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Highway 101: Lessons In Legal Ethics That We Can Learn On the Road

CAROL RICE ANDREWS*

INTRODUCTION

In this Article, I compare two forms of misconduct—a driver's failure to follow the rules of the road[1] and a lawyer's violation of the rules of professional conduct.[2] I conclude that many of the same factors contribute to both types of violation. We can blame in part inadequate education, poor rule drafting, and limited law enforcement, but many violations, whether by drivers or lawyers, seem to result inevitably from our human nature. Human beings simply will not, perhaps cannot, follow all of the rules. Drivers and lawyers, as human actors, sometimes are negligent, ignorant or deliberately defiant of the rules that govern their behavior.

This conclusion should neither alarm us nor lull us into complacency. Despite cries of the so-called declining civility in driving and in the practice of law, both systems of regulation are reasonably effective. For the most part, the roads are safe, and lawyers are honorable professionals. But this reality does not mean that we must condone or accept the current level of noncompliance. Improvements

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1. By "rules of the road," I mean the various laws setting standards for a driver's conduct on public roads. Most of these standards are set by state statutes.

2. Rules of professional conduct for lawyers for the most part are promulgated on a state level, often as rules of the state courts. Most states base their standards of conduct after models developed by the American Bar Association. The ABA models have evolved in content and in format. The first set of ABA standards was the 1908 *Canons of Legal Ethics*. The second set, which replaced the *Canons*, was the 1970 *Model Code of Professional Responsibility*. The current set, which superceded the *Model Code*, are the 1983 *Model Rules of Professional Conduct*. Some states still adhere to the *Model Code* format, but the majority of states model their standards of conduct after the *Model Rules*, typically with local modification on isolated provisions. *See generally* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS (2001) (compiling Model Rules and comparing state variations). An ABA project, known as "Ethics 2000," has proposed a new version, a wide-scale revision to the *Model Rules*, but this new set of rules has not yet been adopted by individual states. The proposed Ethics 2000 rules are available on the ABA's website. *See Proposed Ethics 2000 Rules at* http://www.abanet.org/cpr/e2k-final_rules.html (last visited Sept. 25, 2001). In addition to these rules of conduct, lawyers are governed by a variety of other laws, including the law of agency, contract doctrine, and criminal law. When I refer to the rules of professional conduct of a lawyer in this essay, I use the ABA's current *Model Rules of Professional Conduct* (unless otherwise indicated).

can and should be made in both systems. The proper reform effort—whether increased education, better rule drafting or enhanced enforcement—depends in large part on the type of rule violation at issue. I offer the driving comparison as an aid in making these reform decisions in the field of legal ethics because there are surprising parallels between human behavior in driving and in law practice. In other words, we can learn some important lessons in legal ethics by studying our own behavior on the road.

This project has been one of personal revelation that began when I started teaching professional responsibility or "legal ethics"[3] in 1995. In class, I instructed law students on their obligation to observe all aspects of law, whether related directly to their practice of law or not.[4] Yet, as I soon discovered, I personally did not live up to this ideal, especially when driving. I noticed that I let my speed creep over the limit, did not always signal a turn, sometimes followed too closely, and occasionally rolled through stop signs. Recognizing the inconsistency between my class lectures and my personal behavior, I made a deliberate attempt to regularly obey all traffic regulations. I found this to be almost impossible. I simply could not be a perfect driver and obey every traffic law.

My first reaction was to label myself a hypocrite. That, however, was not easy to swallow, and I soon came to believe that the problem was widespread and not just an ethical lapse on my part. I began to ponder what failings of the system, if any, caused me and most other drivers to break the law. Through this internal debate, I have managed not only to understand some of my own failings on the road, but also to gain insights into both human nature and governmental attempts to license and regulate human behavior. These observations have given me a new

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3. "Legal ethics" is in some ways a misnomer. Most state bar associations and law schools have moved away from using the label "ethics" to describe their codes and classes and now use the terms "professional conduct" or "professional responsibility." Webster's dictionary defines "ethics" as including both codes of conduct and standards of moral responsibility. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 780 (1966). There is much overlap between the two elements, but most law school discussions today emphasize the former rather than the latter. I describe the difference to my classes in terms of the following questions: what a particular rule requires a lawyer to do under specified circumstances tends to be a question of professional conduct or responsibility, whereas the question of ethics would be whether the lawyer decides to abide by that rule, especially in difficult circumstances. My discussion in this Article involves both questions.

4. This arguably is an overstatement of the lawyer's duty with regard to "other" law. Most codes of professional conduct for lawyers include within their definition of professional "misconduct" violations of law, even if done in lawyers' personal lives outside of their representation of clients. The codes vary on the degree to which the criminal violation must bear on the lawyer's professional responsibilities, but the current trend is to require some relationship to the lawyer's fitness to practice. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-5 (1980) [hereinafter MODEL CODE] (noting that "[b]ecause of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession" and that "[t]o lawyers especially, respect for the law should be more than a platitude"); *Id.* at DR-102 (providing that a lawyer should not "[e]ngage in illegal conduct involving moral turpitude"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(b) (1983) [hereinafter MODEL RULES] (providing that 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 in other respects").

perspective in teaching legal ethics and in evaluating the regulation and licensing of lawyers.

The comparison between the ethics and regulation of driving and practicing law at first may seem absurd or facetious. One might think that driving—a mundane activity performed by most adults—is trivial compared to the practice of law—a noble profession at the heart of our justice system. However, compliance with the law is as every bit as important for drivers as it is for lawyers, likely even more so. While lawyers only occasionally take a client's life in their hands, drivers risk their own lives as well as the lives of countless strangers every time they get behind the wheel. Moreover, the very familiarity of driving makes it a particularly useful basis for comparison. Because most of us drive every day, we have an ever-available laboratory in which to evaluate both our own and others' degrees of compliance with the law and personal responsibility.

The comparison between the regulation of driving and the law is surprisingly apt in other ways. Both fields are licensed by the states, which typically require both specialized training and testing before obtaining the licenses and continuing education or testing for continued use of the licenses. Exercise of either activity without a valid license is a crime.[5] Both fields condition the continued grant of the license on compliance with an extensive set of rules and regulations—the rules of the road and the legal profession's rules of professional conduct—and in both, self-regulation is the principal means of enforcement. Both systems absolutely depend on the individual to moderate his or her own activity to conform to the rules. Due to the sheer number of persons engaged in driving and law practice, the authorities—whether state troopers or members of the state bar—cannot possibly observe and regulate the conduct of every individual.

In this Article, I consider the reasons why both systems fail to achieve absolute compliance. I do not purport to conduct an empirical or other scientific study, but instead base my analysis on my own observations and experiences as a practicing lawyer, law professor and driver. I believe that lawyers violate their rules of professional conduct for many of the same reasons that drivers violate the rules of the road. Some failures are due to weaknesses in the system of regulation or license education, but most are just part of our human nature. Many violations are due to the negligence of the actor, but some are deliberate. Humans, particularly when operating under a system of self-regulation, will never completely follow the rules. Yet, improvements in regulation, enforcement, and especially education can reduce the degree of noncompliance. These efforts, however, must be focused and reflect reality, whether on the road or in law offices and courtrooms.

5. *See, e.g.*, ALA. CODE § 32-6-1 (1975) (requiring that a person have a driver's license before driving on Alabama highways); *Id.* at § 34-3-1 (outlawing practice of law in Alabama without a license).

To explore these conclusions, I divide the types of common rule violations by drivers and lawyers into two broad categories: unintentional violations and deliberate violations. Both break down into further subcategories. The first subcategory of unintentional violation is negligent behavior: the driver or lawyer knows the rule but nevertheless fails to pay adequate attention and inadvertently breaks the rule. The second type of violation is due to ignorance, where the driver or lawyer does not know that a rule outlaws the behavior at issue. Deliberate violations fall into three subcategories. The first is the small category of cases that arise from a flawed law. The driver or lawyer refuses to obey the law because the law itself is outdated or otherwise does not reflect reality. The second and far most common type of intentional rule violation is due to the selfish reasons of the actor. The rule itself is justified, but the driver or lawyer chooses to not follow the law for selfish reasons. The final category of deliberate rule violation is the rare case where the actor defies the rule for noble reasons. The driver or lawyer knowingly breaks the rule in order to achieve a higher good.

In this analysis of driver and lawyer rule violations, I exclude deliberate acts that would violate criminal laws independent of the rules of the road or the rules of professional conduct. I do not discuss, for example, cases of road rage in which drivers shoot each other or cases where lawyers steal from their clients. These criminal acts certainly catch the public's attention and draw complaints of declining civility in both driving and law practice, but these cases are at the extreme edge of misconduct.[6] I concentrate instead on the law violations of the drivers and lawyers who are generally good members of society and who consider themselves to be law-abiding citizens.[7]

A. UNINTENTIONAL VIOLATIONS AS A RESULT OF NEGLIGENT BEHAVIOR

I start with what is the most common type of rule violation—that due to the negligence or inattention of the driver or lawyer. In these cases, the person knows and appreciates the rule but fails to live up to its requirements. On the driving side, take any case where the driver is not paying adequate attention to his driving and the vehicles around him.[8] He might inadvertently let his speed exceed the limit. He might drift over the center line or run off the road. He might fail to

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6. This is not to say that these cases are rare. In the case of lawyers, some forms of theft, such as deliberate padding of bills to clients, do not seem to be isolated instances of a rogue lawyer. Indeed, some critics charge that abuses in billing, often in the form of fraud or other theft, are widespread. *See generally* DONALD E. DEKEIFFER, HOW LAWYERS SCREW THEIR CLIENTS (1995); WILLIAM H. ROSS, THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS (1996).

7. Likewise, I do not address behavior that falls within the bounds of the law but that observers might nevertheless consider to be "misconduct." Such behavior, which would include many cases of incivility, may be a problem in terms of professionalism, but lawmakers have not yet deemed it sufficiently problematic to outlaw. In this Article, I focus on behavior that violates actual prohibitions.

8. To distinguish the driver from the lawyer in my examples, I have adopted the convention of referring to drivers as males and lawyers as females. I also refer to the lawyer's clients as males.

notice traffic slowing and hit the car in front of him. He might overlook a traffic signal and not stop as he should.

This type of violation undoubtedly is the primary cause of automobile accidents,[9] but the violation is not the fault of the laws. The laws themselves are reasonable. They set safe speed limits. They require drivers to stay in their own lane or obey traffic signals so that other cars can proceed safely. Indeed, many road safety laws speak expressly in terms of reasonableness and require, for example, that drivers maintain a "reasonable" following distance behind other cars.[10]

Moreover, the driver in these examples knows the law. The driver intends to follow these laws, or, he at least does not make a deliberate decision to disobey them. The typical driver certainly does not set out on the road with the intention of driving negligently or unreasonably. Yet, the driver fails to obey these reasonable laws.

This failure might result from any number of deficiencies, but often the problem is that the driver is distracted.[11] He may be trying to do too much at one time, such as both talk on a cellular phone and find an exit. The driver may be sleep deprived, or he may be under family or work-related stress. The distraction may be as simple as a song on the radio. Almost anything can cause a driver's mind to drift and distract him from his driving. Fortunately, most of these distractions do not cause serious injury, but the driver nevertheless has failed to abide by the traffic laws. More importantly, the driver never knows if he is going to be one of the unlucky few who does get into a serious accident due to his negligence.

Much of this can also be said about lawyers who violate rules of professional conduct. The most frequently violated rules of professional conduct are the simple rules. These are the rules that require a lawyer to represent her client "competently,"[12] to exercise "reasonable diligence" in representing her

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9. It is impossible to find accurate statistics of the actual number of driver rule violations, primarily because many violations are never cited by the police. Even the causes of crashes are difficult to determine. The National Highway Traffic Safety Administration ("NHSTA") estimates that driver behavior contributed to 99% of crashes investigated. *See Relative Frequency of Unsafe Driving Acts in Serious Traffic Crashes, Summary of Important Findings at* http://www.nhtsa.dot.gov/people/injury/research/UDAshortrpt/summary.html (last visited Sept. 25, 2001). The NHSTA found six types of driver behavior that occurred at relatively high frequencies, most of which appear to be negligent-type behavior: driver inattention, vehicle speed, alcohol impairment, perceptual errors, decision errors and incapacitation. *Id.*

10. *See, e.g.*, ALA. CODE § 32-5A-89 (providing that a "driver of a motor vehicle shall not follow another more closely than is reasonable and prudent").

11. The American Automobile Association's ("AAA") Foundation for Traffic Safety recently sponsored a study by the North Carolina Highway Safety Research Center, which found that each year an estimated 284,000 distracted drivers are involved in serious crashes. *See Distracted Drivers Pose Safety Hazard, According to New UNC Study, available at* http://www.aaa.com/news12/Releases/Safety/ddstudy.htm (last visited Sept. 25, 2001).

12. Model Rule 1.1 states that a lawyer "shall provide competent representation to a client." MODEL RULES Rule 1.1.

client,[13] or to keep her client "reasonably informed."[14] In my home state of Alabama, these three rules alone constitute almost half of the rule violations cited by the state bar association.[15]

Although these professional rules speak only in general terms, they are sound laws. They set acceptable standards without cumbersome or unrealistic detail. Some forms of lawyer conduct are suitable for detailed regulation while others are not. Just as lawmakers must broadly regulate many road activities, such as reasonable following distances, bar officials must set general standards for many forms of lawyer conduct and cannot dictate in advance the required course of conduct for each case. For example, a rule setting the number and length of calls or other contacts between lawyer and client could not possibly fit all cases. Such a rule undoubtedly would under-serve some clients and unduly burden others.

For the most part, lawyers fully comprehend their obligations. Lawyers know that they must competently and diligently represent their clients. They know that they must keep their clients informed. Lawyers know that there are countless other obligations that they must meet. Nevertheless, lawyers violate these rules. They procrastinate. They let deadlines slip. They forget about client meetings or other obligations. They do not return client calls.

Why do lawyers violate such simple rules? Some of these violations, especially the case of not returning a client's calls, may be deliberate, but most seem to be negligent. Lawyers often are like the distracted driver. The lawyer has other things on her mind. The distraction may be as ordinary as an ill-timed phone call, or it may be more serious and pervasive. The lawyer may have family problems or substance abuse issues that distract her from her obligations.

Many lawyers find themselves negligently violating standards of conduct because they have let their workload exceed reasonable limits. They try to do too many things and please too many people at one time. They lose control of their case files or client matters. Seemingly all lawyers experience this problem at some point in their career, but most work their way clear without seriously

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13. Model Rule 1.3 mandates that a lawyer "act with reasonable diligence and promptness in representing a client." MODEL RULES Rule 1.3.

14. Model Rule 1.4 provides that a "lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." MODEL RULES Rule 1.4.

15. More than forty-seven rules account for the remaining violations in Alabama. *See* Ala. State Bar Ass'n, *List of Most Violated Rule of Professional Conduct*, Sept. 1992 - Dec. 2000 (on file with author) (noting that of approximately 1,740 total violations in this eight-year period, 365 were violations of Alabama Rule 1.3, barring willful neglect, 285 were violations of Alabama Rule 1.4, mandating reasonable communication with a client, and 108 were violations of Alabama Rule 1.1, requiring competent representation). Other states report violation statistics similar to those in Alabama. *See* Gerald C. Sternberg, *Regulating the Legal Profession*, 71 WIS. LAWYER 25 (Dec. 1998) (reporting that incompetence, lack of diligence and lack of communication constitute 36% of grievances filed against Wisconsin lawyers in 1997-98); Stephen G. Bene, *Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions*, 43 STAN. L. REV. 907 (1991) (reporting that 46% of reported misconduct against California lawyers in 1988-89 involved "a failure to perform for or to communicate with clients").

injuring a client or their practice. Just as with negligent drivers, however, not all lawyers are so lucky. Some lawyers do in fact find that their excessive workload causes them to seriously neglect and harm one or more clients.

What can the legal profession do to prevent these failures? Not much. Just as we cannot stop all drivers from being distracted and negligent, it is virtually impossible to prevent lawyer negligence. First, as proven by our experiences on the road, after-the-fact punishment—or the possibility of such punishment—does little to prevent commission of a negligent act. Drivers and lawyers are fully aware of the potential for license revocation and civil liability resulting from their negligence, but some, perhaps most, are nonetheless negligent. This is due to the very nature of negligence. By definition, the actor does not intend to behave negligently, so the prospect of punishment for negligence is remote and rarely impacts behavior.

To be sure, increasing the punishment would cause many drivers and lawyers to be more careful, but this cannot work on all forms of negligence. In order to be effective, the punishment would have to be so severe that the driver or lawyer could not tolerate the risk of its imposition, no matter how remote. Society, however, usually is unwilling to attach such severe punishment to acts of mere negligence. Just as the driving public would object to lengthy jail time for simple acts of negligence on the road, such as inadvertent and moderate speeding or careless failure to stay in one's lane, lawyers would oppose severe professional discipline, such as disbarment, for isolated instances of negligence, such as a lawyer who forgot to return a client's calls.

We cannot rely upon the police and state disciplinary authorities to intercept and prevent all negligent behavior. State authorities rarely can monitor ongoing behavior to stop negligence before it results in harm. They do not have the resources and manpower. This limitation should be apparent from our experiences on the road. Police sometimes use obvious surveillance by marked patrol cars or cameras to catch or deter negligent speeding and other improper road behavior, but most police resources are spent addressing accidents that already have occurred.

It is even more problematic for state bar authorities to detect ongoing lawyer negligence. Because lawyers work primarily in private under the cloak of confidentiality, bar officials usually cannot observe the work of most lawyers. Meanwhile, clients generally do not know enough about the lawyer's work to recognize and report negligence before it causes actual harm. Other lawyers and judges sometimes observe their fellow lawyers and could act to prevent negligent behavior by their colleagues—indeed, lawyers have an obligation to report the wrongdoing of other lawyers[16]—but lawyers are notoriously reluctant to report

16. *See infra* notes 49-50 and 70-74 (reprinting and discussing Model Rule 8.3, which sets outs the lawyer's duty to report another lawyer's misconduct).

the misconduct of another lawyer, particularly in simple negligence cases, the type discussed here.[17] The only lawyers who seem willing to overcome this reluctance are the officials charged with enforcing the professional rules, but due to their limited resources and the private nature of a lawyer's work, these officials cannot do much to intercept ongoing lawyer negligence.

Targeting the root cause of common cases of negligence can be an effective solution to some forms of driver or lawyer negligence. The fight against drunk driving is a good illustration. After the public realized that so many cases of driver negligence and road deaths were caused by intoxicated drivers, punishments were enhanced for driving under the influence, the public was educated on the dangers of drunk driving and police were trained to identify drunk drivers by their erratic driving behavior. As a result, drunk driving and its resultant deaths and injuries have decreased.[18] Similarly, bar associations have come to realize that many instances of lawyer negligence can be tied to substance abuse by the lawyer, and some states have established programs to educate lawyers generally on this danger and to identify and treat lawyers with substance abuse problems.[19]

A more timely example of an effort to target the root cause of driver negligence is the recent call for a ban on the use of hand-held cellular phones while driving.[20] Such a ban would outlaw the underlying behavior—talking on a phone while driving—even though that behavior does not necessarily lead to driver negligence. This is an example of a precautionary law. Although not all drivers are negligent while using a phone, the activity nevertheless is outlawed because it creates too great a risk that the driver will be negligent. Some rules of professional conduct likewise are precautionary. The strict standards for handling client money in Model Rule 1.15, for example, target the problem of lawyers negligently losing client money by requiring the lawyer to keep her client's funds in a separate bank trust account.[21]

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17. This reluctance to report can itself constitute a separate rule violation by the non-reporting lawyer, but that problem is usually a deliberate defiance of the rule, which I discuss *infra* at notes 70-74.

18. The NHTSA reports that the percentage of fatalities that are alcohol-related has decreased from 57% in 1982 to 38% in 1999. *See Traffic Safety Facts 1999, at* http://www.nhtsa.dot.gov/people/NCSA/809-100.pdf. *See also* MADD, *DUI/DWI Arrests and Convictions, available at* http://www.madd.org/stats/0,1056,1784,00.html (last visited Sept. 25, 2001) (reporting that between 1990 and 1997, the number of arrests for drunk driving decreased by 18% even though the number of licensed drivers increased by 15% over the period).

19. *See generally* 62 ALA. LAWYER (March 2001) (compiling several articles concerning the purpose and work of the Alabama Lawyer Assistance Program, which is a program of the Alabama State Bar Association aimed at helping lawyers with substance abuse problems).

20. In late June 2001, New York became the first state to ban use of hand-held cellular telephones while driving. *See* James C. McKinley, Jr., *New York Votes to Ban Phones Held by Drivers*, N.Y. TIMES, June 26, 2001, at A1.

21. Model Rule 1.15(a) provides:

> 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. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded.

Precautionary laws, however, can solve only a few types of negligence. Because these laws target behavior that is not by itself improper, they must be used with restraint, lest drivers and lawyers rebel. Precautionary laws are most effective when targeted to activities that are known to cause repeated and extreme cases of negligence, such as drunk driving. Contrast, for example, a hypothetical law that prohibited a driver from talking to another passenger or adjusting the car radio. Even though these distractions are known to cause driver negligence and accidents, the law likely would be ineffective.[22] Law enforcement authorities would face an almost impossible task of enforcing such a ban, and drivers would simply ignore it as too broadly impinging on their freedoms.

Even some extreme and repeated causes of driver and lawyer neglect are difficult to target and address through precautionary laws or otherwise. Driving while sleep deprived, for example, can be as dangerous as drunk driving,[23] but rooting out this form of negligence is problematic. A state trooper might be able to identify some sleepy drivers by their erratic behavior just as he can identify drunk drivers, but even if a trooper stops a driver on suspicion of driving while sleep deprived, the trooper cannot discern actual sleep deprivation as easily as he can determine blood alcohol level.[24] Education on the ill effects of driving without sufficient sleep might cause some drivers to take extra care and get sleep before a long drive, but such education likely will not prevent the same driver from driving shorter distances, to work or school, after a sleepless night. Unlike drunk driving, which largely has been transformed in the public's eye as wrongful behavior, sleep-deprived driving is so common that a significant change in attitude must occur before it is widely condemned and avoided.[25]

The same holds true for sleep-deprived lawyers. They can be as dangerous to their clients as sleep-deprived drivers are to others on the road, but sleep deprivation among lawyers will be difficult to eradicate. Although a judge, client or other lawyer might be able to identify and intercede where a lawyer is so sleep deprived that she cannot function, on most occasions when lawyers are sleep

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> Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

MODEL RULES Rule 1.15. The rule of course also serves the added purpose of removing the temptation of the lawyer to steal from her client, but as I note *supra* at note 7, I do not discuss such cases of criminal conduct in this Article.

22. The AAA North Carolina study of car accidents due to driver distractions identified a number of common driver distractions, including the driver eating, drinking, smoking, looking at something outside the car, adjusting dashboard controls, or talking to other occupants of the car. *See supra* note 11. The study reported that talking to other passengers constituted 11% of distractions, adjusting car controls accounted for 3%, while cell phone use accounted for 1.5% of the distractions. *Id.*

23. In 2000, for example, sleep-deprived drivers caused 1,550 deaths and 71,000 injuries. *See* Julie Delcour, *Wake-Up Call: Drowsy Driving Taking Its Toll*, TULSA WORLD, May 30, 2001.

24. *See id.* (reporting on the difficulties of identifying and studying the frequency of sleep-deprived driving).

25. *See id.* (noting the "immense" public outrage concerning drunk driving and the relative lack of concern about drowsy driving: "[f]riends often don't think twice about letting friends drive tired").

deprived outsiders cannot detect the problem. The lawyer may be in court or at a client meeting when her adrenaline is high and she does not appear sleepy. Moreover, an even more significant attitude adjustment may be necessary for lawyers than for drivers. Lawyers often brag that they can function on little sleep. Indeed, this attitude is so commonplace that a new lawyer may think that she owes it to her client to stay up all night and prepare for a client matter, even though every part of her body wants sleep. Education could correct this misguided view and prevent isolated instances of lawyers "pulling all-nighters," but it likely will not stop a lawyer from practicing generally during stressful and sleepless periods.

As the sleep deprivation example suggests, education is most effective when the lawyer is unaware of the risks associated with her actions. For this reason, education concerning common pitfalls for lawyers might prevent some other forms of lawyer negligence. A lawyer, particularly a new lawyer, may not fully appreciate her potential for negligence. She might benefit from tips on the reality of practice, such as what are reasonable and unreasonable workloads. She also might earlier catch and correct her negligence if she knows to watch for certain warning signs of negligence, such as when she finds herself avoiding a client's or supervising attorney's calls or telling "little white lies" about her progress on their matters.

In short, as with driver negligence, targeted punishment, corrective measures and education can avoid some forms of lawyer negligence. But, as we know from our own experiences on the road, no such measures can completely stop us from behaving negligently. Humans are not perfect: we sometimes neglect our duties.

B. UNINTENTIONAL VIOLATIONS DUE TO THE IGNORANCE OF THE ACTOR

A related category of unintended violation is the case where the driver or lawyer does not know that his or her behavior is an infraction. This ignorance can arise in different ways. The driver and lawyer may have gotten an inadequate education in the first place, or they may have forgotten what they once knew. The driver and lawyer may be temporarily in a different jurisdiction from that in which they were trained and licensed,[26] or the law in their own state may have changed since they were first licensed.

On the driving side, our own experiences on the road suggest a number of likely examples of driver ignorance. It would seem that some drivers never learned or have forgotten the rule requiring slower cars to drive in the right-hand lane.[27] Most do not seem to know of the law that limits use of a car's horn to

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26. Courts frequently allow lawyers who are licensed in another state to practice before them on a limited basis: they admit these out-of-state lawyers "pro hac vice," for this matter only, without requiring separate testing concerning the state's laws and rules of conduct.

27. *See, e.g.*, ALA. CODE § 32-5A-80(b) (requiring cars, traveling at slower than normal speed of traffic under existing conditions, to be driven in right-most available lane).

emergency situations.[28] Surely very few drivers remember the significance of each different shape and color of road signs. Other drivers are unsure of the rules in a nearby state, such as whether that state requires headlights when driving in the rain. Or, they may not notice that their own state has recently passed this or other new safety standards.

Lawyers, likewise, are ignorant of at least some of their professional obligations. First, the lawyer may never have learned the rule. The *Model Rules* contain scores of rules detailing the obligations of lawyers. Law school courses in professional responsibility rarely cover every rule. The lawyer must pass the Multi-State Professional Responsibility Exam (MPRE), but the exam does not require the lawyer to know every rule every year. Some rules undoubtedly escape the attention of the new lawyer. The problem is even more acute for lawyers who studied ethics under the *Model Code* or an even older system,[29] or who never studied ethics at all.[30]

The lawyer also may forget or confuse the rules she studied and once knew. Some rules are so detailed that they escape the lawyer's working knowledge as quickly as a driver's knowledge of road signs fades after a driver's exam. Even experts in legal ethics likely cannot recall every provision of and local variation on complex rules such as Model Rule 1.8, detailing regulations for certain lawyer-client transactions,[31] Model Rule 7.2, setting out record-keeping and disclaimer requirements for lawyer advertising,[32] and Model Rule 1.15, detailing the handling of client funds.[33]

Finally, lawyers have difficulty grasping even seemingly simple rules when that rule's content differs from jurisdiction to jurisdiction or is subject to frequent modification. The rule on confidentiality, and the exceptions to that rule, are good examples. Most lawyers perceive their duty of confidentiality as much narrower than their actual duty. This ignorance may be due to the fact that many practicing

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28. *See, e.g., id.* at § 32-5-213 (outlawing use of horn except "as a reasonable warning").

29. *See supra* note 2 (discussing the successive model standards of conduct).

30. *See* RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE iv-v (2001) (noting that "the few existing studies show that lawyers often are unaware of even basic information about the law governing lawyers" and that many older lawyers "either have never formally studied ethics or have not kept up with the developments in the law").

31. Model Rule 1.8 sets out different standards for, and some prohibitions against, several enumerated activities. The specific provisions vary with the type of transaction at issue. For example, some transactions require disclosure and/or client consent in writing, while others require merely client consent after consultation. *See* MODEL RULES Rules 1.8(a) and 1.8 (f).

32. Model Rule 7.2 sets out general standards for lawyer advertisements, but most state variations on the rule provide detailed filing, disclaimer and record-keeping provisions. *See also* ALA. RULES OF PROF'L CONDUCT Rule 7.2 (requiring a disclaimer, filing with the state and record retention). *See generally* GILLERS & SIMON, *supra* note 2, at 355-63 (comparing selected state variations on Model Rule 7.2).

33. Model Rule 1.15, *supra* note 21, sets out general standards for handling of client funds and other property, but many states supplement these general standards with detailed requirements for bank accounts and record-keeping. *See* ALA. RULES OF PROF'L CONDUCT Rule 1.15. *See generally* GILLERS & SIMON *supra* note 2, at 151-57 (comparing selected state variations on Model Rule 1.15).

lawyers were trained in legal ethics under the old *Model Code* system, which in fact had a narrower duty of confidentiality than that under Model Rule 1.6, which now governs most lawyers' behavior.[34] Moreover, an understanding of even the current *Model Rules* duty of confidentiality is confounded by its many exceptions. The exceptions are confusing in that some give the lawyer discretion to decide whether to breach confidentiality while others require the lawyer to affirmatively act to breach confidentiality.[35] Moreover, the list of exceptions is ever changing, and states vary widely in their exceptions.[36] It is no wonder that lawyers often misunderstand their duty of confidentiality.

What is the solution to these forms of ignorance? Education would seem to be the obvious answer to ignorance, whether by a driver or lawyer. Yet, education has limited effectiveness. This limitation is demonstrated by the fact that ignorance persists among drivers and lawyers even though both systems engage in rather extensive education and testing.

On the driving side, most new drivers take driver's education and training, which includes on-the-road practice. The new driver usually must take a written test concerning the rules of the road and demonstrate his proficiency at applying this knowledge in a road test. Most drivers must periodically renew their licenses and take new tests. The legal profession provides even more education and testing on legal ethics. Law schools teach professional responsibility, the MPRE singles out legal ethics for separate testing, and some states require continuing legal education dedicated exclusively to legal ethics.[37] Indeed, the education concerning legal ethics meets or exceeds not only the level of education for driving but also that required for many other areas of law.

This is not to say that there is no room for improvement, but rather to note that education does not eliminate driver or lawyer ignorance. Human beings simply

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34. As I discuss in more detail *infra* at notes 46-47, the *Model Code* protected only information covered by the attorney-client privilege and information likely to be detrimental or adverse to the client, MODEL CODE DR 1-101, whereas the *Model Rules* broadly protect all "information relating to the representation of a client." MODEL RULES Rule 1.6(a). *See supra* note 39 (reprinting Model Rule 1.6).

35. *Compare* MODEL RULES Rule 1.6(b) (giving lawyers discretion to breach confidentiality) *with* Rule 3.3 (requiring lawyers to remedy false evidence even if such remedy requires disclosure of confidential information).

36. For example, Florida requires a lawyer to intervene and reveal a client's intention to commit a financial crime such as fraud, but Alabama forbids a lawyer from breaking a client's confidence for this purpose. *Compare* FLA. RULE OF PROF'L CONDUCT Rule 4-1.6, *with* ALA. RULE OF PROF'L CONDUCT Rule 1.6. *See also infra* notes 76 and 79 (discussing this variation). *See generally* GILLERS & SIMON, *supra* note 2, at 71-76 (comparing selected state variations on Model Rule 1.6). Moreover, the ABA Ethics 2000 Commission has proposed new exceptions to Model Rule 1.6. *See supra* note 2. *See also infra* notes 42 and 47 (discussing one proposed new exception).

37. *See* ALA. STATE BAR MANDATORY CONTINUING LEGAL EDUC. RULES & REGULATIONS, Rule 9 (mandating a six-hour course in "professionalism" within a lawyer's first year of practice); CAL. BUS. & PROF. CODE § 6070 (West 2001) (directing the state bar to adopt a rule requiring a continuing education program that includes legal ethics).

have a limit on what they can learn and retain. They are particularly limited in what they can learn in a single setting of formal education.

This reality, however, does not argue against education but rather for continuing education. Regular reminders on driving standards, such as public announcements concerning a new seatbelt or insurance requirement, help fill the gaps left by the initial driver's education and also alert drivers to new rule changes. Continuing education can be particularly effective for lawyers, who are trained to know that the law is never constant. The education need not be formal classroom training. As with driver education, it also can take the form of general advertising, such as announcements in bar journals concerning a new ethics doctrine.

Finally, the legal profession can avoid some lawyer ignorance by exercising caution in amending the rules of professional conduct. The profession must continue to improve and adapt its rules of conduct, but the proponents of change should be mindful of the effect of the change itself on the very lawyers whom they seek to guide. There is no easy answer. On the one hand, piecemeal changes to isolated rules often escape the attention of lawyers. On the other hand, a large-scale overhaul of the rules that is sufficient to catch the attention of lawyers might overwhelm lawyers. Rulemakers must balance these extremes and weigh the need for reform against the cost of educating lawyers and the danger that lawyers will miss the change and violate the new rule through ignorance.

In sum, lawyers, like drivers, sometimes disobey laws out of ignorance. The legal profession can try to prevent lawyer ignorance through education, but education has its limits. This reality suggests that the legal profession should not rely on a single dose of law school education in professional responsibility. Instead, the legal profession should put greater emphasis on continuing education in legal ethics and be mindful of lawyer ignorance when considering changes to the standards of professional conduct.

C. DELIBERATE VIOLATIONS OF A FLAWED LAW

The previous two categories of rule violation assume that the driver or lawyer does not intend to violate the rules. The remaining three categories assume the opposite. The driver or lawyer fully appreciates that his or her conduct violates a rule, but he or she proceeds anyway. Why do drivers and lawyers intentionally violate a known prohibition? The first reason I proffer is that the rule itself is flawed, in that it is unrealistic or does not serve its purpose. It is important to note, however, that most rules are sound and that this group of flawed rules accounts for a very small number of rule violations.

On the driving side, I can think of only a few examples of rules that are truly flawed. This does not mean that drivers do not consider many traffic laws to be flawed. A particular driver, for example, may deem a speed limit to be ridiculous under his own circumstances (such as when he is in a hurry and the road is

relatively empty), but the rule nonetheless is important for safety of the highways. Most traffic safety laws are rational. They save lives. In the next two sections, I will discuss why drivers and lawyers violate sound rules.

There are some road regulations that are, in fact, not justifiable. One might imagine a low speed limit that once made sense due to a near-by school or poor road conditions, but that is no longer justified after closure of the school or road improvements. On occasion, we see a stop sign that seems out of place, such as one on a very low traffic street or one in the middle of a nearly abandoned parking lot. Perhaps conditions changed or city planners initially overestimated the traffic for the location.

On the law practice side, a change in circumstances does not seem to be the cause of the few flawed rules of professional conduct. Instead, the flawed professional conduct rule usually is unrealistic from the start, although the drafters may not have appreciated that fact when they wrote the rule. The problem often is that the rule sweeps so broadly that compliance is impractical, even though it may not be impossible. In most cases the lawyer could adjust her behavior to conform to the broad proscription, but she chooses not to do so. This is a difficult group to categorize, for arguments could be made that most any rule is unrealistic or serves bad policy in particular applications.[38] I narrowly define this group of flawed rules to include only those rules that do not conform to the reality of law practice across-the-board.

An example of a flawed professional rule is Model Rule 1.6, which prohibits a lawyer from revealing any "information relating to representation of a client."[39] There are exceptions to this duty of confidentiality, but the basic rule remains an

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38. Indeed, law professors regularly argue that certain of the rules are flawed and need reform. This academic criticism is occasionally pervasive, in that it attacks most or all of the rules of professional conduct. *See* PAUL HASKELL, WHY LAWYERS BEHAVE AS THEY DO xiii (1998) (arguing that "the professional rules are morally flawed"). Other academics criticize only isolated rules. I fall into this latter category. *See* Carol R. Andrews, *The First Amendment Problem with the Motive Restrictions in the Rules of Professional Conduct*, 24 J. LEGAL PROF. 13 (2000) (arguing that professional rules that impose a motive restriction on a client's access to court violate the First Amendment Petition Clause); Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887 (1997) (arguing that Model Rule 5.2(b) is flawed).

39. Model Rule 1.6 provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
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> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm,
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES Rule 1.6.

overly broad dictate that does not reflect the realities of law practice. As I discuss above, many lawyers do not appreciate that the rule is this broad, which leads to violations due to ignorance,[40] but even lawyers who fully appreciate the breadth of their duty nevertheless often choose to violate the rule.

The literal terms of Model Rule 1.6 would bar a lawyer from discussing any information concerning her representation of her client under all but the narrow class of excepted circumstances. This prohibition applies even to information that the lawyer got from a public source and to information that is not adverse to her client.[41] A strict reading of Model Rule 1.6 would not permit a lawyer to talk about her client or her client's matter even if she were to cloak her description through use of anonymous names or omission of details because such discussions necessarily reveal some information relating to the representation. The literal terms of the rule also would bar the lawyer from engaging in "shoptalk" with lawyer friends[42] and getting advice from others, including ethical advice from former law professors or others.[43] Even the time-honored tradition of telling "war stories," including those that I tell as a professor, are seemingly within the Model Rule 1.6 prohibition.

A lawyer theoretically could conform to the Model Rule 1.6 strict duty of confidentiality. She simply could refrain from ever talking about her work or seeking outside advice. Yet, most lawyers do not choose to refrain. Like most people, lawyers seem to have a "need" to talk about their work even though such talk violates their professional duty. Indeed, leading scholars on legal ethics have argued that some forms of prohibited revelations, such as lawyer shoptalk, not

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40. *See supra* notes 34-36.

41. MODEL RULES Rule 1.6, cmt. 5 (noting that the confidentiality duty under Model Rule 1.6 "applies not merely to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source"); *id.* at Model Code Comparison (noting that unlike the *Model Code* duty, Model Rule 1.6 "imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed" and "does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental").

42. The ban against friendly shoptalk likely would apply only to friends outside the firm in which the lawyer practices because the client is considered to have implicitly authorized sharing of information among lawyers in a single firm. *See* MODEL RULES Rule 1.6(a), cmt. 8 ("Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.").

43. Some lawyers and scholars argue that the revelations necessary to make such outside legal consultation falls within the implicit authorization exception in Model Rule 1.6(a). *See* GEOFFREY C. HAZARD & W. WILLIAM HODES, 1 THE LAW OF LAWYERING § 9.17, at 9-62 to 9-63 (3d Ed. 2001). However, the issue is sufficiently uncertain that the ABA's Ethics 2000 Commission has recently proposed adding ethics consultation to the Model Rule 1.6 list of exceptions to a lawyer's duty of confidentiality, but interestingly, the proposal does not include an outside consultation for any other purpose. *See Proposed Ethics 2000 Rules*, *supra* note 2, at Proposed Rule 1.6(b)(4) (allowing a lawyer to reveal client information "to secure legal advice about the lawyer's compliance with [the rules of professional conduct]"). *See generally* Drew L. Kershen, *The Ethics of Ethics Consultation*, 6 PROF. LAWYER 3 (May 1995) (discussing the problems under the current *Model Rules* of lawyers seeking outside ethical advice).

only are commonplace but are valuable to the training and support of lawyers.[44] Accordingly, many scholars advocate liberal interpretation of Model Rule 1.6 to allow a number of these common violations.[45] But the fact is that literal terms of the rule bar these activities. For this reason, Model Rule 1.6 is flawed.

How can the legal profession avoid flawed rules such as Model Rule 1.6? The answer seems simple—draft better rules—but in practice that goal is not easy to achieve. Rulemakers face a difficult task. Narrow rules are not always appropriate. The rules must be sufficiently narrow to reflect the reality of law practice, but they also must be broad enough to cover the proscribed conduct. Otherwise, the rule may not adequately address and deter the undesired behavior.

The drafting history of Model Rule 1.6 illustrates this struggle to capture the middle ground. The predecessor version of the confidentiality duty in the *Model Code*, was limited and relatively easy for lawyers to apply. The *Model Code* duty covered only three narrow classes of information: that protected by the attorney-client privilege, that which the client asked to be kept confidential, and that which likely would be detrimental to the client.[46] The *Model Code* duty, however, had some gaps. It required lawyers to speculate as to whether client information was detrimental and apparently permitted lawyers to gossip about their clients, so long as the information did not fall within the limited categories of protection. Model Rule 1.6 fills these gaps, but in doing so, it seemingly has gone too far in the other direction.[47]

The ABA recently has suggested additional exceptions that will help rein in Model Rule 1.6, such as an exception that would allow a lawyer to seek advice from others concerning her ethical duties,[48] but even this latest proposal does not fully reflect the reality of law practice. The proposed rule would not allow lawyer shoptalk or outside consultations on topics other than ethics. Accordingly, even if the proposed rule comes into effect, the lawyer who engages in these discussions must continue to either "rewrite" the rule or ignore it altogether.

These types of violations at first may seem benign. The bar disciplinary authorities do not actively prosecute violations of Model Rule 1.6, and no public

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44. HAZARD & HODES, supra note 43, at § 9.15, at 9-55 to 9-57 (urging a relaxed interpretation of Model Rule 1.6 to allow shoptalk because it "is an informal but important means of continuing professional education and personal development" and noting that a strict reading of Model Rule 1.6 would mean that lawyers would be unable to talk to lay people about their work at all, thus shutting off an important means of "demystifying" the law).

45. *See supra* notes 43 & 44. *See also* ROTUNDA, *supra* note 30, at 143-44 (arguing that the duty of confidentiality does not apply to information that is generally known because such application would not serve the purpose of the duty).

46. MODEL CODE DR 1-101.

47. *See supra* note 41 (comparing Model Rule 1.6 to *Model Code* duty).

48. *See Proposed Ethics 2000 Rules*, *supra* note 2, at Proposed Rule 1.6(b)(4); *see also supra* note 43 (reprinting the proposed exception). The broadened exceptions to Model Rule 1.6 are the subject of controversy. In August 2001, the ABA House of Delegates rejected some of the proposed new exceptions. *See* Mark Hansen, *Model Rules Rehab: House Tackles Tough Issues as Ethics Debate Begins*, 87 A.B.A J. 80-81 (Oct. 2001).

outcry has resulted. These violations, however, are not necessarily harmless. The bar may openly tolerate minor transgressions, such as shoptalk or consultations in violation of Model Rule 1.6, but we must ponder what effect this tolerance of rule violation might have on a lawyer's compliance with rules generally. Does the legal profession really want lawyers redefining and applying the rules of conduct? If the legal profession looks the other way on rule violations such as these, is it not inviting transgression of other rules?

Critical thinking, of course, is an essential characteristic of the ethical lawyer, and lawyers should not blindly follow rules, especially flawed rules. Ethical defiance of rules can have its proper place. Defiance itself, however, of any rule, flawed or sound, has its own negative consequences. In the next sections, I explore the potential harms of lawyers violating sound rules, whether for selfish or for so-called noble purposes. Here, I argue that even defiance of a flawed rule may not be "harmless."

Take the example of the speed limit that is no longer justified due to improvements in road conditions or other changed circumstances. Although the driver may initially attempt to obey the limit, he likely will grow so frustrated that he eventually will ignore it, especially if he regularly encounters it. His new speed may be unreasonably fast because he no longer has a limit to guide him. Moreover, his defiance may carry over to other speed limits. The driver might conclude that if one limit is unfounded, then others, or perhaps all of them, are faulty. Or, he might simply get into the habit of breaking the speed limit and make no conscious effort to conform, especially if his speeding goes undetected by the police.

The same potential problems arise in law practice. When defiance becomes commonplace, such as in the example of lawyer shoptalk, the lawyer loses sight of the rule and her underlying duty. By regularly breaching her duty of confidentiality because she believes the rule to be too broad, the lawyer probably will confuse or forget the sound core of the rule. She eventually will breach her duty of confidentiality in a way that is not harmless. The lawyer also might lose respect for this and other rules. If the lawyer freely can breach the rule on confidentiality, then she might conclude that she can do the same for other rules that she does not like.

Lawyers, like drivers, should have respect for the rules that govern their behavior. Both systems would be better served by realistic and workable rules that keep defiance at a minimum. I recognize that this will require revision of some existing rules and that this proposed reform seems at odds with my prior discussion cautioning that reform may invite violation through ignorance. Rulemakers must tread carefully. They must try to cure flawed rules but yet avoid causing the ignorance that can itself lead to rule violation.

Fortunately, the flawed rules of professional conduct are relatively rare, and their number is dwindling. For the most part, the ABA and state bar officials have been successful in their efforts to identify and amend impractical rules. This does

not mean that compliance will necessarily follow. The reform to Model Rule 8.3, which requires lawyers to report the misconduct of other lawyers, is an example. The original *Model Code* version of the rule required lawyers to report any and all misconduct of other lawyers, with the limited exception of information covered by client privilege.[49] This provision was unrealistic in that it required a lawyer to report even a trivial transgression of another lawyer. Model Rule 8.3 now requires lawyers to report only the misconduct that "raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer."[50] Policy makers have struck the balance that they desire. The new duty to report both recognizes lawyers' hesitancy to report minor transgressions and preserves the self-governance function that the bar views as essential to maintaining the integrity of the profession. To the extent that lawyers continue to defy the new duty to report—and they do[51]—their violations are deliberate and fall in the next category of rule violation, along with most intentional violations.

D. DELIBERATE VIOLATIONS FOR THE SELFISH REASONS OF THE ACTOR

Although the typical driver and lawyer would like to categorize their deliberate violations to be only of flawed rules, the fact is that most rules of the road and rules of professional conduct are sound. They are rationally tailored to legitimate safety and policy concerns. Yet, drivers and lawyers deliberately violate these laws. In most cases, this type of rule violation deserves the label of "ethical lapse" in that the violations are due to the purely selfish or cynical reasons of the actor.

Speeding is the most obvious example of the selfish rule violation on the driving side. Most drivers deliberately exceed the posted speed limit at some

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49. MODEL CODE DR 1-103(A) ("A lawyer possessing unprivileged knowledge of a violation of DR 1-102 [the general misconduct rule] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.").

50. Model Rule 8.3 provides:

> (a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
> (b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
> (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.

MODEL RULES Rule 8.3.

51. The chief ethics officer of the Alabama State Bar Association reports as "sad commentary" the fact that the State Bar receives fewer than six reports per year from other lawyers, even though "national statistics show that in at least 75-80% of matters involving lawyer misconduct, a judge or another lawyer observed, was subjected to, or was personally aware of the misconduct." J. Anthony McLain, *Reporting Misconduct—It's a Good Thing*, 62 ALA. LAWYER 240 (July 2001).

point in their driving career, if not every day. The driver knows or should know of his own speed and the speed limit. He also knows, at least on some level, that speed limits are sound laws and that they save lives.[52] The driver may attempt to justify his speeding by arguing that everyone else is speeding, that he is exceeding the limit by only a small margin or that no one will be hurt if he speeds on this occasion. These attempted rationalizations fail.

Not everyone else speeds, and even if they did, their defiance rarely justifies violation by others. Furthermore, violating a law by just a little bit does not make the driver's actions legal or safe. Increased speeds cost lives. We would all be safer if the speed limits were lower than they are today, but our legislators have drawn a compromise between safety and practicality. Moreover, the driver never knows in a particular case whether his speed will result in injury to himself or others. Countless drivers who were victims of serious accidents would surely love a chance to do it all over again and slow down.

These violations are due to either the arrogance or the selfishness of the driver, or both. He is arrogant in that he assumes that he is above the law and that he alone can override the judgment of the legislature as to proper speeds. The driver might even agree that other drivers should obey speed limits, but he believes that he does not need to do so because he is a "good driver." Or, he may simply be selfish and not consider other drivers at all. He just wants to get to his destination faster than the posted limit would allow. Obviously, none of these reasons justify his disobedience.

At first consideration, it seems difficult to come up with equally obvious examples of intentional law violation on the law practice side. I would like to think that this difficulty is because lawyers do not deliberately violate professional rules as often as drivers disobey traffic laws. But the sad fact is that lawyers knowingly violate their professional obligations. For some lawyers, such violations are as common as their breaking the speed limit on the drive to and from their law offices. However, the typical lawyer is savvy about the repercussions of professional violations. She is not as ready to admit a knowing violation of her professional obligations as a driver might admit to his speeding.

Some deliberate rule violations are so common that they have become habit or local custom among lawyers. For example, I discovered after moving to Alabama that defense lawyers in Alabama civil cases regularly file what has become known as "dilatory motions to dismiss." These motions raise several defenses, often all of the defenses listed in the procedural rules as available bases for a pre-answer motion to dismiss the suit.[53] The lawyer files the motion, not because

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52. The NHTSA reports that in 1999, speeding was a contributing factor in 30% of all fatal crashes and that 12,628 lives were lost in speeding-related crashes. *See* NHTSA, *Traffic Safety Facts 1999, available at* http://www.nhtsa.dot.gov/people.ncsa/pdf/Speeding99.pdf.

53. Federal Rule of Civil Procedure 12(b), for instance, lists seven defenses that may be raised in a pre-answer motion to dismiss: lack of subject-matter jurisdiction, lack of personal jurisdiction, improper venue,

she believes that the defenses actually apply to the case, but instead to get more time to file the defendant's formal responsive pleading, the "answer."[54] The lawyer rarely conducts any kind of investigation into the application of these defenses to the actual case. In fact, the lawyer usually has the motion on her word processor and files the motion after making only minor changes to her computer form, such as inserting the proper caption.

In most cases, the dilatory motion violates several ethical and procedural rules. Model Rule 3.1, for example, bars a lawyer from asserting or controverting an issue "unless there is a basis for doing so that is not frivolous."[55] Model Rule 3.2 requires a lawyer to make "reasonable efforts to expedite litigation."[56] Model Rule 3.3 instructs a lawyer to not "knowingly make a false statement of material fact or law to a tribunal."[57] Finally, Model Rule 3.4 makes it an independent ethical violation for a lawyer to "knowingly disobey an obligation under the rules of a tribunal."[58] The procedural rules of most courts require reasonable efforts to ensure that motions are well-founded. Federal Rule of Civil Procedure 11, for example, requires a lawyer to conduct a reasonable inquiry before filing a motion.[59] Rule 11 also requires her to certify that the motion is not filed for any improper purpose, such as unnecessary delay, that the motion has "evidentiary support," and that it is warranted by the law.[60]

Despite these seemingly clear rules forbidding dilatory motions to dismiss, the Alabama defense lawyer attempts to justify the filing of the motion on the grounds that her client needs the extra time, that no one is really hurt by the motion, and that everyone else is doing it. Just as the speeding driver's attempts to justify his actions fail, these attempts by the lawyer also fail. The procedural rules provide a legitimate mechanism for seeking more time to file a pleading—a motion to extend time[61]—and use of a dilatory motion to gain more time undermines that procedure, as well as the purpose of the pre-answer motion. The pre-answer motion to dismiss is meant to resolve basic procedural objections early in the proceeding, before the court and parties devote extensive effort and resources on developing the merits of the case. Frivolous assertion of these

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insufficient process, defective service of process, failure to state a claim and failure to join an indispensable party. FED. R. CIV. P. 12(b). A typical "dilatory" motion would assert all seven of these defenses, and perhaps others, as grounds to dismiss the complaint.

54. Federal Rule of Civil Procedure 12(a) gives a defendant 20 days to file his formal pleading—the answer—but, if the defendant instead files a Rule 12(b) pre-answer motion to dismiss, the rule stays the time for filing the answer pleading until the court has ruled on the motion. *Id.* at 12(a)(4).

55. MODEL RULES Rule 3.1.

56. MODEL RULES Rule 3.2.

57. MODEL RULES Rule 3.3(a)(1).

58. MODEL RULES Rule 3.4(c).

59. FED. R. CIV. P. 11(b).

60. *Id.*

61. Federal Rule of Civil Procedure 6, for example, instructs parties on the means by which they can "enlarge" the time periods set under other federal rules, such as that for filing an answer. FED. R. CIV. P. 6.

defenses puts the court and plaintiff in a predicament. Do they waste their valuable resources and give a meaningful response to the motion, or should they just assume that the motion was meant solely to gain more time for the defendant? If they choose the latter and essentially ignore the motion, as many courts and plaintiffs do in Alabama, they run the risk of undermining the validity of the judgment if in fact one of the defenses happens to have merit.[62]

These practices are not unique to Alabama. In my ten-year civil litigation practice in Chicago and my eight years thereafter teaching civil procedure, I have observed many pleadings that raise similar problems. For example, all too often a defendant's answer pleading states far more affirmative defenses than could possibly apply in a single case. Indeed, many answers assert all of the defenses listed in the procedural rules.[63] The lawyers in these cases obviously do not conduct a reasonable inquiry into the factual and legal merit of each defense. The typical justifications for such an over-inclusive listing of defenses are that the lawyer has little time to prepare the answer and that she runs the risk of forfeiting a defense if she fails to assert it in the answer. Again, these justifications do not fly. First, if the lawyer needs more time, the solution is to file a motion for an extension of time as the rules provide, not to violate other rules. Second, if she abides by her duty to conduct a reasonable inquiry, the lawyer likely will not overlook a valid defense, and if her reasonable diligence fails to identify a defense, the liberal rules for amendment of pleadings probably will allow her to later amend her pleading and assert the defense.[64] Finally, such an answer, like the dilatory motion in Alabama, wastes the resources of both the plaintiff and the court in that they must assume that such defenses are real and spend their efforts in responding to and ruling on the defenses.

A related problem arises from the practice of some criminal defense lawyers to remain deliberately ignorant of the actual facts concerning their client's alleged offense. In order to sidestep the rule against asserting a false claim or defense, the lawyer elects to not "know" whether the defense is true or false. In a murder case, for instance, the lawyer would not allow her client to tell her whether he committed the murder because if the client admitted to the act, the lawyer could

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62. Alabama plaintiffs typically ignore dilatory motions, and most courts summarily deny the motion. The case progresses with no serious consideration of the grounds raised in the dilatory motion. The defendant merely gets a few extra weeks to prepare and file his answer. However, if the plaintiff wins at trial or otherwise, the defendant likely will appeal and ask the appellate court to reverse on any number of grounds, including those raised in the dilatory motion. If one of the grounds raised in the dilatory motion, such as lack of jurisdiction, just happened to be valid, the appellate court likely would reverse the judgment because the defendant technically raised the issue in the trial court, even though the trial court, plaintiff, and likely even the defendant did not realize that it was a genuine issue at the time of the dilatory motion.

63. Federal Rule of Civil Procedure 8(c), for example, lists eighteen affirmative defenses that if applicable, the defendant must assert in the answer. FED. R. CIV. P. 8(c). These defenses include such diverse defenses as the statute of limitations, the statute of frauds, discharge in bankruptcy, arbitration and award, contributory negligence, and failure of consideration. *Id.*

64. *See* FED. R. CIV. P. 15(a) (instructing that leave to amend pleadings "shall be freely given").

not put on the defense that her client did not commit murder. Although some of the nation's most prominent lawyers widely promote this or related practices,[65] I contend that it violates the lawyer's duties under the *Model Rules*.

Model Rule 3.1 forbids a lawyer from taking a position "unless there is a basis for doing so that is not frivolous."[66] Surely this prohibition would include assertion of a defense which the lawyer has not properly investigated and which has no facts to support it.[67] The mere fact that she does not "know" the defense to be false does not save her actions. Model Rule 3.1 sets an objective frivolous standard rather than a subjective standard.[68] Even if the rule set a subjective standard, I believe that deliberate ignorance under these circumstances—to enable the lawyer to not be burdened by the truth—is nevertheless a violation of the lawyer's duties. By refusing to let the client correct her when she "unknowingly" puts on a false defense, the lawyer arguably is inducing another—her client, who knows that the defense is false—to help her violate the rules.[69] At a minimum, she is engaging in conduct that is dishonest or "prejudicial to the administration of justice," in violation of Model Rule 8.4.[70]

In each of these examples, the lawyer is adjusting her behavior in reaction to some form of rule. In the case of the dilatory motion, the Alabama lawyer is reacting to the time limit set in the procedural rules for filing her answer. In filing the over-inclusive answer, the lawyer is trying to avoid the procedural penalty of forfeiture for failure to state a defense, and in the case of the criminal defense lawyer's deliberate ignorance, she is trying to avoid the ethical prohibition

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65. *See* Lincoln Caplan, *Don't Ask, Don't Tell*, NEWSWEEK, AUGUST 1, 1994, at 22 (summarizing strategies of prominent criminal defense lawyers). *See also* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS, 119, 141 (Matthew Bender & Co. Inc. 1990) (describing the strategy of some well-known lawyers to deliberately not "know" that their clients are planning to commit perjury).

66. *See* MODEL RULES Rule 3.1.

67. The prohibition in Model Rule 3.1 arguably would include a defense that is in fact true but for which the lawyer had no basis. Courts have held that the reasonable inquiry requirement of Federal Rule of Civil Procedure 11, for example, is violated even though the ignorant lawyer happens to stumble upon the truth and state a valid defense without first conducting an inquiry. *See* Garr v. U.S. Healthcare, Inc., 22 F.3d 1274, 1279 (3d. Cir. 1994) (holding that litigant "will not be saved from a Rule 11 sanction by the stroke of luck that the document happened to be justified"); *but see In re* Keegan Mgmt. Co., 78 F.3d 431, 434-35 (9th Cir. 1996) (holding that a meritorious complaint is not subject to Rule 11 sanctions even though plaintiff's lawyer did not conduct a reasonable inquiry).

68. *See* MODEL RULES Rule 3.1. *See also id.* at comments (noting that the test under Model Rule 3.1 is "objective"). The predecessor version in the *Model Code* set a subjective standard. *See* MODEL CODE DR 7-102(A)(1) (providing that a lawyer shall not "assert a position" that "he knows or when it is obvious that such action would serve merely to harass or maliciously injure another").

69. Model Rule 8.4 declares that it is professional misconduct for a lawyer to "violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another." MODEL RULES Rule 8.4(a).

70. Model Rule 8.4 requires that a lawyer not engage in conduct involving "dishonesty, fraud, deceit or misrepresentation" or that which "is prejudicial to the administration of justice." MODEL RULES Rule 8.4(c) & (d). In addition, there is the question whether an ignorant lawyer can competently represent her client as required by Model Rule 1.1. *See supra* note 12.

against stating a false defense. One might argue in at least some of these examples that the lawyer's behavior is in substantial compliance with the rules. Yet, her behavior is not in compliance. An analogy on the driving side is the driver who does a "rolling stop" at a stop sign. The driver violates the law. The sign says "stop," not "slow down."

One also might argue that this type of deliberate rule violation belongs in the first category of rule violations—negligent violation—because the practice has become so routine that the lawyer does not really think about her actions. However, these are not cases where the lawyer's behavior inadvertently crosses the line of propriety. The lawyer knows her obligations under the rules, and she also knows that her motion or pleading violates those obligations. She has purposefully modified her behavior to conform to some, but not all, of the rules. The fact that she has so repeatedly violated the rules as to render her violations routine does not make her violations any less deliberate. She is like the driver who regularly chooses to violate a speed limit and gives this violation very little thought (a deliberate rule violation), rather than the driver who occasionally and inadvertently lets his speed drift over the speed limit (a negligent rule violation).

Nor does the fact that the lawyer is violating the rules on behalf of a client redeem her violation. Most lawyers act on behalf of clients. That is the nature of their profession. The rules do not excuse rule violations at the request or benefit of a client. If they did, the rules of conduct would be almost meaningless.

Moreover, even if the lawyer truly believes that she is acting in her client's best interest by filing the dilatory motion, over-inclusive answer, or false pleading, in most cases, she also is acting for selfish reasons. These practices have become local custom or habit for a reason: they ease the lawyer's burden, at least in the short term. The lawyer does not have to work now to determine which defenses legitimately apply in her client's case. She does not have to worry about the embarrassment or potential malpractice liability if she overlooks a defense. She does not have to wrestle with the ethical or moral issues of dealing with a criminal client who admits his own guilt. She can procrastinate and put off this work or this debate for a later date, and possibly avoid it altogether. In short, just like the driver who regularly speeds, these routine types of deliberate rule violations usually are made to advance the personal motives of the lawyer.

Having characterized and described the violation, we are left with the question of how to prevent this type of routine violation. The prevention can come on two fronts. First, heightened enforcement might stop some forms of routine rule violations. Just as the obvious presence of state troopers deters speeding, stricter and more obvious enforcement of the procedural rules and the rules of professional conduct could break lawyers of their bad habits. Enhanced and well-publicized enforcement would be especially effective for violations that occur in open court, such as the dilatory motion to dismiss or the over-inclusive answer. A few well-publicized instances of sanctions for these rule violations would certainly cause some lawyers to develop new habits.

Enforcement, however, cannot reach all forms of habitual violation. It is difficult to imagine, for example, how enforcement could stop the deliberately ignorant criminal defense lawyer. A judge or state disciplinary authority can never know the actual state of knowledge of the criminal defense attorney and whether she deliberately is avoiding the truth.

Education is the second front of stopping the routine rule violation. Education initially may seem futile. After all, drivers seemingly appreciate the dangers of speeding but continue to speed. I would surmise, however, that more intense (and perhaps more graphic) education on the perils would cause some drivers to slow down. I personally slow down when I learn of a recent death or injury due to speeding.

Education may have more impact on lawyers who engage in routine violations. To be effective, the education should address not only the basic duties of the lawyers but also the practical reality of their breach. Law schools or continuing education programs could explain in detail how a dilatory motion or over-inclusive answer violates several of the lawyer's obligations and how that violation impacts the parties and court system. Ethics authorities also could counter the well-publicized statements by certain criminal defense lawyers in which they advocate deliberate ignorance of the truth of a client's defense. The bar could educate young lawyers that such ignorance is not the proper way to prepare a criminal defense and that it can hurt the innocent client by not giving the lawyer sufficient information to prepare the defense. Like the video showing highway deaths due to speeding, this form of education would remind lawyers that their behavior violates the rules and causes some harm. At least some lawyers might conform their behavior.

Effective education also should address the means by which the lawyer could serve her client's as well as her own needs through legitimate means, such as a motion to extend the time for answering. This element of the education would target the selfish reasons of the lawyer by demonstrating that she can achieve many, if not all, of her own goals through proper means, and by pointing out that her current method might actually cause more harm than good (e.g., it might draw sanctions). An analogy on the driving side would be a reminder that speeding often shaves only a few minutes off the total travel time and can actually delay the trip if a police officer stops the driver.

Although education might cause some lawyers to break their routine—or in the case of law students, never fall into the bad habit—education, like enforcement, is not a universal cure. In order to counter the popular practices, the education must be detailed and comprehensive. Law schools and bar authorities, however, cannot address every practice in detail. They might be able to educate against and stop some widespread practices, such as the dilatory motion in Alabama or the deliberately ignorant criminal defense lawyer, but as they eliminate one bad habit through education, another bad habit is likely to emerge. Lawyer creativity has few bounds.

Routine or habit violations are not the only form of deliberate rule violations. Drivers and lawyers also engage in isolated rule violations, where they choose to violate a particular rule under unique circumstances. In such cases, the driver or lawyer purposefully pauses and considers the propriety of his or her actions and yet deliberately chooses to violate the law. They usually make this choice for selfish reasons. Take the example of the driver who wants to make an illegal U-turn but first pauses to weigh the risks. His assessment of the risks might include looking for oncoming cars or for police. If he decides to proceed with the maneuver, he most probably does so for selfish reasons, such as to get to his destination faster.

An example of the isolated rule violation on the law practice side is the lawyer's decision not to report the misconduct of another lawyer. As I discuss above, lawyers are loathe to report one another,[71] but they cannot rationalize that their failure to report is due to a flawed rule, at least in jurisdictions that have adopted Model Rule 8.3. Although lawyers may not like it, the duty, as currently stated in Model Rule 8.3, serves the policy aims of the legal profession. The rule requires a lawyer to report only misconduct that raises a substantial question about the other lawyer's fitness to practice law.[72] This is exactly the type of conduct that the legal profession wants to curtail. Because bar officials cannot observe and intercept many forms of lawyer misconduct, effective regulation of the bar depends in large part on self-enforcement and the cooperation of other members of the bar, including their reporting of serious misconduct by other lawyers.

Since so few lawyers report one another, it would seem that this failure is an example of the routine violation that I discuss above. However, the duty is relatively narrow and does not arise often in an individual lawyer's career. Indeed, there are several conditions built into Model Rule 8.3 that limit the lawyer's obligation to report another. For example, the duty is not triggered unless the lawyer has actual knowledge of the other's violation.[73] Moreover, a lawyer cannot report if doing so would reveal confidential information of the reporting lawyer's client.[74]

Nevertheless, most lawyers will encounter a situation in which they have a duty to report, and they will not abide by this duty. Many lawyers may attempt to reconcile their failure to report on one of the technical grounds discussed above. For instance, they may argue that they do not really "know" that the other lawyer engaged in misconduct. Although lack of knowledge is often a ground to avoid the duty to report, it cannot apply in every case. Surely some lawyers and judges have the requisite knowledge. Pretending to not know what is in fact known is

71. *See supra* notes 48-50.
72. *See supra* note 50 (reprinting excerpts of Model Rule 8.3).
73. MODEL RULES Rule 8.3(a).
74. MODEL RULES Rule 8.3(c).

itself a lie. So, why do so many lawyers make this pretense or otherwise ignore their duty to report? They do so primarily for their own selfish reasons. Lawyers fail to report because reporting makes them uncomfortable, because they have a misguided sense of professional courtesy, or because they hope that the favor of not reporting will be reciprocated to them in the future.[75]

What can the legal profession do about isolated rule infractions such as failure to report? The proposed solutions for the routine violation—heightened enforcement and better education—will not be as effective for these isolated cases. To be sure, if the driver or lawyer sees that he is being observed by someone in authority, he or she likely will not proceed to violate the rule, but, as I note above in discussing the negligent rule violation, this level of enforcement is rare, especially in law practice.[76] In the case of a lawyer's failure to report, few outsiders know of the underlying misconduct, so state bar authorities cannot act against either the first lawyer who engages in the initial misconduct or the second lawyer who fails to report it. Indeed, the inability of state disciplinary authorities to know of such misconduct is the essential premise of the duty to report.

Education will deter few lawyers who deliberate the question and choose to violate the rules. In these cases, the lawyer already is thinking about the rule and its underlying policies. She presumably weighs the risks, just as the driver making the U-turn looks for oncoming traffic. It is possible that the lawyer does not fully appreciate the policies underlying the rule and will therefore benefit by added education, but this is likely not the case with many lawyers contemplating a deliberate rule violation. Most lawyers understand the policies behind rules such as the duty to report. They simply do not want to comply. Just as further education would have little effect on the driver making the illegal U-turn, added education, assuming adequate education in the first place, likely would not deter many isolated rule violations by lawyers. This is not to say that enhanced enforcement and education would be useless in stopping intentional rule violations, but rather to point out that they cannot eliminate all or even most of these violations.

In sum, deliberate rule violations are relatively common, both on the road and in law offices and courtrooms. Most are due to the purely selfish reasons of the driver or lawyer. We can try to combat these violations through heightened enforcement and education, but these solutions must be targeted to the violation at issue. Moreover, we must recognize that enforcement and education can do only so much. Many of us will break at least some rules when it suits our own purposes.

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75. Indeed, due to the limitations in Model Rule 8.3, especially the client confidentiality exception, the lawyer will most often face the duty to report when the other lawyer is not a colleague in her firm but instead a friend who has confided in her. This friendship makes the duty to report even more personally difficult for the lawyer to follow.

76. *See supra* text accompanying notes 17-18.

E. DELIBERATE VIOLATIONS FOR THE NOBLE PURPOSES OF THE ACTOR

Finally, I turn to the small category of noble rule violations. Here, the driver or lawyer engages in independent and ethical thinking and chooses to defy the rule to achieve a higher good. On the driving side, take again the example of the driver who is considering making an illegal U-turn or breaking the speed limit. Rather than the personal selfish reasons that I assume in the prior section, the driver wants to make the U-turn or speed in order to save time in transporting an injured passenger to the hospital. Such noble traffic violations are rare. Very few drivers confront emergency transport situations, and even these emergencies do not always require illegal traffic maneuvers to aid the passenger.

Examples on the law practice side are likewise rare. As an illustration, I return to the lawyer's duty of confidentiality and propose the example of a client who tells his lawyer that he intends to commit criminal fraud. Under Model Rule 1.6, the lawyer is limited in the circumstances in which she can reveal a client confidence, even if such revelation is necessary to prevent her client from committing a crime. The rule gives the lawyer discretion to reveal a client's intention to commit a crime only where the crime likely will result in imminent death or serious bodily injury.[77] Model Rule 1.6 does not allow a lawyer to reveal her client's intention to commit a lesser crime, such as financial fraud.

A lawyer faced with a client's admission that he intends to commit financial fraud, however, may feel a moral imperative to act to prevent that crime. She of course should try to dissuade her client from committing the crime. If these attempts fail, however, she is faced with the dilemma of whether to breach her duty of confidentiality. If she decides to defy Model Rule 1.6, the lawyer will not be taking the easy way out. Her act of defiance usually will involve much more anguish and negative repercussions, from both the bar and her client, than simply remaining silent. She nevertheless may decide to suffer these consequences in order to achieve what she perceives as a higher good—to prevent the client's proposed crime.

Does her selfless motive mean that we should applaud this type of rule violation? The answer again surely will foster debate, but I urge caution in encouraging even such selfless ethical violations.[78] Defiance, even if honorably motivated, may cause more harm than good. On the driving side, it takes little to imagine a driver who, under the stress of an emergency, impulsively decides to speed or take an illegal U-turn to get a passenger to the hospital but, in the process, causes another accident and greater injury. Similar results can happen on the law side, regardless of the good intentions of the lawyer. In the case of the

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77. MODEL RULES Rule 1.6(b)(i).

78. I recognize that I am bucking the trend, at least that of popular culture which today seems to encourage moral defiance of professional standards. *See* William H. Simon, *Moral Pluck: Legal Ethics in Popular Culture*, 101 COLUMBIA L. REV. 421 (2001) (discussing the pervasive use of moral defiance in popular media).

lawyer contemplating revelation of her client's proposed fraud, she runs the danger of overlooking that her client has reconsidered and decided against the crime. Compounding matters is the fact that the lawyer probably will be making this critical decision by herself and under time pressure. If she acts too impulsively, she risks breaching her duties and gaining nothing, other than harm to her client and to herself.

Even if the driver's or lawyer's defiance in fact achieves an affirmative benefit in the particular situation at hand—the driver speeds and safely gets his passenger to the hospital in time for treatment or the lawyer breaches confidentiality and actually protects potential victims from her client's fraud—the question remains as to whether the defiance nevertheless harms society. On the driving side, we must consider the broader aim of the traffic rule. State lawmakers enact speed limits and other safety rules to protect the users of the road from unsafe conditions. Although one driver might defy these laws and achieve a good, the state still may be justified in condemning the violation as too great a risk for others on the road. In other words, the state has concluded that it is willing to risk the passenger in the rare case where speeding might help save his life, in order to save many others from the dangers of a speeding driver, no matter how noble his purpose.[79]

Likewise, the drafters of the rules of professional conduct have made choices as to which standards of conduct will promote the societal good. I again return to the example of the client's intention to commit fraud. The policy choice underlying the ban on revealing the client's intention is controversial,[80] but it is a policy that many practicing lawyers, ethicists and rulemakers believe is sound. The aim of the Model Rule 1.6 ban is to lessen crime, which is itself an unquestionably high societal purpose. The controversy is whether the prohibition achieves this aim. The Model Rule 1.6 ban is based on the belief that strict confidentiality encourages clients to discuss their plans with lawyers and thus

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79. This issue recently has prompted a public policy debate in my hometown of Tuscaloosa, Alabama. A woman was rushing her 14-year old son to the hospital after he was in a collision, and a state trooper stopped and ticketed her for following another car too closely. *See* Emilio Sahurie, *Family Hopes to Inspire Change After Traffic Stop*, TUSCALOOSA NEWS, June 15, 2001, at 1A & 5A. Her son died, and she blames in part the police for delaying her. In response, police officials have urged greater cooperation and understanding by the police in such emergencies, but they also urge caution by drivers and note that a "driver speeding to hospital or the site of an emergency not only endangers himself or herself but others on the highway." *Id.* at 5A.

80. The Model Rule 1.6 ban on speaking to prevent a client fraud is not universally accepted. Many states have broken away from the *Model Rules* approach and expressly permit a lawyer to act to prevent any form of crime, including fraud. *See* GILLERS & SIMON, *supra* note 2, at 71-74 (surveying state variations on Model Rule 1.6). *See also* MODEL CODE DR 4-101(C)(3) (giving lawyers the discretion to reveal client information to the extent necessary to prevent the client from committing "a crime"). Indeed, some states *require* a lawyer to breach confidentiality under these circumstances. *See* FLA. RULE 1.6 (providing that a lawyer "shall reveal" information the lawyer believes is reasonably necessary "to prevent a client from committing a crime"). The circumstances under which a lawyer may reveal client confidences to prevent a fraud also were the subject of debate at the August 2001 meeting of the ABA House of Delegates to consider the Ethics 2000 proposed revision to Model Rule 1.6. *See* Hansen, *supra* note 47.

gives lawyers an opportunity to intercede and persuade their client to comply with the law. Under this view, without the promise of confidentiality, the client would never come to the lawyer and therefore more likely would commit the crime. The counter view is that crime is more likely lessened by the lawyer breaching confidentiality and acting to prevent the crime. The ABA and many states, however, have weighed these policy arguments and determined that silence is more likely to achieve the societal goal of lessening crime.

Lawyers will disagree with this and other policy choices, and the legal profession will never stop lawyers from defying rules for this reason. I do not argue that this should be our aim. The legal profession should encourage independent thinking and ethical debate. The point is instead that the lawyer's ethical debate should include consideration of these policies and the negative consequences of rule violation, even in seemingly noble instances. Just as drivers would be well served by remembering the risks of speeding even in an emergency, a lawyer also would benefit by fully appreciating the risks of her breach as well as the policies underlying the rule itself. This higher level of analysis requires education. Once the lawyer knows and considers all of the relevant factors, the decision becomes one personal to the lawyer, outside the control of the legal profession. In short, all that the legal profession can do is to educate the lawyer sufficiently in the first place and hope that she carefully considers her decision before she acts.

CONCLUSION

In the foregoing comparison of driving and lawyering, I have made several recommendations as to how the legal profession can make modest improvements in the rate of lawyer rule violations. I speak only in broad strokes and do not purport to definitively solve the problem of lawyer misconduct. Instead, I offer the comparison to give a new perspective on lawyer professionalism. The comparison should remind us that lawyers are humans and that any system that attempts to regulate human behavior has its limits, especially when addressing negligent behavior. In concluding that much of the problem is due to human nature, however, I do not mean to make excuses for lawyers or to suggest that the legal profession should turn a blind eye to lawyer misconduct. Rather, I believe that recognition of this fact of life will better enable bar authorities and legal educators to concentrate on steps that might actually improve compliance, such as the focused education, enforcement and rule reform efforts that I discuss in each of the five sections above.

To conclude on a personal note, I can report that I have followed my own recommendation as to education. In my teaching, I take a moderate approach that neither preaches from an ivory tower nor assumes a depressing world of declining civility. Although I teach policy, theory, and other law, I am unapologetic in my emphasis on the rules of professional conduct. I strongly

believe that law students, like drivers, must know and understand the rules that will govern their behavior. I also believe that they should not be shocked by the real world. I openly acknowledge in class that lawyers often break the rules. But I do not shrug my shoulders and end the discussion there. I try to explore the root cause of at least some violations, and explain how lawyers usually can avoid the violations and still serve their clients and themselves.

The reality of law practice is not always easy to bring home to the students. Unlike driver's education students, who have observed actual driver behavior almost every day of their lives, law students usually have little familiarity with law practice. Real-world examples therefore are essential to giving context and meaning to the classroom discussion of professional responsibility. Case opinions, of course, give examples of real lawyers trying to cope with the rules of professional conduct, but cases, written by outsiders, do not fully convey the lawyer's actual experience. I sometimes draw upon my own practice, but with each year that I am outside of practice, this experience loses its relevance to the students. For these reasons, I make a conscious effort to keep up to date with practicing lawyers. I especially try to learn what advice the lawyers are giving my students, whether in the lawyers' visits and speeches at the law school or through their employment of students. Although much of what I hear reflects good ethical judgment, I also have learned of practices that are in violation of the rules of professional conduct. Rather than lamenting this misdirection to my students, I now welcome the opportunity to talk with the students about these practices in class before the students leave law school. In almost all cases, we arrive at ways to achieve the goal of the lawyer without violating the rules.

I occasionally draw directly upon the driving analogy in class discussion. Because law students, though inexperienced in law, have been driving for years, the comparison is an easy way to illustrate some basic points. I use the analogy, for example, in teaching the basic negligence and competence rules. I ask students to think about how often and why they have been negligent in their driving and to contemplate the ways in which that negligence that might also occur in their law practice. Similarly, the comparison is useful in rebutting some of the common attempts at justifying many deliberate rule violations, such as the "everybody does it" argument, and in reminding students that even seemingly innocuous rule violations can have unforeseen dangers and repercussions.

The analogy also can calm law students' concerns about entering the harsh world of actual practice. I explain to students that just as they generally are good drivers, despite their occasional traffic violation, they can be good lawyers despite their (hopefully) infrequent rule violation. Nor do they need to worry unduly about everyone else. The roads generally are safe, and the legal profession for the most part is comprised of lawyers who are ethical and doing their best to serve their clients and the profession.

Perhaps the most important lesson that law students can draw from the analogy

is to remain vigilant in their own conduct. They must recognize that precisely because they are fallible humans, they must never let down their guard. They must wage a constant personal battle to follow the "rules of the road," whether as a driver on the highways or as a lawyer in the courtrooms and law offices. Indeed, this is a lesson that we can all take to heart.