the lawyer's obligation to counsel is largely a matter of professional discretion and judgment. Model Rule 2.1 states: "In representing a client, a lawyer *shall* exercise independent professional judgment and render candid advice. In rendering advice, a lawyer *may* refer not only to law but to other

131. Cramton & Knowles, *supra* note 87, at 69 (concluding that the "defense lawyers probably made the decision not to disclose on their own").

132. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2007) (providing the duty to communicate).

133. *Id.* at R. 2.1; see Cramton & Knowles, *supra* note 87, at 84-96.

The most important lesson of *Spaulding*, then, concerns the lawyer's counseling role: the lawyer must take the client seriously as a person, communicate with and advise the real client (not a client stereotype), and engage in a moral dialogue in which lawyer and client can learn from each other how to act decently in an unredeemed world.

Id. at 95-96.

134. On the question of whom the lawyer represents in insurance defense practice, see CRYSTAL, PROFESSIONAL RESPONSIBILITY, *supra* note 2, at 310-23.

considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."¹³⁵ Students could be asked how application of different philosophies of lawyering would affect the way in which they counsel their clients.¹³⁶

Under a client-centered philosophy the lawyer should counsel the clients about how the report could be handled with a view to maximizing the clients' interests. But what are the interests of each of the clients? How can the lawyer determine their interests? The obvious answer is for the lawyer to discuss with the clients what their interests are. Suppose the lawyer meets with the defendant and informs the defendant of the medical report and of the plaintiff's lack of knowledge of the contents of the report. The lawyer can then assist the client in deciding the client's interests with regard to the report. The lawyer can articulate at least two possible client interests with regard to the report. One interest is purely economic—handling the report in a way that minimizes the client's possible liability for damages. With regard to this economic interest, the lawyer could explain that disclosure of the report may make it more difficult to settle the case because the plaintiff's demand for damages will increase. This consequence is almost certain to occur. In addition, disclosure of the report could expose the defendant to damages if the plaintiff is able to obtain a recovery in excess of the policy limits. The likelihood of this situation occurring depends on the amount of the policy and the seriousness of the plaintiff's injuries. On the other hand, nondisclosure of the report could also result in a long-term economic cost because the defendant would be under the cloud of possible reopening of the proceedings. Further, nondisclosure could increase the damages to which the defendant might be subject. If the plaintiff suffers serious injury or dies because his medical condition was not disclosed, the plaintiff or his estate might bring suit against the defendant for fraudulent nondisclosure, exposing the defendant to actual and punitive damages.¹³⁷ Such damages would almost certainly not be covered by insurance. Another possible interest of the defendant is moral—the interest in complying with a moral obligation to inform the plaintiff of a life-threatening condition. It is important for students to understand that a client-centered approach does not require them to assume that their clients are only interested in money and have no interest in morally correct behavior.¹³⁸

The defendant must decide based on the lawyer's advice whether he recognizes either or both of these interests and, if so, whether disclosure or

135. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007) (emphasis added).

136. For an elegant description of the discretionary aspects of counseling, see Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 26–29 (1988).

137. RESTATEMENT (SECOND) OF TORTS § 551(2)(e) (1977) (providing liability for nondisclosure).

138. Cramton & Knowles, *supra* note 87, at 94–96.

nondisclosure of the report is the best way to maximize those interests. If the defendant recognizes that he has a moral obligation to disclose the plaintiff's condition, the economic analysis becomes irrelevant. If the defendant does not recognize this moral obligation, the defendant may still decide that disclosure is in the defendant's interest for economic reasons.

Assuming the lawyer has multiple clients, the lawyer must engage in a similar counseling session with his other client, the insurance company. It is possible that the clients could be in agreement with regard to how the report should be handled. Under a client-centered philosophy the lawyer would follow the clients' mutual decision even if the lawyer did not necessarily agree with their conclusion. If the clients disagreed, then the lawyer would be forced either to withdraw because the clients have directly adverse positions with regard to disclosure of the report¹³⁹ or perhaps inform both clients that they need independent representation with regard to their conflict of interest.¹⁴⁰

Suppose the lawyer adheres to a philosophy of morality. How would the lawyer's handling of the report differ from the way a lawyer who follows a client-centered philosophy handles the matter? Regardless of which philosophy the lawyer follows, the lawyer still has an obligation to counsel his or her clients.¹⁴¹ However, counseling under a philosophy of morality would be quite different from counseling under a client-centered philosophy. Under the client-centered approach the lawyer would assist the clients in determining their interests and the best way of effectuating those interests. Under a philosophy of morality the lawyer would determine whether morality requires disclosure of the report. In making this determination the lawyer might rely on his or her moral intuition, moral theory, religious values, or other sources of moral obligation.¹⁴² Just to take one example, Professor Paul Tremblay has argued that lawyers should handle discretionary decisions by employing casuistry, decision-making based upon comparison of paradigm cases.¹⁴³ The comment to Model Rule 1.6 provides the following example of when a lawyer would be permitted to reveal confidential client information to prevent death or bodily harm:

Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if

139. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(3) (2007).

140. For a discussion of the ethical obligations of insurance defense counsel when a conflict arises between the insurer and the insured, see CRYSTAL, PROFESSIONAL RESPONSIBILITY, *supra* note 2, at 310–23.

141. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007).

142. For a discussion of the relationship between lawyers' personal values and their professional obligations, see Green, *supra* note 9, at 41–51 (discussing the complex question of the relationship between a lawyer's personal or religious values and the lawyer's professional obligation to counsel the client).

143. Tremblay, *The New Casuistry*, *supra* note 37, at 492.

there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.¹⁴⁴

To employ the method of casuistry the lawyer would need to identify a paradigm case in which disclosure would not be appropriate even though death or serious bodily injury could result. For example, the Restatement provides the following example:

Lawyer advises Manufacturer on product-liability matters. Lawyer had previously advised Manufacturer that use of Component A in a consumer product did not create an unreasonable risk of harm and was in compliance with consumer-protection and other law. Lawyer has now learned that Supplier, unknown to Manufacturer, provided Component A in a form not in compliance with Manufacturer's specifications. Manufacturer promptly altered its production methods so as to avoid any significant risk of harm in products manufactured in the future. There is a slight statistical chance that a consumer using the prior version of the product containing the noncomplying version of Component A might suffer serious bodily harm, but only in a highly unlikely combination of circumstances. Manufacturer's responsible officers have decided not to issue a public notice of the slightly increased risk of harm. Lawyer does not have discretion under this Section to use or disclose Manufacturer's confidential information to make a public warning of the slightly increased risk of harm.¹⁴⁵

Using the method of casuistry a lawyer could compare the features of these cases ("triangulation") and reach a conclusion about whether disclosure would be appropriate in a situation like *Spaulding v. Zimmerman*.¹⁴⁶ As Professor Tremblay argues, the method of casuistry avoids the necessity of a complex understanding of moral theories and of choosing among these theories.¹⁴⁷

If the lawyer decides that morality requires disclosure of the report, as appears likely, the lawyer would aggressively counsel the clients of their moral obligation to disclose the report. A lawyer following this philosophy would also probably go further. The lawyer might inform the clients that if the clients refused to disclose the report, the lawyer would exercise his professional discretion to do so.¹⁴⁸ Or, the lawyer might inform the clients that if they refused to disclose the report the lawyer would not disclose the report but

144. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 6 (2007).

145. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 66, illus. 4 (2000).

146. Tremblay, *The New Casuistry*, *supra* note 37, at 518.

147. *Id.* at 492.

148. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2007) (providing lawyers with discretion to reveal confidential information "to prevent reasonably certain death or substantial bodily harm").

would be forced to withdraw from representation.¹⁴⁹ Under a philosophy of morality, however, a lawyer could not lie to the clients about their legal obligation to disclose the report in order to carry out the lawyer's conclusion that morality requires disclosure. A lawyer who did so would be engaging in morally reprehensible conduct—deception of a client—when the morally correct result can be achieved without deceit. Instructors could ask other students to analyze how they would handle their counseling obligations using other philosophies of lawyering.

VII. OTHER METHODOLOGIES FOR TEACHING A PHILOSOPHY OF LAWYERING

Creative teachers can come up with many other ways in which students can begin to develop their own philosophies of lawyering. Consider the following possibilities:

A. *Teacher Demonstrations*

Instructors can demonstrate for students the application of different philosophies of lawyering. For example, an instructor could conduct a mock counseling session with a client, role played by a student, based on the facts of a problem or case in which the instructor uses one of the philosophies of lawyering discussed in the course. Class discussion after the demonstration could focus on justifications for use of the philosophy that the teacher employed and the desirability of alternative approaches.

B. *Panel Discussions*

The instructor could invite several lawyers to class for a panel discussion moderated by the instructor. The focus of the panel discussion would be similar to that of the lawyer interview paper described above: to identify specific issues of professional responsibility that the panel members have encountered, to explain why the issue was difficult, and to discuss how the panel member resolved the issue and why.¹⁵⁰ The instructor can structure the discussion to cover a full range of issues at the personal, practice, and professional levels.¹⁵¹ The discussion should enable students to observe the approaches used by practicing lawyers to resolve difficult, uncertain questions of professional responsibility.

149. *See id.* at R. 1.16(b)(4) (providing for permissive withdrawal if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement”).

150. *See supra* Part IV.A.1.

151. *Id.*

C. *Use of Videos and Films*

A number of excellent videos dramatizing issues of professional responsibility have been produced. Instructors could use these videos as the basis of class discussion of both substantive issues and of the lawyering philosophies adopted by the lawyers portrayed in the video.¹⁵² Feature length films, such as *To Kill a Mockingbird*, can also be used to illustrate and critique different philosophies of lawyering.¹⁵³

D. *Role Plays*

Role plays are an excellent method by which students can become personally involved in making decisions and exercising professional judgment. In the role plays students will by necessity adopt some philosophy of lawyering. In the critique following the role play, the instructor could focus the discussion on description of the philosophy used by the student, justifications for the approach, and alternative approaches that could be used.

CONCLUSION

Lawyers develop different approaches to lawyering, but they often do so more by happenstance than careful reflection. Courses in professional responsibility can assist students in developing their philosophies of lawyering with greater care. In this article I have tried to offer a number of illustrations of how this goal can be achieved.

152. See CRYSTAL, PROFESSIONAL RESPONSIBILITY, *supra* note 2. The teacher's manual to my book discusses how many videos can be used in a course on professional responsibility. See CRYSTAL, *supra* note 74.

153. See Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473, 482 (1994) (arguing that Finch is "not an adequate role model for today's lawyer" because of his unwillingness to use his legal skills to work toward alleviating injustice).

