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Of Shining Knights and Cunning Pettifoggers: The Symbolic World of the Model Rules of Professional Conduct

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This article offers a coherent ethical perspective on the American Bar Association (ABA) Model Rules of Professional Conduct. The legal profession bases its Model Rules on assumptions about lawyers, their clients and adversaries, the authority to which lawyers appeal, and the economy in which they practice. Citing in support every Model Rule, this article exposes the rich symbolic assumptions underlying the Rules and concludes that it is through this symbolic world that the Model Rules are best understood. This article includes a description of the normative economy on which the symbolic world of the Model Rules is based.

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I. Models of Normative Interpretation

Now is a good time to consider what the ABA Model Rules of Professional Conduct say about the legal profession. The way in which the Rules describe or conceive of lawyers, their clients, the world in which their clients operate, and the economy in which lawyers practice all shed light on the profession. There are remarkable challenges and opportunities within law and the legal profession. The public questions our values, morals, ethic, commitment, and purpose—not to mention our billing rates and practices. We question ourselves. The best answers may be the pragmatic rather than the theoretical ones. People need lawyers. They continue to retain and pay us. But so pragmatic an answer still begs us to consider what makes the legal profession function as a prelude to our learning how lawyers can practice with greater meaning and purpose. These considerations will help us to understand how we can encourage the next generation of lawyers in their professional responsibility.

In order to gain a more comprehensive understanding of what lawyers do and how well they do it, it might be useful to have a fresh model for interpretation. Looking at the Model Rules as data on the profession's nature, the question becomes what is the most useful perspective from which to understand and appreciate the Rules as emblematic of the profession's coherence? How should any system of morality or ethics be understood to represent the deeper meanings of the people or profession it governs? The question here is not whether a certain sub-rule should be amended to modify discrete duties arising in rare or narrow circumstances. It is instead how, through a study of the Rules, we can take a useful view of ourselves as a profession.

Normative scholars have taken at least four different perspectives in evaluating ethical systems: (1) descriptive; (2) synthetic; (3) hermeneutic; and (4) pragmatic.[1] A descriptive view focuses on an ethical code's substantive detail.[2] A synthetic view looks at the comprehensiveness and consistency of an ethical code.[3] A hermeneutic perspective considers the interpretive quality of an ethical code—whether it contains rules, elicits principles, and produces paradigms.[4] A

1. *See, e.g.*, RICHARD B. HAYS, THE MORAL VISION OF THE NEW TESTAMENT 3 (1996) ("The four tasks interpenetrate one another, of course, but it is useful to distinguish them for heuristic purposes.").

2. *Id.* ("The *descriptive* task is fundamentally exegetical in character.").

3. *Id.* at 4 ("[W]e must move on to ask about the possibility of coherence among the various witnesses. When we ask this question, we move from the descriptive to the *synthetic* task. Is it possible to describe a unity of ethical perspective within the diversity of the canon?").

4. *Id.* at 208-09.

pragmatic view measures effectiveness based on what the ethical code actually produces.[5] The question is which of these perspectives is the most useful in understanding and appreciating, and perhaps better shaping, the Model Rules.

The Model Rules work fairly well as a descriptive ethic. The Rules are plainly proscriptive, prohibiting such acts as commingling,[6] misrepresentation,[7] improper influence,[8] and a variety of other bad acts. The Rules provide lawyers with a reasonably precise understanding of what they *are not* to do in commonly encountered circumstances, such as conflicts of interest,[9] solicitation,[10] and obstruction.[11] The Rules are also prescriptive in that they provide reasonable guidance to lawyers on what they *are* to do in a variety of circumstances. For example, the Rules instruct lawyers on the safekeeping of client funds and property[12] and on the requirements for diligence,[13] competence,[14] independent judgment,[15] confidentiality,[16] and so on.

Taken together with the drafters' comments, the Model Rules generally do not lack descriptive detail. There are, however, some areas in which the Rules could be more precise. For example, few details are provided on how to adequately screen a disqualified lawyer from a matter so as to avoid imputed disqualification of other members of the firm.[17] Yet, even on that issue, the comments provide reasonably

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5. *Id.* at 7, 313.

6. MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (2006) ("A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.").

7. *Id.* at R. 4.1 ("[A] lawyer shall not knowingly: (a) make a false statement of material fact to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client. . . .").

8. *Id.* at R. 3.5(a) ("A lawyer shall not . . . seek to influence a judge, juror, prospective juror or other official by means prohibited by law. . . .").

9. *See, e.g., id.* at R. 1.8 (entitled "Conflict of Interest: Current Clients: Specific Rules").

10. *See id.* at R. 7.3(a) ("A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. . . . ").

11. *See id.* at R. 3.4(a) ("A lawyer shall not . . . unlawfully obstruct another party's access to evidence. . . .").

12. *Id.* at R. 1.15(a) ("Other property shall be identified as such and appropriately safeguarded.").

13. *Id.* at R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

14. *Id.* at R. 1.1 ("A lawyer shall provide competent representation to a client.").

15. *Id.* at R. 5.4 (entitled "Professional Independence of a Lawyer").

16. *Id.* at R. 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client. . . .").

17. *Id.* at R. 1.11(b)(1) (stating that no lawyer in a firm with a disqualified former public officer may undertake the representation unless "the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee

detailed guidance.[18] While the Rules provide prescriptive guidance, a descriptive study of the Rules, by itself, falls short as a measure of their overall effectiveness. Description has little to do with circumspection and perspective, and even less to do with normative evaluation.

Viewing the Model Rules from the perspective of a synthetic system also fails to adequately measure their effectiveness. Scanning their table of contents shows that the Rules cover a broad and comprehensive range of duties and responsibilities in an organized fashion. The Rules are also by and large consistent rather than contradictory. Surely tensions exist within the rules. For example, the duty of confidentiality conflicts, to some degree, with a lawyer's ability to disclose information in order to prevent client crime and fraud.[19] Similarly, the prohibition against frivolous claims and defenses must be reconciled with the equally-recognized duty to preserve a client's constitutional right against self-incrimination.[20] Yet, the Rules attempt to embrace and balance these tensions, rather than disregard or dismiss them. The Rules are to be read together so that lawyers are not left to choose between conflicting provisions. Despite such comprehensiveness and consistency, an analysis of the Rules based on these attributes is not an adequate measure of their effectiveness. This type of analysis establishes only that whatever the Rules are doing, they are doing it *consistently*. This approach leaves unanswered the important question of whether the Rules are functioning as effectively as possible in their aim as a normative system.

The Model Rules are also an effective hermeneutic system because they lend themselves well to interpretation. They not only state clear

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therefrom"); *see also id.* at R. 1.0(k) ("'Screened' denotes the isolation of a lawyer from any participation in a matter. . . .").

18. *Id.* at R. 1.0 cmt. 9 (explaining that screening requires "such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.").

19. *Compare id.* at R. 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client. . . ."), *with id.* at R. 1.6(b) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary" to prevent death or substantial bodily harm or to prevent crime or fraud using the lawyer's services.).

20. *Compare id.* at R. 3.1 ("A lawyer shall not bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous. . . ."), *with id.* at R. 3.1 ("A lawyer for the defendant in a criminal proceeding or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.").

rules, but also illustrate clear principles such as the duty of loyalty[21] both during and after the representation[22] and the duties of independence,[23] honesty,[24] and discretion.[25] The Rules also provide lawyers with objectives for things like pro bono service[26] and remediation of client wrongs,[27] which further suggests rule- and principle-based possibilities and paradigms—common components of any comprehensively hermeneutic system. As useful as they are, hermeneutics alone also fail to provide a full and complete perspective on the Model Rules. Hermeneutic rules and principles are too didactic and the paradigms too bound by context, character, and time to achieve this article's broader objective of gaining a coherent and synthetic perspective on the profession.

The Model Rules also seem fully adequate as a pragmatic solution. Indeed, the democratic process by which the American Bar Association enacts the Rules practically ensures their pragmatic nature.[28] A king ruler would probably have imposed a different set of Rules—perhaps more idealistic and utopian or perhaps more regulatory and constraining. The fact that the profession regulates itself through a representative body that debates and acts on rule recommendations ensures that the Rules comport rather neatly with what lawyers are actually willing to do. The Bar's willingness to follow the Rules is evident in their having been adopted or at least used as a model in a substantial majority of jurisdictions.[29]

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21. *See id.* at R. 1.7 (entitled "Conflict of Interest: Current Clients"); *id.* at R. 1.8 (entitled "Conflict of Interest: Current Clients: Specific Rules"); *id.* at R. 1.8(f) ("A lawyer shall not accept compensation for representing a client from one other than the client" except under certain conditions.).

22. *See id.* at R. 1.9 (entitled "Duties to Former Clients").

23. *See id.* at R. 2.1 ("[A] lawyer shall exercise independent professional judgment. . . ."); *id.* at R. 5.4 (entitled "Professional Independence of a Lawyer").

24. *See id.* at R. 4.1 (entitled "Truthfulness in Statements to Others").

25. *See id.* at R. 2.1 ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation.").

26. *See id.* at R. 6.1 ("Every lawyer has a professional responsibility to provide legal services to those unable to pay.").

27. *See id.* at R. 1.6(b)(3) (stating that a lawyer may disclose confidential information "to prevent, mitigate or rectify substantial injury to the financial interests or property of another").

28. *See* MORTIMER D. SCHWARTZ ET AL., PROBLEMS IN LEGAL ETHICS 37-38, 40-41 (7th ed. 2005) (describing the organization of the American Bar Association and its Commission on Evaluation of Professional Standards, as well as giving a brief history of the promulgation and adoption of the Model Rules).

29. *See id.* at 40 ("Roughly forty states and other jurisdictions have adopted new legal ethics rules patterned on the ABA Model Rules. . . ."); *see also* Gregory C. Sisk, *Iowa's Legal Ethics Rules—It's Time to Join the Crowd*, 47 DRAKE L. REV. 279, 280 n. 6 (1999) (stating that thirty-nine states have adopted ethics rules patterned after the ABA

The fact remains, however, that the Bar's pragmatic adoption of and efforts to enforce the Model Rules also fail as an adequate measure of the Rules' effectiveness. The mere fact of the Bar's endorsement of the Rules does little to help us understand, appreciate, and evaluate them. Take into consideration, for example, the low esteem in which lawyers are held despite the widespread adoption of these rules,[30] or the relatively infrequent enforcement of lawyer disciplinary rules.[31] Both could be seen as indicative of the pragmatic failure of the Rules. Conversely, the latter may be seen as evidence that the Rules work quite well. The question is how does one evaluate empirical evidence regarding the Model Rules without having an understanding and standard against which to evaluate? Ethical systems must in some respect be judged from outside the pragmatic experience of the practitioner because judging solely by pragmatic experience is not ethics but description. Ethics connotes comparison to a superior, or at least minimally acceptable, normative standard.

This brief survey brings us to one last possibility: an evaluation of the Model Rules based on whether they articulate a meaningfully symbolic system. Individual rules, subsets of rules, and the Rules as a whole create a symbolic view of lawyers, clients, adversaries, and the legal system that is based on collective assumptions made by the Rules' drafters about each of these categories. One cannot regulate a lawyer without assuming that the lawyer possesses certain characteristics. To make a rule without making certain assumptions about lawyers in general is to regulate in a vacuum—without problem, premise, or purpose. The same consideration holds true for clients: to enact a lawyer-conduct regulation absent assumptions about the client is vacuous. Clearly, the rule-makers must also have made certain assumptions about the elements of a lawyer's world, such as clients, adversaries, and the professional marketplace, before attempting to regulate the lawyer's conduct towards these elements. Identifying these symbolic assumptions enables a meaningful study of the Rules. Indeed, what better way to understand and synthesize the Rules than to consider their unexposed foundational assumptions? Simply identify the underlying assumptions upon which

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Model Rules and that other states appear prepared to adopt similar rules).

30. *See* William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325, 325-26 (1996) (explaining that lawyer corruption, greed, and selfishness contribute to the profession's poor image).

31. *See* George C. Harris, *Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients Through Disclosure of Constituent Wrongdoing*, 11 GEO. J. LEGAL ETHICS 597, 660 (1998) ("[G]iven the infrequency of enforcement of professional conduct rules, it is safe to assume that those rules have marginal effect on lawyer behavior. . . .").

the Rules are based and a symbolic perspective on the profession emerges.

II. The Symbolic World of the Model Rules of Professional Conduct

The Model Rules are designed for application in a hazardous, foreboding, conflict-ridden and, in an important sense, *chivalric* world. Consider, for example, the Rules against conflicts of interest.[32] The rules governing conflicts of interest reflect the value placed on loyalty to the client and on independent judgment by the legal profession. In fact, these are the principles that the conflict of interest rules might be said to represent. The proscriptions against conflicts of interest demand generally that a lawyer's allegiance be to a single client.[33] These rules also require that a lawyer's advice to that client be free from outside influence, including influence arising from personal interest.[34] Why does the profession so deeply value loyalty and independence? What are we assuming about our professional world when we require lawyers to embrace these concepts? Loyalty and independence from outside influence take on critical importance in situations of stress, adversity, and challenge. It is in hazardous environments—like prisons, high-crime areas, or the barbaric lands that surrounded feudal estates in times past—that allegiance and loyalty (whether to leader, gang, or lord) become vital. The Rules' demand for independent allegiance is based on symbolic assumptions about the nature of a lawyer's world—a world of conflict and battle in an adversarial and contentious setting.

Thus, there exists the assumption that the Model Rules relate to a perilous world of substantial danger and risk in which participants (clients) require loyal and zealous support in order to best protect their interests and assure positive outcomes. Clients are a class set apart by their need for legal representation. This, in itself, speaks volumes about the unusual world in which clients find themselves. At first blush, it may

32. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2006) (entitled "Conflict of Interest: Current Clients"); *id.* at R. 1.8 (entitled "Conflict of Interest: Current Clients: Specific Rules"); *id.* at R. 1.9 (entitled "Duties to Former Clients"); *id.* at R. 1.10 (entitled "Imputation of Conflicts of Interest: General Rule"); *id.* at R. 1.11 (entitled "Special Conflicts of Interest for Former and Current Government Officers and Employees"); *id.* at R. 1.12 (entitled "Former Judge, Arbitrator, Mediator or Other Third-Party Neutral"); *id.* at R. 1.18 (entitled "Duties to Prospective Client"); *id.* at R. 2.3(b) ("When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.").

33. *Id.* at R. 1.7(a) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest.").

34. *See, e.g., id.* at R. 5.4(c) ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.").

appear amusing to compare our legal system to a perilous feudal society or to attribute to lawyers a chivalric loyalty. However, any dubiousness in this regard evaporates when one considers the manifold legal dangers that clients face.[35] In truth, the physical, mental,[36] emotional,[37] financial,[38] and familial[39] perils of modern phenomena, like divorce, loss of child custody, job loss, financial liability, business failure, home loss, bankruptcy, arrest, conviction, incarceration, and capital punishment, are no less hazardous or traumatic than were the dangers faced in ancient or feudal society. The symbolic world of the Model Rules treats the legal system as a treacherous environment in which clients are best protected by a lawyer ally.[40]

The Model Rules correctly view these dangers as animate, directed, and potent. In the symbolic world of the Rules, threats do not merely lie latent but rather stalk[41] and pursue[42] the client, sometimes even from within a client organization.[43] There is the rare client who seeks preventive counsel—perhaps to avoid commission of a crime[44] or breach of a contract. The vast majority of law practice, however, involves the

35. *See id.* at pmbl. cmt. 13 ("Lawyers play a vital role in the preservation of society.").

36. *See, e.g., id.* at R. 1.14 cmt. 1 ("[A] severely incapacitated person may have no power to make legally binding decisions.").

37. *See, e.g., id.* at R. 1.4 cmt. 7 ("[A] lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client.").

38. *See, e.g., id.* at R. 1.8(e) ("A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation. . . .").

39. *See, e.g., id.* at R. 1.14(b) ("[T]he lawyer may take reasonably necessary protective action, including . . . seeking the appointment of a guardian ad litem, conservator or guardian.").

40. *See, e.g., id.* at R. 6.1 cmt. 2 (recognizing "the critical need for legal services that exists among persons of limited means").

41. *See, e.g., id.* at R. 3.8(c) (" The prosecutor in a criminal case shall . . . not seek to obtain from an unrepresented accused a waiver of important pretrial rights. . . .").

42. *See, e.g., id.* at R. 3.8(a) ("The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. . . .").

43. *See id.* at R. 1.13(b) ("If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.").

44. *See id.* at R. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").

client who has already committed the crime or breached the contract;[45] therefore, the Rules must assume that loss, liability, and incarceration are of real threat to most clients. It is precisely because of these real and significant threats that the Rules assume that clients need a lawyer who possesses the requisite competence and diligence.[46] If the stakes were not what they are, perhaps some lesser standard would suffice. Instead, the stakes are high—literally life or death in some situations and imminent failure or fortune in others. The perils attendant to such harms are commonly so novel and difficult[47] that they create tales that are compelling enough to warrant valuable literary rights.[48] The Rules' symbolic assumption of a perilous world accurately reflects the reality of both the client's condition and the lawyer's professional environment.

Another assumption underlying the Model Rules is that the perilous symbolic world in which lawyers and clients operate is neatly divided between good and evil, right and wrong, and truth and falsity. The Rules clearly recognize that there is such a thing as truth. While the principle of truth is simple and straightforward, it has, nonetheless, presented a great challenge to many, even those of great influence, through the ages. The Rules require honesty and full disclosure to a client[49] and prohibit false statements to prospective clients in advertising communications.[50] Similarly, the Rules require honesty and fair dealing with adversaries[51] and candor to the tribunal, including disclosure of adverse controlling law to an otherwise uninformed tribunal.[52]

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45. *See id.* at R. 3.1 ("A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.").

46. *See id.* at R. 1.1 (entitled "Competence"); *id.* at R. 1.3 (entitled "Diligence").

47. *See id.* at R. 1.5(a)(1) (noting that "the novelty and difficulty of the questions involved" are considered in determining the reasonableness of a fee).

48. *Id.* at R. 1.8(d) ("Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.").

49. *See id.* at R. 1.0(e) ("'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."); *id.* at R. 1.4(a)(1) ("A lawyer shall . . . promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in R. 1.0(e), is required by these Rules. . . ."); *id.* at R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

50. *Id.* at R. 7.1 ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.").

51. *Id.* at R. 3.4(b) ("A lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. . . .").

52. *Id.* at R. 3.3(a)(2) ("A lawyer shall not knowingly . . . fail to disclose to the

For all of the academic world's contrary positivist, realist, and relativist writing, the symbolic world of the Model Rules assumes the objectivity of truth and falsehood. The world in which the Rules exist is also a somewhat chaotic place in which the smallest cause can produce the greatest result—a phenomenon known as the "butterfly effect." Some of the Rules apply only in cases of "substantial" circumstances,[53] "reasonable" conduct,[54] or "significant" risks,[55] suggesting a cumulative model that permits or excuses minor transgressions with minimal effects. Yet, many of the Rules are not so limited and apply with equal force to even the smallest transgression. For example, not even one dollar may be commingled,[56] surcharged,[57] or miscalculated.[58] Not even a single false claim or defense is excused,[59] and not a word to a tribunal may be

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tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. . . .").

53. *See id.* at R. 1.0(l) ("'Substantial' when used in reference to degree or extent denotes a material matter of clear and weighty importance."). For examples of use of the word "substantial" throughout the Model Rules, see *id.* at R. 1.6(b)(1) (discussing "substantial bodily harm"); *id.* at R. 1.6(b)(2) (discussing "substantial injury to the financial interests or property of another"); *id.* at R. 1.8(c) (prohibiting lawyers from soliciting "any substantial gift from a client"); *id.* at R. 1.8(d) (prohibiting lawyers from obtaining literary rights that are "based in substantial part on information relating to the representation"); *id.* at R. 1.11(a)(2) (prohibiting a lawyer from representing a client if he has "participated personally and substantially as a public officer or employee" in the matter); *id.* at R. 8.3(a) (addressing Rule violations that raise a "substantial question" as to a lawyer's fitness).

54. *See id.* at R. 1.0(h) ("'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer."). For examples of use of the word "reasonable" throughout the Model Rules, see *id.* at R. 1.3 (requiring a lawyer to act with "reasonable diligence" when representing a client); *id.* at R. 1.4(a)(4) (requiring a lawyer to comply with all "reasonable requests for information" from clients).

55. For examples of use of the word "significant" throughout the Model Rules, see *id.* at R. 1.7(a)(2) (discussing when a "significant risk" creates a concurrent conflict of interest); *id.* at R. 1.10(a) (discussing when a "significant risk" requires that a conflict be imputed on all lawyers in a firm); *id.* at R. 7.3(a) (prohibiting a lawyer from soliciting business when his own pecuniary gain is a "significant motive").

56. *See id.* at R. 1.15(b) ("A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.").

57. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 379 (1993) ("[I]n the absence of disclosure to the contrary, it would be improper if the lawyer assessed a surcharge on these disbursements over and above the amount actually incurred unless the lawyer herself incurred additional expenses beyond the actual cost of the disbursement item.").

58. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2006) ("Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.").

59. *See id.* at R. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. . . .").

false and untrue whether or not it is material.[60] These prohibitions recognize that a client's interests can be irreparably harmed and prejudiced by even the smallest of transgressions related to truth, honesty, candor and fidelity. The Rules appropriately require lawyers be hyper-vigilant in these situations and circumstances.

It is only by recognizing the nature of the world in which clients operate that a student of the law can fully grasp and appreciate the Model Rules and their significance. For example, if the client's world posed minimum hazard and risk, the Rules would make little sense. Given the assumptions of danger and risk in the client's world, however, the provisions seem obvious. Again, in the face of such peril, the need for things like allegiance, competence, and diligence is clear.

There is no compelling evidence that the assumptions upon which the Rules are based are incorrect. To the contrary, the hazards that loom are as palpable as the iron bars behind which lawyers often counsel their clients. A system of professional rules that assumed that the client's risks were ephemeral, that his world was sanguine, and that his fears were nothing but paranoia would be more fitting to a Buddhist retreat than an urban office. The symbolic assumptions about the client's environment which underlie the Rules are insightful, accurate, and astute, and they properly serve as a foundation for the standards of professional responsibility.

III. The Model Rules' Symbolic Lawyer

In addition to assuming that the legal system operates in a symbolic world, the Model Rules also assume that the rules will regulate a certain kind of symbolic lawyer. The foundational assumption in this regard is that the symbolic lawyer is corruptible, or subject to temptation, in professional practice and personal nature.[61] What purpose would elaborate rules prohibiting specific behavior serve if those governed by the regulations were pure? The Rules assume that lawyers are not perfect, are of fallible character, and that absent such proscriptions, they would be less ethical.[62] Indeed, the specific prohibitions within the Rules neatly reflect the symbolic lawyer's natural tendency for corruption. The

60. *See id.* at R. 3.3(a)(1) ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal. . . .").

61. *See, e.g., id.* at R. 8.4 (explaining that it is "professional misconduct" for a lawyer to violate the Model Rules, commit a certain type of crime, act dishonestly or fraudulently, prejudice the administration of justice, imply the ability to bribe judges, or help a judge violate judicial ethics).

62. *See id.* at R. 8.5(a) ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs.").

Model Rules do not prohibit lawyers from acting like a loon because, frankly, lawyers are not prone to do so. The Rules only proscribe and address that conduct which lawyers are reasonably and foreseeably prone to commit. One temptation to which lawyers are naturally suspect is an inflated sense of ego and pride, which is addressed in the Rules' prohibition against making unsubstantiated, self-aggrandizing comparisons of oneself to other lawyers.[63] The Rules also suggest many other evils that tempt and prey upon lawyers including committing crimes[64] or fraud,[65] lying,[66] leveraging,[67] bribing,[68] concealing,[69] obstructing,[70] disparaging,[71] disobeying,[72] and delaying.[73] Indeed, given the breadth of the behaviors regulated and the depravity of the wrongs addressed, the Rules appear to assume that the symbolic lawyer is not only susceptible to corruption but actually prone to such an end.

A second foundational, symbolic assumption that the Model Rules make about lawyers is that they are capable of meaningful self-examination. The Rules assume that lawyers are perfectible, or at least redeemable through education, introspection, and self-discipline. It is assumed that when confronted by the prospect of their misconduct, lawyers will conform by altering their behavior as required rather than by justifying their bad acts. In this regard, the Model Rules are hortatory: they warn, instruct and attempt to equip lawyers to make ethical

63. *See id.* at R. 7.1 cmt. 3 ("[A]n unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading. . . .").

64. *See id.* at R. 8.4(b) ("It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer. . . .").

65. *See id.* at R. 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . .").

66. *Id.*

67. *See id.* at R. 1.15 cmt. 3 ("[A] lawyer may not hold funds to coerce a client into accepting the lawyer's contention.").

68. *See id.* at R. 7.6 ("A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.").

69. *See id.* at R. 3.4(a) ("A lawyer shall not . . . conceal a document or other material having potential evidentiary value.").

70. *See id.* ("A lawyer shall not . . . unlawfully obstruct another party's access to evidence. . . .").

71. *See id.* at R. 8.2(a) ("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.").

72. *See id.* at R. 3.4(c) ("A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal. . . ."); *id.* at R. 8.4(d) ("It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice. . . .").

73. *See id.* at R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

decisions through self-examination and self-criticism.[74] The necessity of this assumption to the creation of an effective system of Rules is less obvious than one might think. The Rules could have been drafted in a style similar to that of a criminal code, which was to be read and applied by ethics "prosecutors" (disciplinary authorities) as purely an enforcement tool. Instead, the Rules were written to be read and accepted by the putative lawyer-transgressors themselves. True, the Rules require managing partners and supervisory lawyers to take reasonable measures to ensure rule-compliance by subordinate lawyers[75] and non-lawyer assistants.[76] However, the Rules also require subordinate lawyers to know and comply with the Rules notwithstanding contrary directives from their supervisors.[77]

The Model Rules are for the benefit of all lawyers, not merely for ethics "prosecutors" or specialists. The Rules are far more than a set of regulations upon which to administer discipline as an after-effect of a violation; they are a system of education and deterrence. The symbolic lawyer envisioned by the Rules is a self-examining, self-critical ethicist, who is capable (if appropriately educated) of dealing properly with deception by clients[78] and witnesses[79] and of avoiding things like false advertising,[80] misrepresenting the lawyer's status to unrepresented persons,[81] dealing unfairly with adversaries,[82] and making misstatements

74. *See, e.g., id.* at pmbl. (enumerating "A Lawyer's Responsibilities").

75. *Id.* at R. 5.1(a) ("A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."); *id.* at R. 5.1(b) ("A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.").

76. *Id.* at R. 5.3 (entitled "Responsibilities Regarding Nonlawyer Assistants").

77. *See id.* at R. 5.2(a) ("A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.").

78. *See id.* at R. 1.2(d) ("A lawyer shall not . . . assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . ."); *id.* at R. 1.16(b)(2) ("[A] lawyer may withdraw from representing a client if . . . the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent. . . ."); *id.* at R. 3.3(a)(3) ("If . . . the lawyer's client . . . has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures. . . .").

79. *See id.* at R. 3.3(a)(3) ("If . . . a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures. . . .").

80. *See id.* at R. 7.1 ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.").

81. *See id.* at R. 4.3 ("When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.").

82. *See id.* at R. 3.4(a) ("A lawyer shall not . . . unlawfully alter, destroy or conceal a

to third persons.[83]

In addition to assuming the lawyer's capacity for constructive self-criticism, the Model Rules likewise assume that lawyers will seek to act ethically because of an innate or trained propensity toward ethical obedience, even in an environment of corruption. It is assumed that lawyers will refer to and obey the Rules even when in the questionable company of perjurious[84] or repugnant[85] clients and witnesses,[86] murderers,[87] other criminals,[88] or schemers.[89] The Rules assume that the symbolic lawyer so desires to behave ethically that the lawyer is willing to stand apart from the worst of influences. The Rules further assume that the symbolic lawyer is not only willing to resist the bad but also willing to sacrifice her personal rights and interests to advance the good causes of her client.[90] The Rules' symbolic lawyer not only is fair and reasonable in charging fees[91] but also has truly charitable and civic aspirations.[92] One illustration of this point is the Rules' exception to the prohibition against in-person solicitation when the solicitation is for charitable rather than pecuniary purposes.[93] If it is in the nature of

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document or other material having potential evidentiary value.").

83. *See id.* at R. 4.1(a) ("[A] lawyer shall not knowingly . . . make a false statement of material fact or law to a third person. . . .").

84. *See id.* at R. 3.3(a)(3) ("If . . . the lawyer's client . . . has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures. . . .").

85. *See id.* at R. 1.16(b)(4) (stating that a lawyer may withdraw from representation if "the client insists upon taking action that the lawyer considers repugnant"); *id.* at R. 6.2(c) (stating that a lawyer shall not seek to avoid appointment unless "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.").

86. *See id.* at R. 3.3(a)(3) ("If . . . a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures. . . .").

87. *See id.* at R. 1.6(b)(1) (stating that a lawyer may reveal information necessary "to prevent reasonably certain death").

88. *See id.* at R. 1.6(b)(2) (stating that a lawyer may reveal information necessary "to prevent the client from committing a crime" under certain conditions).

89. *See id.* at R. 1.6(b)(2) (stating that a lawyer may reveal information necessary "to prevent the client from committing a . . . fraud that is reasonably certain to result in substantial injury to the financial interests or property of another" under certain conditions).

90. *See id.* at R. 6.1(b)(1) (stating that a lawyer should provide legal services "at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights").

91. *Id.* at R. 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.").

92. *See id.* at R. 6.1(b)(1) (stating that a lawyer should provide legal services "at no fee or substantially reduced fee to . . . charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes").

93. *See id.* at R. 7.3 ("A lawyer shall not by in-person, live telephone or real-time

chivalry to forgo one's own interests to advance the interests of another, the Rules assume some extent of that admirable quality.[94] The Rules also encourage membership in legal services organizations[95] and organizations devoted to legal reform,[96] and they relax conflicts requirements to encourage participation in court-annexed legal services programs.[97] The Rules expressly reject the assumption that lawyers would routinely advance unsupportable causes[98] and instead require that lawyers take the side of truth over falsity.[99] The Rules assume a symbolic lawyer who desires ethical action and is willing to engage in personal sacrifice to achieve this end.

The Model Rules temper the optimism of these symbolic assumptions in at least one important respect by assuming that lawyers, although capably self-critical and desirous of good, may require ethical counsel to achieve these goals. The practice of law remains a self-regulating profession.[100] Lawyers grant themselves no regulatory privilege against self-incrimination but must instead answer disciplinary charges and correct disciplinary officials' misapprehension of their innocence.[101] Proof that the Rules properly assume that lawyers may not act ethically absent professional advice lies in the provision that allows lawyers to disclose confidences to the extent necessary to receive ethical counsel.[102]

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electronic contact solicit professional employment from a prospective client *when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. . . .*") (emphasis added).

94. *See id.* at R. 1.3 cmt. 1 ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer. . . .").

95. *See id.* at R. 6.3 ("A lawyer may serve as a director, officer or member of a legal services organization. . . .").

96. *See id.* at R. 6.4 ("A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer.").

97. *See id.* at R. 6.5(a)(1) (stating that a lawyer in a court-annexed legal services program "is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest").

98. *See id.* at R. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. . . .").

99. *See id.* at R. 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty. . . .").

100. *Id.* at pmbl. cmt. 10 ("The legal profession is largely self-governing."); *see also id.* at R. 8.5(a) ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs.").

101. *See id.* at R. 8.1(b) (stating that a lawyer in connection with a bar disciplinary matter shall not "fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority").

102. *See id.* at R. 1.6(b)(4) (stating that a lawyer may reveal confidential information

The underlying optimism with which the symbolic lawyer is viewed is further tempered by the suggestion that, where possible, lawyers avoid rather than attempt to manage bad influences.[103] These mixed symbolic characteristics appear consistent with traditional moral and religious notions of man's corrupted but perfectible nature and with the text- and counsel-based transformative means by which man approaches that perfection. Overall, the Rules' symbolic lawyer is readily understood to be a fatally human, but also curiously divine, professional.

IV. The Model Rules' Symbolic Client

The Model Rules assume in their fabric a symbolic client: a person who is alone and vulnerable and in need of a loyal ally. The Rules, while directed to lawyers, must assume certain characteristics, capabilities, and incapacities of clients in order to effectively regulate lawyer conduct. For example, the Rules do not require lawyers to feed their clients because clients are presumed capable of obtaining their own nourishment. In fact, the Rules expressly prohibit lawyers from providing financial assistance for things like a client's subsistence in cases of pending or anticipated litigation.[104]

Except in special circumstances,[105] the Model Rules assume that a client is generally capable of protecting his own interests. The Rules do not, for instance, routinely assume that clients are so incapable of deciding their own matters that lawyers should decide those matters for them. Clients, not lawyers, are to determine the objectives of their representation and are to make key decisions regarding it, such as whether to settle, enter a plea, go to trial, waive a jury, or testify.[106] The Rules require lawyers to counsel clients to the extent necessary for the clients to make informed decisions.[107] This is because the symbolic

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"to secure legal advice about the lawyer's compliance with these Rules").

103. *See id.* at R. 1.16(b)(2) ("[A] lawyer may withdraw from representing a client if . . . the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent. . . ."); *id.* at R. 6.2(a) ("A lawyer shall not seek to avoid appointment . . . [unless] representing the client is likely to result in violation of the Rules of Professional Conduct or other law. . . ."); *see also id.* at R. 1.2(b) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

104. *Id.* at R. 1.8(e) ("A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation. . . .").

105. *See id.* at R. 1.14 (entitled "Client with Diminished Capacity").

106. *See id.* at R. 1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation. . . .").

107. *Id.* at R. 1.4(a)(1) ("A lawyer shall . . . promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in R. 1.0(e), is required by these Rules. . . ."); *id.* at R. 1.4(b) ("A lawyer shall explain a matter

client is presumed capable of making these decisions, but only with a lawyer's help.

The Model Rules' presumption of client capability is in some respects extraordinary. By and large, a similar presumption does not exist in the case of a doctor and patient or even the case of an auto mechanic and patron. In these situations, the service recipient's (i.e. the patient's) active participation is often viewed as less vital, so the service provider (i.e. the doctor) spends less time counseling him. To the contrary, respectful counsel between a lawyer and client is considered necessary to client decision-making, a right which is afforded to the client because of the Rules' symbolic view of the client.

Though capable, the Model Rules' symbolic client suffers a particular kind of vulnerability when in the absence of a lawyer ally. The Rules require diligent and timely,[108] as well as competent[109] and licensed,[110] representation and lawyer-like conduct for all law-related services.[111] The Rules contain these requirements presumably because without them clients would be at greater risk and disadvantage. Although the Rules give decision-making authority to the client,[112] the Rules also authorize lawyers to carry out their work with the implied authority of the client.[113] Not only do lawyers act for clients, but also the Rules permit lawyers and clients to become economic allies through contingency fee agreements.[114] This symbolic alliance, though, is a peculiar one in which the lawyer is not a typical business partner, associate,[115] or intimate acquaintance of the client.[116] Instead, the lawyer

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to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

108. *See id.* at R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

109. *See id.* at R. 1.1 ("A lawyer shall provide competent representation to a client.").

110. *Id.* at R. 5.5(a) ("A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.").

111. *Id.* at R. 5.7(a) ("A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services. . . .").

112. *Id.* at R. 1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation. . . .").

113. *Id.* ("A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.").

114. *Id.* at R. 1.5(c) ("A fee may be contingent on the outcome of the matter for which the service is rendered. . . .").

115. *See id.* at R. 1.8(a) ("A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client" except under certain conditions.); *id.* at R. 1.8(i) ("A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client" except in certain forms.).

116. *Id.* at R. 1.8(j) ("A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.").

is a curiously independent ally.[117] The Rules prohibit lawyers from communicating *ex parte* with represented persons,[118] based on the assumption that represented persons are particularly vulnerable when their counsel are not present. As a result of the same presumed vulnerability, the Rules also prohibit lawyers from sharing fees with non-lawyers,[119] conducting in-person solicitation,[120] advertising nominal certification,[121] and using misleading trade names.[122] The Rules proscribe these behaviors based on an assumption that clients cannot manage their legal affairs absent the loyalty and allegiance of counsel. Without counsel, clients are assumed to be alone in an unfamiliar and hazardous world or divided from those who would ordinarily protect them.

This is not to say that clients do not have natural allies. These allies are often found in marital partners, business associates, parents, other family members, agencies, and other professionals. The fact remains, however, that many legal matters involve the disruption or termination of these very relationships—the separation of the client from the people who would ordinarily provide him with support. Examples include divorce and child custody matters, business dissolution cases, professional malpractice suits, will contests, and so on. The same family members, friends, business associates, and professionals who were once the client's confidants and supporters may become her adversaries. The client is often divided from her natural allies by the very matter for which she seeks legal counsel—hence the client's need for a lawyer ally.

The Model Rules also assume a symbolic client who is worthy of a lawyer's sacrificial service. The Rules encourage pro bono service[123] and require a lawyer to accept indigent representation, except for good

117. *See id.* at R. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client. . . .").

118. *See id.* at R. 4.2 ("[A] lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter. . . .").

119. *Id.* at R. 7.2(b) ("A lawyer shall not give anything of value to a person for recommending the lawyer's services" with certain exceptions.).

120. *Id.* at R. 7.3(a) ("A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain" with certain exceptions.).

121. *Id.* at R. 7.4(d) ("A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law" with certain exceptions.).

122. *Id.* at R. 7.5(a) ("A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1.").

123. *See id.* at R. 6.1 ("Every lawyer has a professional responsibility to provide legal services to those unable to pay.").

cause shown.[124] Further, the Rules prohibit withdrawal from a client's matter if that withdrawal would have material adverse effects on the client[125] and require a lawyer to continue to represent a client if ordered to do so.[126] Even if a lawyer properly withdraws from a case, the lawyer has a continuing duty to adequately protect the former client's interests.[127] Additional client protections are afforded by the prohibition against the artificial sale of a law practice[128] and the rule that neither a former client[129] nor another lawyer[130] may restrict a lawyer's right to practice or represent certain clients. Implicit in these rules is the assumption that clients have value worthy of a lawyer's service—not just some value but value that is greater than the lawyer's interests. In other words, the Rules require that lawyers place a client's interests ahead of their own. By requiring candid advice[131] rather than the cheers of a sycophant, the Rules also assume that lawyers should care more about clients than about causes. It is not the conniving client whom the Rules dictate we should deplore but the client's connivance. It is when a client persists in a crime or fraud that the Rules permit, but notably do not require, withdrawal.[132] The Rules presume that the client is salvageable—that the lawyer-client relationship should be preserved—even when the situation cannot be salvaged. The symbolically valued and salvageable client is in some respects an extraordinarily chivalric assumption and one that is not typically the basis for relationships in the business world outside of this noble profession.

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124. *See id.* at R. 6.2 ("A lawyer shall not seek to avoid appointment by a tribunal. . . .").

125. *See id.* at R. 1.16(b) ("[A] lawyer may withdraw from representing a client if . . . withdrawal can be accomplished without material adverse effect on the interests of the client. . . .").

126. *See id.* at R. 1.16(c) ("When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.").

127. *See id.* at R. 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests. . . .").

128. *Id.* at R. 1.17(a) (stating that a lawyer may sell a law practice only if the "seller ceases to engage in the private practice of law, or in the area of practice that has been sold").

129. *Id.* at R. 5.6(b) (stating that a lawyer shall not participate in making "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.").

130. *Id.* at R. 5.6(a) (stating that a lawyer shall not participate in making a partnership agreement "that restricts the right of a lawyer to practice after termination of the relationship").

131. *See, e.g., id.* at R. 2.1 ("[A] lawyer shall . . . render candid advice.").

132. *See id.* at R. 1.16(b)(2) ("[A] lawyer may withdraw from representing a client if . . . the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent. . . .").

V. The Model Rules' Symbolic Adversary

The symbolic world of the Model Rules takes a distinctive approach to adversaries as well. Though much of what lawyers do involves competition over substantial stakes, the Rules do not allow that conflict to devalue the participants in a cutthroat competitive model. The Rules' symbolic world values adversaries much as it requires lawyers to value their own clients. The Rules require lawyers to act fairly toward their adversaries[133] and include prohibitions on obstructing access to[134] or falsifying evidence,[135] disobeying court rules,[136] engaging in frivolous discovery, and failing to respond to legitimate requests.[137] At trial, lawyers must continue to treat their adversaries properly by not alluding to irrelevant matters,[138] making assertions of personal knowledge, or offering personal opinion in the role of an advocate.[139] These prohibitions against lawyers speaking as a witness or acting as a judge are really quite extraordinary when taken in context. The Rules, in effect, recognize that lawyers are not to judge others[140]—that judgment of an adversary lies beyond the personal opinion or predilection of the lawyer. The Rules further protect fairness in the adversary process by prohibiting lawyers from placing witnesses beyond an adversary's reach.[141] The Rules clearly seek to preserve the probability of a just and

133. *Id.* at R. 3.4 (entitled "Fairness to Opposing Party and Counsel").

134. *Id.* at R. 3.4(a) ("[A] lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.").

135. *Id.* at R. 3.4(b) ("[A] lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. . . .").

136. *Id.* at R. 3.4(c) ("A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal. . . .").

137. *Id.* at R. 3.4(d) ("A lawyer shall not . . . make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request. . . .").

138. *Id.* at R. 3.4(e) ("A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence. . . .").

139. *Id.* ("A lawyer shall not . . . assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused. . . ."); *see also* R. 3.7 (entitled "Lawyer as Witness").

140. *See, e.g., id.* at R. 1.11 (distinguishing a lawyer's private practice role from a lawyer's participation as a government officer); *id.* at R. 1.12(a) ("[A] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator, or other third-party neutral. . . ."); *id.* at R. 2.4(b) ("A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them.").

141. *Id.* at R. 3.4(f) ("A lawyer shall not . . . request a person other than a client to

fair result in the legal system.

The overriding symbolic assumption within the Rules is that legal contests are not meant to destroy adversaries but to prevent, deter, resolve, and redress criminal, fraudulent, and other law-breaking conduct. Though battles are waged, their purpose is not the destruction of another but the condemnation of law and code-breaking conduct. The Rules are in this respect redemptive. Every contestant is presumed capable of absolving his own wrong, even if by conviction and sentence or by liability and satisfaction of judgment. No contestant is so easily condemned as to justify procedural corruption.

Indeed, because the real enemies are not the contestants but their misconduct, the Rules' symbolic contest must be valorous. For example, the Rules require lawyers to promptly bring an adversary's inadvertent disclosure of confidential information to the adversary's attention.[142] In addition, the Rules prohibit a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person and from using methods of obtaining evidence that would otherwise violate the rights of such a person.[143] The Rules prohibit lawyers from unduly influencing judges, jurors, and other officials[144] and from engaging in conduct that is disruptive to tribunals,[145] especially through extra-judicial appeals to the masses.[146] Such conduct is prohibited because contestants ought only to be justly condemned rather than condemned by fiat or through influence. Prosecutors in particular must refrain from condemning by unsupported accusations[147] and from over-punishing through concealment of mitigating circumstances.[148] These symbolic assumptions are extraordinary in that even the worst of adversaries are highly valued in their redemptive capacity and are deemed to deserve fair treatment.

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refrain from voluntarily giving relevant information to another party. . . .").

142. *Id.* at R. 4.4(b) ("A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.").

143. *Id.* at R. 4.4(a) ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.").

144. *Id.* at R. 3.5(a) ("A lawyer shall not . . . seek to influence a judge, juror, prospective juror or other official by means prohibited by law. . . .").

145. *Id.* at R. 3.5(d) ("A lawyer shall not . . . engage in conduct intended to disrupt a tribunal.").

146. *Id.* at R. 3.6 (entitled "Trial Publicity").

147. *Id.* at R. 3.8(a) ("The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. . . .").

148. *Id.* at R. 3.8(d) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate guilt of the accused or mitigates the offense. . . .").

VI. The Model Rules' Symbolic Authority

From the broadest perspective, it could be concluded that the foremost symbolic assumption within the Model Rules is that authority judges lawyers. The fact that the Rules include a broad collection of "thou shalts" and "thou shalt nots" presumes that judgment is imminent—present at all times in all tasks a lawyer performs and all relationships a lawyer maintains. Indeed, the Rules prohibit a lawyer from knowingly speaking any false word to a tribunal, whether or not material, though out of further respect for the tribunal, only material misstatements need be affirmatively corrected.[149]

Such judgment-immanence is extraordinary and is also an extraordinarily useful and commendable assumption. This is so in part because in the workaday world outside of the professional rules, most people operate on the opposite assumption—that judgment requires both departure from the norm ("if everyone else is doing it, it must be okay") and detection ("if I can get away with it, I should do it"). These kinds of justifiers explain why drivers exceed the speed limit while continuously monitoring for law enforcement. Though they are plainly in violation of a meaningful law intended to preserve life and safety, speeding drivers knowingly violate that law to the extent of detection and enforcement because they presume no other judgment. To the contrary, the Rules assume a world of lawyers who recognize and value the immanence of judgment. They assume that lawyers will comply with the Rules because the Rules are promulgated authority and not merely because the lawyers could otherwise be caught and lose their law licenses. Yes, there are enforcement mechanisms outside of the Rules, but the Rules themselves say nothing about these mechanisms. The Rules merely say that their violation is professional misconduct[150]—as if lawyers should know that there is a value all its own to obeying authority without considering the possibility of detection and enforcement. In the Model Rules' symbolic world, authority is omnipresent.

The Model Rules also make certain assumptions regarding the nature of that authority: that it is worth obeying and respecting. If, in the symbolic world of the Rules, authority is immanent then it is also eminent. Various Rules require lawyers to obey[151] and show respect for authority rather than to insult or denigrate it.[152] Other Rules prohibit

149. *See id.* at R. 3.3(a)(1) ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal. . . .").

150. *See id.* at R. 8.4(a) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct. . . .").

151. *See id.* at R. 3.4(c) ("A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal. . . .").

152. *See id.* at R. 3.5(d) ("A lawyer shall not . . . engage in conduct intended to

lawyers from encouraging those in authority to violate the rules themselves.[153] The symbolic value of these measures lies not in cultivating a slavish attitude among lawyers to follow the rule of law no matter how constituted, but in cultivating an appreciation for the benevolence of authority generally—that without authority purposeful social relationships, no less the practice of law, would be impossible. In the Model Rules' symbolic world, authority has a value and eminence worth honoring if not exalting.

The Model Rules also encourage lawyers to appeal to authority[154]—to seek out authority in support of that which lawyers and clients require. The symbolic assumption is again that authority is generally beneficent and, moreover, that appeal to authority is an implicit condition of meaningful society. The symbolic lawyer must appeal to authority to serve client needs. But even so, in the symbolic world of the Rules, it is the spirit or penumbra of authority which the symbolic lawyer must accept as guide rather than the legalistic letter of authority. The Rules repeatedly temper the symbolic lawyer's temptation to exhibit and demand a rigid obedience with cautions that the rules are to be applied when substantial and material.[155] In this symbolic world, authority is immanent, eminent, beneficent, and sensitive.

VII. The Model Rules' Symbolic Economy

Taking these symbolic assumptions together, one can see that the Model Rules presume a kind of symbolic economy in which lawyers operate or ought to operate. Exposing the symbolic world of the Rules as enables one to recognize more readily the distinct normative economy that the Rules embody. The Rules presume that lawyers practice within a market of personal, professional, institutional, and community values.

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disrupt a tribunal."); *id.* at R. 8.2(a) ("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer. . . .").

153. *See id.* at R. 8.4(f) ("It is professional misconduct for a lawyer to . . . knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.").

154. *See id.* at R. 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."); *id.* at R. 3.3(b) (discussing disclosure to the tribunal); *id.* at R. 3.3(d) ("[A] lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision. . . ."); *see also id.* at R. 3.9 ("A lawyer representing a client before a legislative body or administrative agency in a non-adjudicative proceeding shall disclose that the appearance is in a representative capacity. . . .").

155. *See id.* at *R.* 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

As individuals, we do not necessarily share normative economies. Some of us do not value normative goods highly. Others of us do not accept the infinite supply of certain normative goods or their infinite reward when purchased. But the Rules suggest a normative economy by which the profession already benefits—and would benefit further if recognized and followed by a greater numbers of lawyers. That is, lawyers are quite familiar with the normative economy but primarily by intuition, whereas they are quite able to recognize the worldly professional economy about which much has been said and written. What then are the characteristics of the Rules' symbolic normative economy?

Given the judgment-immanence the Model Rules ascribe to authority, the Rules' normative economy is unquestionably providential rather than situational or probabilistic. The Rules presume that the fate of a lawyer is not governed by chance or circumstance but instead by an accumulation of the lawyer's judgments consistent with the normative economy in which the lawyer operates—and that the more consistent the lawyer, the more beneficent the judgment. No lawyer's fate is unfair because the normative economy is based on an order intuitively known to all of us and, moreover, because the goods within that economy are unlimited in supply. The goods within the lawyer's normative economy are distinct in another important respect: they have an innately more lasting value than the goods of the worldly professional economy. Another important distinction for the normative economy is that all of its participants—lawyers, clients, and adversaries—are on equal terms having equal power of purchase. Lawyers must therefore treat each participant in the normative economy as if he were no less valuable to the lawyer than the lawyer's own self, demanding in certain instances sacrificial professional service.

The normative economy's currency is not so much the lawyer's service as the lawyer's care, commitment, and concern within that range of goods defined normatively. One could thus say that the normative economy is perfectly efficient as to the lawyer's allocation of that currency because the normative economy's regulator is omniscient. That condition of omniscience alone demands a perfect obedience to the regulator's authority within the normative economy. There is no sense pretending or fooling around. Indeed, if the truth be known, it is not the enforcement of the Model Rules that condemns lawyers but, given that judgment is immanent, their promulgation. Under the Rules, lawyers succeed not by acquisition, self-pursuit, or self-preservation but, in large part, by self-abnegation. The normative economy bases itself on the lawyer's transformation rather than on utilitarian or instrumentalist regulation. The more a lawyer understands and follows the normative economy, the more the lawyer is likely to succeed in the monetary or

worldly economy at least in a manner in which success is relatively assured, satisfying, and stable. The normative economy does not burden lawyers but frees them to act in professionally meaningful and satisfying manners. Clients tend to recognize and seek out the counsel of lawyers who know the normative economy. On the other hand, lawyers who fail to render normative advice to clients in need of it tend to lose their clientele for lack of authority. The lawyer's obligation to render normative counsel is consistent with clients' intuited belief in and experienced embrace of the functionality and beneficence of the normative economy. Clients understand that their success depends on the normative economy more so than on the monetary imperatives on which some lawyers operate outside of the normative economy.

VIII. Conclusion

To summarize, one could say that the Model Rules make the symbolic assumption of a foreboding, conflict-ridden world in which the dangers to clients are animate and potent and in which the smallest wrongs can cause the greatest of harms. The Rules assume that this perilous symbolic world is one divided into right and wrong—into truth and falsity that can be determined objectively by someone other than the lawyer, client, or adversary. Lawyers inhabit the Rules' symbolic world as needed allies to their marginally capable clients. The Rules' symbolic lawyers are, however unfortunately, themselves subject to corruption. At the same time, symbolic lawyers possess the antidote to their corruption: they are both capable of meaningful self-examination and prone to engage in it. The challenge in meeting the requirements of the chivalrous code of this symbolic world is that lawyers need the counsel of the Rules and those who know them in order to see past their own self-delusions to the ethical truths that will allow them to avoid corruption. The clients in this symbolic world are not much help to themselves and of no help to their lawyers. Though largely capable of providing for their basic needs and understanding their lawyers, symbolic clients are separated from many of their natural allies and are vulnerable to substantial harm. Most importantly, however, these clients are worth a lawyer's professional sacrifice even when, and perhaps especially when, harm is nearly certain.

Significantly, under the Model Rules, the symbolic client's adversaries have an equal worth. In the symbolic world of the Rules, it is crime and fraud, not a client's adversary, which deserve to be vanquished. Lawyers must fight with valor the symbolic contest to defeat these wrongs because, in the end, lawyers have no claim to infallibility in exercising their judgment. Whether one contestant or

another prevails, lawyers must follow the symbolic code of valor if, as their profession requires, they are to fight again. Lawyers must obey and respect the symbolically omnipresent authority that decides the contest as well as immanently enforces the valorous code. These conditions on law practice create a symbolic normative economy, distinct from the worldly economy, which is at once providential, beneficent, transformative, and unbounded in extent and nature. Lawyers who best intuit and who most willingly pursue this normative economy are also those who best serve their clients while finding the most meaningful professional success—shining knights rather than cunning pettifoggers within the symbolic nature of a lawyer's professional responsibility.