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Post-Watergate: The Legal Profession and Respect for the Interests of Third Parties

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INTRODUCTION

As a result of Watergate, disciplinary proceedings were brought against at least twenty-nine lawyers, which resulted in disciplinary action against at least eighteen of them.¹ Their misconduct included aiding and abetting burglary, obstruction of justice, perjury, violation of campaign laws and conspiracy to violate citizens' constitutional rights, among other charges.² As a result of lawyers' involvement in Watergate, the American Bar Association (ABA) worked to improve ethical standards for lawyers to rehabilitate the profession's tarnished reputation. The ABA's reform efforts included the enactment of the Model Rules of Professional Conduct ("Model Rules") in 1983 and the adoption of a requirement that all ABA accredited law schools provide legal ethics education.³ Subsequent events involving lawyers, however, should cause the legal profession to question whether these reforms adequately help lawyers navigate their often competing roles while maintaining the trust and respect of the public that is necessary to sustain our legal system.

There are many lenses through which one can view the events of Watergate.⁴ This article, however, suggests that much

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¹ *N.O.B.C. Reports on Results of Watergate-Related Charges against Twenty-Nine Lawyers*, 62 A.B.A. J. 1337 (Oct. 1976).

² *Infra* Part I.B.

³ *Infra* Part II.D.

⁴ See, e.g., Arnold Rochvarg, *Enron, Watergate and the Regulation of the Legal Profession*, 43 WASHBURN L.J. 61, 61 (2003) (looking at Watergate as concerning the role of an attorney for an organization when the attorney learns of misconduct by those acting for the organization); Fred D. Thompson, *One Lawyer's Perspective on Watergate*, 27

of the conduct of the lawyers who were disciplined as a result of Watergate violated the interests of third parties, which included both individuals⁵ and the broader community.⁶ If the lawyers had been trained and sensitized to assess the impact of their conduct on the interests of third parties, perhaps some of them would have paused and considered their choices more carefully. Instead, many of them seemed to have pursued the interests of their client or superior zealously and without any consideration of the impact on third parties.⁷ Viewing the conduct of the lawyers through this lens may help inform our understanding of subsequent events where the public has felt betrayed by lawyers' conduct. The conduct of lawyers frequently has serious and foreseeable consequences on third parties that are a byproduct of zealous advocacy. This outcome is frequently proper in our adversarial system, but sometimes it is not. The public's disdain for the legal profession is particularly acute in these circumstances.⁸

Thus, forty years after Watergate, the legal profession should question whether it adequately inculcates in lawyers not only respect for the rule of law but also, specifically, respect for the interests of third parties. This is not to suggest that a lawyer will, or should, frequently allow consideration of a third party's interests to trump the lawyer's duty of loyalty to his or her client. Indeed, the proper execution of a lawyer's duties will often demand the lawyer put his or her client's interests first, even when it harms the interests of others.

That conclusion, however, should not preclude a lawyer, who is an agent of justice in addition to being an advocate, from routinely assessing the consequences of his or her conduct on the

OKLA. L. REV. 226, 226 (1974) (viewing the events of Watergate as generating precedents that will govern the future relationship of the executive and legislative branches); Richard D. Schwartz, *After Watergate*, 8 LAW & SOC'Y REV. 3, 4 (1973) (seeing the events of Watergate as illustrating "the danger that governmental use of information control can threaten freedom of choice in the political process"); John Blake, *Forgetting a Key Lesson from Watergate?*, CNN.com (Feb. 4, 2012), <http://www.cnn.com/2012/02/04/politics/watergate-reform/index.html?iref=allsearch> (viewing Watergate as a campaign finance scandal).

⁵ See *infra* notes 93, 96 and accompanying text.

⁶ See, e.g., In the Matter of Wild, 361 A.2d 182, 184 (D.C. Cir. 1976) (suspending attorney Claude Wild from the practice of law for one year following his conviction for violating campaign finance laws and quoting the sentencing judge who noted that the crime may be one worse than a crime of violence because it "is corrupting our government").

⁷ *Infra* Part I.B.

⁸ See John E. Montgomery, *Incorporating Emotional Intelligence Concepts Into Legal Education: Strengthening the Professionalism of Law Students*, 39 U. TOL. L. REV. 323, 333 (2008) (lack of civility and overly aggressive tactics may not necessarily be ethical violations but the public frequently views them harshly and with distaste).

interests of third parties. Perhaps through that viewpoint some misconduct could be averted. Furthermore, even when a lawyer concludes that the law properly demands action of him or her that will harm the interests of third parties, this reflection may allow the lawyer to discuss with the client not just what the law allows, but the moral implications of taking a legally permissible course of action; in other words, to advise the client on the right thing to do. These moments of reflection may also allow for important consideration of whether the law as written has struck the right balance between loyalty to one's client and the interests in justice, or whether reform is necessary. Lastly, if the public viewed lawyers as a group that is constantly mindful of how its conduct affects other people, that perspective may aid in improving the public's opinion of the legal profession.

No single reform can likely instill in lawyers a routine practice of assessing how their actions impact third parties and how to include the interests of third parties in the framework they use to assess difficult ethical situations. Instead, a variety of reforms would probably be required to create such a cultural shift. This article suggests two areas of reform for consideration: the Model Rules and legal education.

The Model Rules and its predecessors, the 1908 Canons of Professional Ethics and the 1969 Model Code of Professional Responsibility, articulate a need for lawyers to comply with the rule of law during their representation of clients, as well as in their personal affairs.⁹ Each of these guidelines clearly prohibited the violation of the criminal laws that many of the lawyers involved in Watergate committed.¹⁰ The Model Rules and its predecessors also all contain provisions that expressly or implicitly are concerned with the rights of third parties in some specific situations, such as a lawyer's duty not to make false statements of material fact to third parties.¹¹ However, neither the Model Rules nor its predecessors contain a broad principle that a lawyer's ethical decision-making framework should be informed, at least in part, by the impact of the lawyer's conduct on the interests of third parties. Such a principle could be included in the Model Rules, probably not as a standard for disciplinary enforcement, but as a general guiding principle such as those set forth in the Preamble.

Next, legal education can help future lawyers develop an analytical framework to consider ethical dilemmas, in part,

⁹ *Infra* Part II.B-D.

¹⁰ *Infra* Part II.B-D.

¹¹ *Infra* Part II.B-D.

through the perspective of third parties. Increasingly, legal ethics education has used a problem-based pedagogy to put ethical dilemmas in context and to give students the opportunity to assess problems from different roles, such as lawyer, client, third-party neutral and judge.¹² Such roles could also include third parties impacted by lawyers' conduct, which could broaden the perspective through which ethical problems are viewed and analyzed. Additionally, legal ethics education may benefit from the growing dialogue about developing the emotional intelligence of law students and lawyers. Emotional intelligence includes developing empathy for others and an understanding of their perspective, which could be valuable to legal ethics education.¹³

Legal education can also help train lawyers to do a better job of educating their clients about the role of lawyers and the limits on their role. The conduct of the actors involved in Watergate has, in many instances, been explained by the context in which the actors were placed—specifically the White House and all of its power and prestige.¹⁴ There is undoubtedly some truth to that explanation, but it would be an overstatement to say that the motivations of the actors were unique to that powerful setting. In today's competitive business world, private attorneys must compete vigorously to retain their clients' business or risk losing income and frequently job security. This can create incredible pressure to satisfy the demands of clients, who are not bound by the professional rules of ethics and frequently are not even interested in hearing about them.¹⁵ Thus, lawyers need to do a better job of communicating with their clients about the limits of their role. No matter which lawyer a client sees, that client should hear a clear and consistent message that the lawyer is not there to win at all costs, but to advocate for the client within the parameters of the facts and the law, while treating third parties with dignity and respect.

Part I of this article gives a brief overview of Watergate and focuses on the specific conduct of some of the lawyers who were disciplined. Part II of this article gives an overview of the history the American Bar Association's efforts to codify ethical rules including the promulgation of the 1983 Model Rules of Professional Conduct. Part III will discuss post-Watergate events involving lawyers that have impaired the public's trust of the profession, which suggest there is still room for improvement. Lastly, Part IV will discuss possible reforms to the Model Rules

¹² *Infra* Part IV.B.

¹³ *Infra* Part IV.B.

¹⁴ *Infra* Part III.

¹⁵ *Infra* Part III.

and legal education that could help instill in lawyers a principle of evaluating the impact of their conduct on third parties as a routine part of legal practice and ethical decision-making.

I. WATERGATE

A. A General Overview

While the events that comprise what is now referred to collectively as “Watergate” are extensive, this article will only briefly outline some of the events to provide context for a more detailed exploration of the actions of some of the individual lawyers involved in Watergate. The epicenter of Watergate occurred on June 17, 1972, when five men were arrested at the Democratic National Committee (DNC) offices located in the Watergate Hotel.¹⁶ This break-in was part of a broader campaign strategy devised by Nixon and his aides aimed at attacking Nixon’s Democratic opponent in the 1972 campaign.¹⁷ This strategy included bugging the offices of the DNC in order to obtain political intelligence.¹⁸

The men arrested on June 17, 1972, were James McCord, who was working for the Committee to Re-elect the President (CRP)¹⁹ and four Cubans.²⁰ Those involved in planning and authorizing the break-in included Gordon Liddy (a lawyer), Jeb Magruder, and John Mitchell, the former U.S. Attorney General who had left that post to work for CRP and take over the management of Nixon’s re-election campaign.²¹ The break-in occurred just months before Nixon won the 1972 election by a landslide for a second term.²² The events that collectively comprise “Watergate,” however, span the years before and after the break-in.

In many ways, the story of Watergate began in 1971, when the *New York Times* began publishing the Pentagon Papers, a top-secret study regarding the Vietnam War, which Daniel Ellsberg had leaked to the press.²³ Responding to this leak, the White House formed the “Plumbers,” a group tasked with

¹⁶ Tad Szulc, *Democratic Raid Tied to Realtor*, N.Y. TIMES, June 19, 1972, at 1; SAM J. ERVIN, JR., *THE WHOLE TRUTH: THE WATERGATE CONSPIRACY* 7 (1980).

¹⁷ ERVIN, *supra* note 16, at 3–4.

¹⁸ *Id.* at 5.

¹⁹ Rochvarg, *supra* note 4, at 61–62.

²⁰ ERVIN, *supra* note 16, at 7–8.

²¹ *Id.* at 4, 40.

²² *Id.* at 10 (“President Nixon was returned to the White House over his Democratic opponent, Senator George S. McGovern, by a landslide victory in which he received 520 of the nation’s 538 electoral votes and 60.8 percent of its popular votes.”).

²³ *Id.* at 120.

plugging information leaks.²⁴ Members of the “Plumbers” included Egil “Bud” Krogh (a lawyer), G. Gordon Liddy (a lawyer) and Howard Hunt, a former employee of the Central Intelligence Agency.²⁵

The “Plumbers” sought to discredit Daniel Ellsberg’s character and mental stability, which was the motivation behind a burglary of the offices of Dr. Fielding, Ellsberg’s psychiatrist.²⁶ Members of the “Plumbers,” including Krogh authorized the burglary, which was carried out by a team that included Liddy, Hunt and four Cubans.²⁷ It was these same four Cubans who, along with James McCord, (McCord was working for CRP), subsequently broke into the DNC offices at Watergate.²⁸ This fact, in large part, appears to have motivated Nixon and the White House’s cover-up of the Watergate break-in.²⁹ While direct ties between CRP’s Watergate break-in and the White House were weak, the ties between the White House and the break-in of Dr. Fielding’s office were stronger; this made the President vulnerable to being implicated in wrongdoing.³⁰ Because four of the men involved in the break-in of Dr. Fielding’s office were taken into custody and faced criminal charges for the Watergate break-in, the President’s administration apparently perceived a threat that those men would disclose information about the break-in of Dr. Fielding’s office and the role of the White House, as part of a plea bargain.³¹ And thus, the Watergate cover-up began.

Concerns about additional leaks also caused Nixon to want to obtain Morton Halperin’s papers from the Brookings Institute because there were reports that those papers would extend the Pentagon Papers into the time frame of Nixon’s administration.³² Breaking in and stealing the papers was not feasible because

²⁴ *Id.*

²⁵ *Id.* at 105–06, 120.

²⁶ *Id.* at 106.

²⁷ JOHN W. DEAN, *BLIND AMBITION: THE END OF THE STORY* 506–10 (2009); see *N.O.B.C. Reports*, *supra* note 1, at 1337 (listing lawyers who were involved in Watergate-related activities).

²⁸ DEAN, *supra* note 27, at 101–02; ERVIN, *supra* note 16, at 10.

²⁹ See *infra* note 31.

³⁰ Nixon never admitted to knowing about the Ellsberg break-in prior to March 1973—eighteen months after the break-in occurred. FRED EMERY, *WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON* 210 (1994). However his close aides were apparently never sure of this, and were concerned that he could be implicated. See DEAN, *supra* note 27, at 240–41, 314–16.

³¹ DEAN, *supra* note 27, at 101–06.

³² *Id.* at 43. “Although the Pentagon Papers did not deal directly with the Nixon administration, the president believed that publishing the papers would undermine his efforts to control Vietnam policy.” MICHAEL A. GENOVESE, *THE WATERGATE CRISIS* 15 (1999).

they were believed to be in a very secure vault inside the building.³³ Nixon's Special Counsel, Chuck Colson (a lawyer),³⁴ proposed a plan to firebomb the Brookings Institute to create chaos and provide an opportunity to gain access to the facility.³⁵ This plan was abandoned after White House Counsel John Dean raised an objection to it.³⁶ While Dean's intervention stopped this plan, instead of viewing Dean's objections as wise counsel, some of the President's inner circle viewed him as having some "little old lady" in him.³⁷ In other words, those in power seemed to send a message that the people ready and willing to do the President's bidding should not feel constrained by the law.

The combination of the Ellsberg and Watergate break-ins set the stage for the events after the Watergate break-in, when the White House and many individuals associated with it engaged in cover-up activities³⁸ that would result in a multitude of criminal charges.³⁹ These events, and others, arose in an environment in which the White House and the presidency were in many instances viewed as infallible and above the law.⁴⁰ There seems to have been a general attitude that began with Nixon that the ends sought by the White House justified any means. For example, with respect to the documents Nixon wanted from the Brookings Institute, tapes of Nixon reveal demands from him such as, "Goddamnit, get in [the Brookings Institute] and get those files. Blow the safe and get it," and "You're to break into the place, rifle the files, and bring them in."⁴¹ In 1975 Dean Weckstein wrote about this attitude among the Watergate actors:

There is a difference in application, but not in underlying principle, between those who would state that it is a lawyer's duty to use any means (legal or illegal; honest or dishonest) to get his client off or otherwise achieve a victory and those who would break into a

³³ DEAN, *supra* note 27, at 43.

³⁴ See *infra* notes 66, 67 and accompanying text.

³⁵ DEAN, *supra* note 27, at 43.

³⁶ *Id.* at 43–46.

³⁷ *Id.* at 46.

³⁸ *Id.* at 532–36. John Dean wrote:

Bud Krogh's explanation as to why the cover-up occurred—that the Ellsberg-related burglary was at the core of the cover-up—is correct, at least as far as the White House was concerned. This fact was well understood by all who were involved in the cover-up, although it has been left to only Bud and myself to acknowledge it, since Haldeman, Ehrlichman, and Mitchell went to their graves either pretending they did not understand why the cover-up occurred or denied that anything untoward had, in fact, happened.

Id. at 529.

³⁹ Lyman M. Tondel, Jr., *Watergate: The Public Lawyer and The Bar as seen from the Perspective of the ABA Ethics Committee*, 30 BUS. LAW. 295, 296 (1975).

⁴⁰ See *infra* note 166 and accompanying text.

⁴¹ DEAN, *supra* note 27, at 32–33; STANLEY I. KUTLER, *ABUSE OF POWER: THE NEW NIXON TAPES* 3, 6 (1997).

psychiatrist's office or engage in illegal wiretapping in the name of national security or to get their candidate elected and save the world from George McGovern.⁴²

B. Lawyers' Crimes and Discipline

The criminal offenses of some of the lawyers involved in Watergate included "ordering, acquiescing in, participating in, or helping to cover up burglaries and thefts; illegal wiretapping; obstruction of justice; perjury; violations of campaign contribution laws; [and] giving and accepting bribes."⁴³ Most of these lawyers were not acting in their capacity as a lawyer when they engaged in misconduct.⁴⁴ This did not, however, prevent them from being subject to discipline by the states and courts in which they were admitted to practice.⁴⁵ Nor did that fact prevent damage to the reputation of lawyers and their role in the administration of justice.⁴⁶

John Dean, former White House Counsel, famously testified before the Senate Watergate Committee in 1973 about a list he had made of all the people that he thought had violated the law.⁴⁷ He had put an asterisk next to ten of the names on the list, each of whom was a lawyer.⁴⁸ Senator Talmadge questioned Dean about the significance of the marks and Dean responded, "[T]hat was just a reaction to myself, the fact that how in God's name could so many lawyers get involved in something like this?"⁴⁹ Dean's list turned out to be modest.

The National Organization of Bar Counsel created a Special Committee on the Co-ordination of Watergate Discipline in 1973.⁵⁰ The committee issued its final report in 1976 and reported that disciplinary proceedings had been initiated against twenty-nine lawyers in connection with Watergate-related matters.⁵¹ The report disclosed that seven of the lawyers involved had been disbarred (President Nixon among them), public disciplinary action had been taken against another eleven

42 Donald T. Weckstein, *Watergate and the Law Schools*, 12 SAN DIEGO L. REV. 261, 270 (1975). He also wrote, "We must encourage our law students to accept the priority of process over results and means over ends . . ." *Id.*

43 Tondel, *supra* note 39, at 296.

44 See Stuart E. Hertzberg, *Watergate: Has the Image of the Lawyer Been Diminished?*, 79 COMM. L.J. 73, 74 (1974).

45 See Clark, *infra* note 50.

46 See, e.g., Weckstein, *supra* note 42, at 271; Hertzberg, *supra* note 44, at 74.

47 John W. Dean, III, *Watergate: What Was It?*, 51 HASTINGS L.J. 609, 611 (2000).

48 *Id.*

49 *Id.*

50 N.O.B.C. Reports, *supra* note 1, at 1337; see also Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 HASTINGS L.J. 673, 678-79 (2000).

51 N.O.B.C. Reports, *supra* note 1, at 1337.

other lawyers, and as of 1976 no public disciplinary action had been reported against the remaining eleven lawyers.⁵²

While many of the actions of the disciplined lawyers involved violations of the law that were more injurious to society as a whole, many of the violations of the law also directly infringed on the rights and interests of individuals. For example, in the opinion that disbarred Nixon from the New York Bar, the Court's description of Nixon's misconduct included conduct that directly violated the rights of Dr. Fielding, who had his office broken into, and Daniel Ellsberg, whose personal legal defense was obstructed:

Mr. Nixon improperly . . . attempted to obstruct an investigation by the United States Department of Justice of an unlawful entry into the offices of Dr. Lewis Fielding, a psychiatrist who had treated Daniel Ellsberg; improperly concealed and encouraged others to conceal evidence relating to unlawful activities of members of his staff and of the Committee to Re-elect the President; and improperly engaged in conduct which he knew or should have known would interfere with the legal defense of Daniel Ellsberg.⁵³

Egil "Bud" Krogh, the Deputy Assistant for Domestic Affairs to the President of the United States and later Undersecretary of Transportation, was also disbarred.⁵⁴ Krogh recalled a meeting where President Nixon's Chief of Staff, Bob Haldeman, and Chief Domestic Advisor, John Ehrlichman, told Krogh, "[Y]ou have one client. And that client is Richard Nixon."⁵⁵ Krogh has since reflected, "The choice of words was deliberate. Our client was a person, not the President or the presidency. And we were to serve his wishes as zealously as we could."⁵⁶

As a member of the White House "Plumbers," Krogh was instructed that the President wanted him to investigate the leak of the Pentagon Papers with the "utmost zeal," and to utilize whatever means the government had at its disposal to stop leaks of information that the President considered a matter of national security.⁵⁷ This led to Krogh's involvement in adopting a plan whereby Howard Hunt, another member of the "Plumbers," would break into the office of Dr. Fielding, Daniel Ellsberg's psychiatrist, in an effort to steal records that could depict Ellsberg as someone who was unreliable and untrustworthy.⁵⁸

⁵² *Id.*; see also Clark, *supra* note 50, at 678–79.

⁵³ *In re Nixon*, 53 A.D.2d 178, 179–80 (N.Y. App. 1976).

⁵⁴ *In re Krogh*, 536 P.2d 578, 589–90 (Wash. 1975).

⁵⁵ Lynne Reaves, *Ethics in Action: Two Recall Watergate Lessons*, 70 A.B.A. J. 35, 35 (1984).

⁵⁶ *Id.*

⁵⁷ *In re Krogh*, 536 P.2d at 579–80.

⁵⁸ *Id.* at 580.

The Supreme Court of Washington's opinion that disbarred Krogh focused on his guilty plea to a violation of 18 U.S.C. § 241 (conspiracy against the rights of citizens), which was a felony.⁵⁹ The charges against Krogh included specific violations of Dr. Fielding's rights:

[T]hat while the respondent was an officer and employee of the United States Government, [he] . . . unlawfully, willfully and knowingly did combine, conspire, confederate and agree with his co-conspirators to injure, oppress, threaten and intimidate Dr. Lewis J. Fielding, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States, and to conceal such activities. It further charged that the co-conspirators did, without legal process, probable cause, search warrant or other lawful authority, enter the offices of Dr. Fielding in Los Angeles County, California, with the intent to search for, examine and photograph documents and records containing confidential information concerning Daniel Ellsberg, and thereby injure, oppress, threaten and intimidate Dr. Fielding in the free exercise and enjoyment of the right and privilege secured to him by the Fourth Amendment to the Constitution of the United States, to be secure in his person, house, papers and effects against unreasonable searches and seizures To all of these allegations, the respondent had pleaded guilty.⁶⁰

As otherwise stated by the court, Krogh not only flagrantly disregarded the laws of the United States, but also the fundamental rights of citizens.⁶¹

The court's opinion indicated that perhaps the environment in which Krogh was functioning helped lead him astray:

[Krogh] indicated that he had been blinded, perhaps, by the power of the Presidency or what he conceived to be its power. A number of men who submitted letters attesting to his good character expressed the concern that they in the same circumstances might have behaved in much the same manner.⁶²

⁵⁹ *Id.* at 578.

⁶⁰ *Id.* at 579. The opinion states that Krogh became distressed when he learned that the burglars had left evidence of their break-in "not, it appears, because of concern of Dr. Fielding's property but rather because of the fear that an investigation of the burglary might lead to a discovery of the identity of the perpetrators." *Id.* at 580.

⁶¹ *Id.* at 584.

⁶² *Id.* at 583; see also *D.C. Bar v. Kleindienst*, 345 A.2d 146, 149 (D.C. Cir. 1975) (order suspending former Attorney General of the United States Richard Kleindienst from the practice of law for thirty days and stating "that respondent is a man of high professional stature, with correspondingly high obligations, who was caught up in a 'highly charged political atmosphere . . . when pressed by political opponents.'"); In the *Matter of Wild*, 361 A.2d 182, 185 (D.C. Cir. 1976) (order suspending attorney Claude Wild from the practice of law for one year acknowledged that Wild had been pressured by the Nixon administration to make illegal campaign contributions on behalf of his employer, Gulf Oil, and that he feared reprisals to his employer if he did not make the donation). Sam Dash, the chief counsel to the Senate Watergate Committee also wrote

Krogh seems to have given little thought to the impact of his conduct on others at the time of his actions; he was focused on his and his superior's interests.⁶³

Krogh's reasoning for pleading guilty to the criminal charges suggests a later-developed appreciation of his violations of the rights of third parties. Krogh explained:

I had a chance to sit back and sort of look at where I was. I was under indictment in both California and Washington and yet I was a person that was at large, free to travel, free to associate with whomever I wished. I could say what I wanted to and if I said it to certain individuals it would get reported. I could attend any church of my choice. There were a number of things I was enjoying as a defendant, potential defendant in a criminal trial and yet here I was defending conduct when I was a government servant which had stripped another individual of his Fourth Amendment rights to be secure from an illegal search, and I suppose it was that I felt that if I had continued to defend that, I would in a sense be attacking the very rights which I was enjoying at that time as a potential defendant.⁶⁴

Charles Colson, White House Aide and Special Counsel to President Nixon, was also disbarred following his conviction for obstruction of justice.⁶⁵ The charges to which Colson pled guilty included impeding and obstructing justice in connection with the criminal trial of Daniel Ellsberg by "devising and implementing a scheme to defame and destroy the public image and credibility of Daniel Ellsberg and those engaged in the legal defense of Daniel Ellsberg, with the intent to influence, obstruct and impede the conduct and outcome of the criminal prosecution . . ."⁶⁶ These activities were done at the behest of President Nixon who was angered by the release of the Pentagon Papers and had instructed Colson to stop the leaks of sensitive information "no matter what the cost," including disseminating material to the

about the tension between a lawyer's obligation to do the right thing and a client's expectations of a lawyer. With respect to teaching legal ethics he wrote:

It's nice to talk about these things theoretically in law school. But in the real world the choice a lawyer sometimes has to make is to stand up to a client who wants to do something wrong and say no. And by standing up to him you may lose your job.

Reaves, *supra* note 55, at 35.

⁶³ The opinion disbaring Krogh states that he became distressed when he learned that the burglars had left evidence of their break-in "not, it appears, because of concern of Dr. Fielding's property but rather because of the fear that an investigation of the burglary might lead to a discovery of the identity of the perpetrators." *In re Krogh*, 536 P.2d at 580.

⁶⁴ *Id.* at 581.

⁶⁵ *In re Colson*, 412 A.2d 1160, 1161-62 (D.C. Cir. 1979).

⁶⁶ *Id.* at 1162-63. Some of the specific acts included releasing defamatory allegations about one of Ellsberg's attorneys and attempting to obtain and release derogatory information about Daniel Ellsberg, including his psychiatric files. *Id.* at 1163.

news media that would “expose” Ellsberg and his motives.⁶⁷ There is, of course, a societal interest in the integrity of criminal proceedings; but in addition, Daniel Ellsberg and his counsel also had an individual interest that was infringed by this conduct—namely the right to be free from lawyers falsely attacking their public image and reputation through illicit means.

Another actor in Watergate, attorney Donald Segretti, was hired by two members of Nixon’s staff, Dwight Chapin and Gordon Strachan, to pull pranks on Democratic presidential aspirants in order to cause internal divisions and prevent the party from uniting around one candidate.⁶⁸ In short, “[Segretti] repeatedly committed acts of deceit designed to subvert the free electoral process.”⁶⁹ As a result of these activities, Donald Segretti was convicted of violating campaign laws.⁷⁰ He was subsequently suspended from the practice of law for two years as a result of those convictions.⁷¹

Segretti’s “pranks” certainly subverted society’s interest in an honest election process, but his activities also invaded the interests of specific individuals. For example, Segretti wrote and distributed a letter on the Citizens for Muskie Committee letterhead, without its consent, which falsely accused Senators Humphrey and Jackson (both candidates for the Democratic nomination for President) of sexual improprieties.⁷² Both Senators Humphrey and Jackson had the individual right not to have a lawyer knowingly publicize false accusations about them. Segretti also wrote another letter on Senator Humphrey’s stationery, without his consent, falsely alleging that Representative Shirley Chisholm, also a Democratic candidate, had been committed to a mental institution and was still under psychiatric care.⁷³ Senator Humphrey had the right not to have his identity misappropriated, and Representative Chisholm had the right not to have false accusations knowingly made about her mental capacities. Perhaps Segretti recognized this when he testified before the Senate Watergate Committee, “To the extent

⁶⁷ *Id.*

⁶⁸ *In re Segretti*, 544 P.2d 929, 930 (Cal. 1976).

⁶⁹ *Id.* at 934.

⁷⁰ *Id.* at 930. Specifically, Segretti was convicted of violating federal law prohibiting the publication or distribution of statements relating to presidential candidates without disclosing the names of the persons or organizations responsible for the publication or distribution, as well as conspiracy to commit such acts. *Id.*

⁷¹ *Id.* at 936.

⁷² *Id.* at 931.

⁷³ *Id.*

the activities have harmed other persons and the political process, I have the deepest regret.”⁷⁴

The California Supreme Court not only suspended Segretti from the practice of law, it also ordered that he (and all future suspended members of the bar) pass the then newly instituted Professional Responsibility Examination as a condition of reinstatement.⁷⁵ The court wrote, “In short, although we cannot insure that any attorney will in fact behave ethically, we can at least be certain that he is fully aware of what his ethical duties are.”⁷⁶

In the early to mid-1970s, as the events of Watergate were still unfolding, some members of the legal profession made comments that expressed concern about the Watergate participants’ disregard for the rights and dignity of third parties. For example, in 1973 ABA President Robert Meserve spoke to the ABA about Watergate and quoted the late John Lord O’Brian who wrote, “The whole American way of life, to say nothing of the confidence of the citizens in the government, is based, as we all know, upon a belief in the dignity of the individual accompanied by a pervasive sense of intelligent toleration and respect for the rights of the others.”⁷⁷

Meserve observed that perhaps “the belief in individual dignity and the deliberate promotion of mutual respect and tolerance” had suffered the most damage from Watergate.⁷⁸

Attorney Elliot L. Richardson, who gave an address at the ABA’s 1974 annual convention, had some similar reflections on the cause of Watergate and the continued presence of the cause:

The problem is that the forces underlying Watergate morality persist. And very important among these forces, although not sufficiently appreciated as such, is the *decline of a sense of community* Those who lack a sense of community become prone to a rootless kind of amorality that makes them easily influenced by the institutional value systems to which they happen for the time being to belong.⁷⁹

⁷⁴ *Id.* at 934 n.5. Other disciplinary actions included the disbarment of John Mitchell, former Attorney General of the United States, after his conviction for conspiracy, perjury and obstruction of justice, *In re Mitchell*, 351 N.E.2d 743, 744–45 (N.Y. 1976), and the disbarment of Gordon Liddy following his conviction for several crimes, including burglary in the second degree. *In re Liddy*, 343 N.Y.S.2d 710, 711 (N.Y. App. Div. 1973).

⁷⁵ *In re Segretti*, 544 P.2d at 936–37.

⁷⁶ *Id.* at 936.

⁷⁷ Robert W. Meserve, *The Legal Profession and Watergate*, 59 A.B.A. J. 985, 986 (1973).

⁷⁸ *Id.*

⁷⁹ Elliot L. Richardson, *The Watergate Morality*, 24 BUFF. L. REV. 267, 269 (1974–75) (emphasis added).

Richardson went on to state that such rootlessness may lead to the “sustained pursuit of self-interest,” and that such “[e]xcessive absorption in self-interest leads, in turn, to individualism unconstrained by respect for other individuals.”⁸⁰ Richardson further stated, “Indeed, where there is true respect for other people—the awareness that each is a unique, sacrosanct individual equal in dignity to every other human being—there is awareness of obligation which is higher and more sensitive than any requirement of the law.”⁸¹

Richardson’s address is somewhat reminiscent of Justice Brandeis’ comments in a 1933 speech where he opined that the reason that lawyers do not hold a high position with the people is not because of a lack of opportunity, but because “[i]nstead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people.”⁸²

II. POST-WATERGATE LEGAL REFORMS

At the time of Watergate, the ABA’s 1969 Model Code of Professional Responsibility (“Code”) was the national model of ethical rules that influenced the codes of conduct adopted by the various states. The ABA revisited the Code in 1977, when it formed the Commission on the Evaluation of Professional standards, known as the Kutak Commission, to recommend changes to the Code.⁸³ The result was the ABA’s adoption of the 1983 Rules of Professional Conduct (“Rules”), which remains the predominant guide for the states today. However, in order to examine the evolution of ethical rules and their perception of the role of the lawyer in society, it will be helpful to start our review of ethical guidelines in the mid-1800s. The perception of the lawyer’s role has slightly shifted over time from one who is a member of the community, charged with maintaining independence and keeping an eye on justice, to one who is more of a partisan advocate who has less independence from the directives of his or her client.⁸⁴ This shift may underlie part of the cause of Watergate, and it still persists today.

⁸⁰ *Id.*

⁸¹ *Id.* at 271.

⁸² LOUIS D. BRANDEIS, BUSINESS—A PROFESSION 337 (1933).

⁸³ ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES v (1987) [hereinafter ABA, THE MODEL RULES AND THEIR DEVELOPMENT IN THE HOUSE OF DELEGATES].

⁸⁴ Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 220–22 (2002).

A. Ethics Before the ABA's Involvement

Before the ABA drafted the Canons of Professional Ethics in 1908, there were several early statements of ethics that influenced the development of the ABA's 1908 Canons. First, David Hoffman's 1846 book *A Course of Legal Study* contains one of the earliest American statements of lawyers' ethics in a section titled "Fifty Resolutions in Regard to Professional Deportment" ("Resolutions").⁸⁵ The Resolutions contemplated the lawyer's role as a moral agent of justice as being paramount to the lawyer's role as a zealous advocate under the law. Otherwise stated, Hoffman believed that moral law, which he understood to have a religious foundation, took priority over positive law.⁸⁶ For example, the Resolutions provided the following with respect to the representation of a defendant who the lawyer knows has committed a crime:

Persons of atrocious character, who have violated the laws of God and man, are entitled to no such special exertions from any member of our pure and honourable profession; and, indeed, to no intervention beyond securing them a fair and dispassionate investigation of the *facts* of their cause, and the due application of the law: all that goes beyond this, either in manner or substance, is unprofessional, and proceeds, either from a mistaken view of the relation of client and counsel, or from some unworthy and selfish motive, which sets a higher value on professional display and success, than on truth and justice, and the substantial interests of the community.⁸⁷

Other Resolutions regarding civil matters contained similar principles. For example, the Resolutions admonished a lawyer never to plead the statute of limitations if that was the only defense available and the client was conscious of owing a debt.⁸⁸ Similarly, the Resolutions stated that lawyers "will never plead, or otherwise avail of the bar of *Infancy*, against an honest demand" if the client has the ability to pay and has no other defense.⁸⁹ They also stated that even if the law provided for such a defense, the lawyer should independently judge whether its use was proper under the circumstances.⁹⁰ One writer described Hoffman's moral philosophy as follows, "He maintains that

⁸⁵ DAVID HOFFMAN, *A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY* 752–75 (1846). Hoffman drafted this book to be the curriculum at his planned law school at the University of Maryland. James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2422 (2003).

⁸⁶ Altman, *supra* note 85, at 2423. Hoffman's resolutions included: "What is morally wrong, cannot be professionally right . . ." HOFFMAN, *supra* note 85, at 765.

⁸⁷ HOFFMAN, *supra* note 85, at 756.

⁸⁸ *Id.* at 754.

⁸⁹ *Id.* at 754–55.

⁹⁰ *Id.*

attorneys must independently consult their consciences when conducting their cases and should not press claims that would make bad law. Hoffman's moral system, then, is explicitly premised on the assumption that men's consciences will accurately reflect shared community norms."⁹¹

The next influential statement of lawyers' ethical duties was George Sharswood's "An Essay on Professional Ethics," which was published in 1884 and then reprinted in 1907.⁹² Sharswood also emphasized the importance of a lawyer's conscience in the course of his professional work, but his approach has been described as more nuanced than Hoffman's.⁹³ With respect to defendants, Sharswood believed that the value of lawyers in the adversary system provided sufficient justification for a lawyer to represent a client who the lawyer believed had committed a wrong.⁹⁴ However, his view was more akin to Hoffman's when it came to representing a plaintiff in a civil case. In that situation, Sharswood wrote that a lawyer has "an undoubted right, and [is] in duty bound, to refuse to be concerned for a plaintiff in the pursuit of a demand, which offends his sense of what is just and right."⁹⁵ Sharswood also wrote that, other than the ministry, there was no profession other than the law where a "high-toned morality" was imperative; indeed "[h]igh moral principle is [the lawyer's] only safe guide; the only torch to light his way amidst darkness and obstruction."⁹⁶

Lastly, the first code of ethics formally adopted in the country was the Alabama State Bar Association's Code ("Alabama Code"), adopted in 1887.⁹⁷ The Alabama Code also contemplated that a lawyer's role as an advocate would be

⁹¹ Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 494 (1998) (footnotes omitted).

⁹² GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1993).

⁹³ Altman, *supra* note 85, at 2427-29.

Because Sharswood emphasizes, much more than Hoffman, the importance of the adversary process to the administration of justice and acknowledges, to a much greater extent, that the lawyer's professional role is shaped by that process, Sharswood's view of the lawyer's duty 'when the legal demands or interests of his client conflict with his own sense of what is just and right' is much more nuanced than Hoffman's.

Id. at 2427.

⁹⁴ *Id.* at 2428-29.

⁹⁵ *Id.*

⁹⁶ SHARSWOOD, *supra* note 92, at 55. Sharswood also wrote, "The client has no right to require [the lawyer] to be illiberal—and he should throw up his brief sooner than do what revolts against his own sense of what is demanded by honor and propriety." *Id.* at 74-75. Sharswood also acknowledges that there are not necessarily easy answers when the legal demands and interests of the client conflict with the lawyer's own sense of what is just and right. *Id.* at 81.

⁹⁷ Altman, *supra* note 85, at 2437.

subordinate to his own moral views and to his obligations to third parties:

[A]ccording to the Alabama Code, the lawyer's duty of zealous representation is subject to the lawyer's greater obligations to (i) the legal system, i.e. 'obedience to law'; (ii) *third parties*; i.e. '*the obligation to his neighbor*'; and (iii) his own moral view of right and wrong or, in other words, what was just and unjust in the eyes of his God; i.e. 'accountability to the Creator.'⁹⁸

The Alabama Code heavily influenced the ABA's Canons of Professional Ethics, with some provisions of the Canons being derived primarily from the language in the Alabama Code.⁹⁹

B. The Evolution of the ABA's Model Rules of Professional Conduct

Since its formation, the American Bar Association has adopted three major iterations of ethical guidelines for lawyers in the United States—the 1908 Canons of Professional Ethics, the 1969 Model Code of Professional Responsibility, and the 1983 Model Rules of Professional Conduct. Each document gives some consideration of the role of morality in lawyering, although the emphasis on the lawyer's role as a moral actor arguably decreases with each version. Each document has also contained language regarding the need for lawyers to operate within the bounds of the law in order to uphold the public's respect for the law and the legal profession, which are important rationales. None of these documents, however, explicitly state that upholding the rule of law frequently serves another broad purpose—it prevents a lawyer from becoming an instrument in the violation of the rights of third parties.

While all of the documents contain some sections that give parameters about lawyers' treatment of third parties in certain circumstances, none of them specifically set out third parties as an important beneficiary of adherence to the rule of law or as a specific consideration that should inform a lawyer's ethical decision-making regarding his or her actions. This is not to suggest that a lawyer's loyalty to his or her client is not going to trump consideration of a third party's rights at times; indeed, sometimes the proper role of a lawyer will demand that outcome. That reality, however, should not preclude a lawyer from thinking through the implications of his or her conduct regarding the rights of third parties and, perhaps through that lens, some misconduct could be averted. Furthermore, even when a lawyer

⁹⁸ *Id.* at 2448 (emphasis added).

⁹⁹ *Id.* at 2453.

concludes that the law properly demands action of him or her that will harm the interests of third parties, this reflection may allow the lawyer to discuss with the client not just what the law allows, but the moral implications of taking a legally permissible course of action. At other times, the lawyer may conclude that the law demands action of him or her that will harm the rights of the third parties, but these moments may allow for important reflection on whether the law as written has struck the right balance between advocacy and interests in justice.¹⁰⁰ Working to reform and improve the law is also within the proper role of all lawyers.¹⁰¹

C. The ABA Canons of Professional Ethics

In 1908 the ABA promulgated the Canons of Professional Ethics (“Canons”).¹⁰² The Canons are believed to be, at least in part, a response to President Theodore Roosevelt’s criticism of the legal profession, particularly corporate lawyers.¹⁰³ In 1905 President Roosevelt gave a speech at Harvard where he made the following statements about the legal profession:

Every man of great wealth who runs his business with cynical contempt for those prohibitions of the law which by hired cunning he can escape or evade is a menace to our community; and the community is not to be excused if it does not develop a spirit which actively frowns on and discountenances him. The great profession of the law should be that profession whose members ought to take the lead in the creation of just such a spirit. We all know that, as things actually are, many of the most influential and most highly remunerated members of the bar in every centre of wealth make it their special task to work out bold and ingenious schemes by which their very wealthy clients, individual or corporate, can evade the laws which are made to regulate in the interest of the public the use of great wealth.¹⁰⁴

Hoffman’s Resolutions, Sharswood’s essay on ethics, and the Alabama State Bar Association’s 1887 Code all had some influence on the drafters of the Canons.¹⁰⁵ There is also support

¹⁰⁰ See *infra* Part IV.A.

¹⁰¹ MODEL RULES OF PROF’L CONDUCT Preamble 6 (2009) (“As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”).

¹⁰² CANONS OF PROF’L ETHICS (1908).

¹⁰³ Altman, *supra* note 85, at 2403.

¹⁰⁴ President Theodore Roosevelt, Speech at Harvard University (June 28, 1905), available at <http://www.theodore-roosevelt.com/images/research/txtspeeches/143.txt>. One scholar has suggested that the ABA’s formation of the 1908 Code of Professional Ethics stemmed from this speech. Altman, *supra* note 85, at 2409.

¹⁰⁵ Altman, *supra* note 85, at 2400; see also David O. Burbank & Robert S. Duboff, *Were the Watergate Lawyers an Exception?*, 3 B. LEADER 17, 17 (1978).

for the view that, by the late 1800s, lawyers were viewing their responsibilities to their clients as their primary, and perhaps exclusive, moral obligation and the Canons were drafted to try to counter that trend.¹⁰⁶ While heavily influenced by the Alabama Code, one writer has argued that the Canons “express a more robust vision of conscientious lawyering that enlarges the authority of, and gives greater support to, the lawyer’s moral autonomy in the relationship.”¹⁰⁷ The Canons “prescribed a vision of conscientious lawyering” where “a special obligation for achieving moral and legal justice” limited zealous advocacy.¹⁰⁸

The Preamble to the Canons underscored the need for the public’s faith in the legal profession: “The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.”¹⁰⁹ Believing that no set of rules could be codified to govern the behavior of lawyers, the Canons adopted broad ethical principles to provide general guidelines.¹¹⁰

The Canons contained principles that cautioned lawyers to limit their zealous advocacy by adherence to the rule of law. For example, the Canons expressly stated that the rule of law constrained a lawyer’s obligation to zealously advocate for his client and recognized the damage to the profession’s reputation when the public viewed lawyers as not being bound by the law:

Nothing operates more certainly to create or foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client’s cause *The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery. He must obey his own conscience and not that of his client.*¹¹¹

Canon 32 further advised that the lawyer

¹⁰⁶ Altman, *supra* note 85, at 2447.

¹⁰⁷ *Id.* at 2441.

¹⁰⁸ *Id.* at 2401.

¹⁰⁹ CANONS OF PROF’L ETHICS Preamble (1908), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpsc/Canons_Ethics.authcheckdam.pdf.

¹¹⁰ *Id.*

¹¹¹ CANONS OF PROF’L ETHICS Canon 15 (1908) (emphasis added). In this same spirit, the Canons also stated that no client was entitled to receive “any service or advice involving disloyalty to the law” CANONS OF PROF’L ETHICS Canon 32 (1908).

advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance *with the strictest principles of moral law*. He must also observe and advise his client to observe the statute law¹¹²

This drafting appears to place primary consideration on moral law and secondary consideration on positive law. It may also have been the drafter's most direct response to President Roosevelt's concerns.¹¹³ Many of the drafters shared his concerns about the increased commercialization of the legal profession "as a general threat to the moral autonomy of the lawyer in the attorney-client relationship."¹¹⁴

The Canons did recognize that in performing his duties, the lawyer's treatment of third parties had some specific limits. For example, the Canons made clear that clients, not lawyers, are the litigants and that clients' animosity towards each other should not influence a lawyer's treatment of opposing counsel or parties.¹¹⁵ Canon 18 stated,

A lawyer should always treat adverse witnesses and suitors with fairness and due consideration The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities.¹¹⁶

Similarly, Canon 30 admonished a lawyer to "decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong."¹¹⁷

The Canons also acknowledged one particular circumstance where the rights of third parties would trump a lawyer's fidelity to his or her client. Canon 37 provided that "The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened," although he is not

¹¹² CANONS OF PROF'L ETHICS Canon 32 (1908) (emphasis added).

¹¹³ Altman, *supra* note 85, at 2461.

¹¹⁴ *Id.* at 2475. Altman's article concludes, "[T]o lawyers in the twenty-first century, for whom norms of lawyer conduct have become 'legalized,' [the Canons] may seem overly ambitious. But to members of the Canons Committee, a normative statement regarding lawyer conduct implied something imbued with morality and, in at least some members' minds, religion as well." *Id.* at 2499.

¹¹⁵ CANONS OF PROF'L ETHICS Canon 17 (1908) ("Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the cause. All personalities between lawyers should be scrupulously avoided.")

¹¹⁶ CANONS OF PROF'L ETHICS Canon 18 (1908).

¹¹⁷ CANONS OF PROF'L ETHICS Canon 30 (1908).

compelled to do so.¹¹⁸ Implicit in this Canon is an acknowledgment that there are times when the rights of a third party may trump a lawyer's duty to his or her client.

While the Canons articulated specific limits on advocacy that take into consideration the rights of third parties, the Canons did not explicitly set out the rights of third parties as an important corollary to respect for the rule of law or as an important broad framework through which a lawyer should consider the consequences of his or her actions when acting on behalf of a client. In fact, the drafters of the Canons rejected a proposal to include language similar to that found in the Alabama Code regarding "limitations upon a lawyer's zealous representation of his client in terms of 'man's accountability to his Creator, . . . the duty of obedience to law *and the obligation to his neighbor.*"¹¹⁹

C. The ABA Model Code of Professional Responsibility

In 1969 the ABA adopted the Model Code of Professional Responsibility ("Code"), which supplanted the Canons.¹²⁰ The structure of the Code differed from the Canons. Whereas the Canons consisted of only ethical guidelines, the Code articulated nine general Canons each of which was followed by ethical considerations and specific disciplinary rules.¹²¹ The Code explained that the Canons were statements of axiomatic norms, the Ethical Considerations were aspirational in character, and the Disciplinary Rules were mandatory in nature and were to form the standards for disciplinary action as enforced by the various states.¹²² Like the Canons, the Code contained principles regarding the rule of law's limits on a lawyer's zealous advocacy, as well as some specific principles regarding lawyers' respect for the rights of third parties.

The Preamble to the Code starts with some recognition of the relationship between the rule of law and the rights of individuals,

¹¹⁸ CANONS OF PROF'L ETHICS Canon 37 (1908).

¹¹⁹ Altman, *supra* note 85, at 2453 (alteration in original) (emphasis added).

¹²⁰ MODEL CODE OF PROF'L RESPONSIBILITY Preface (1980). The Code was amended in 1970 and every year between 1974–1980. A copy of the Code with its amendments is available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpr/mcpr.authcheckdam.pdf>.

¹²¹ MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (1980). The Preface to the Code described some of the deficiencies with the Canons as follows, "The previous Canons were not an effective teaching instrument and failed to give guidance to young lawyers beyond the language of the Canons themselves They were not cast in language designed for disciplinary enforcement and many abounded with quaint expressions of the past." *Id.* at Preface.

¹²² MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (1980); *see also* Geoffrey C. Hazard, *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1251 (1991).

although it does not specifically put these ideas in the context of a lawyer's conduct:

The continued existence of a free and democratic society depends upon recognition of *the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual* and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.¹²³

The need for lawyers to respect the rule of law is also found throughout the Code. For example, Ethical Consideration 1-5 states, "Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude."¹²⁴ Respect for the rule of law is also the central theme in Canon 7 of the Code, "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."¹²⁵ Similarly, Ethical Consideration 7-19 states, "The duty of a lawyer to his client and his duty to the legal system are the same; to represent his client zealously within the bounds of the law."¹²⁶

The Code also permits a lawyer, as did the Canons, to inform a client about the moral consequences of a course of action, although this consideration is not expressed with the same primacy as it was in the Canons.¹²⁷ Instead, the Code provides:

Advice of a lawyer to his client need not be confined to purely legal considerations In assisting his client to reach a proper decision, *it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.* He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.¹²⁸

Although, as one writer concluded, "In the last analysis, the Code is not a guide to moral action. The Code, with its emphasis on the rules, presents as the ultimate question to be answered,

123 MODEL CODE OF PROF'L RESPONSIBILITY Preamble (1980) (emphasis added).

124 MODEL CODE OF PROF'L RESPONSIBILITY EC 1-5 (1980).

125 MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980).

126 MODEL CODE OF PROF'L RESPONSIBILITY EC 7-19 (1980).

127 See CANONS, *supra* note 109.

128 MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1980) (emphasis added).

‘How do I stay out of trouble?’ rather than ‘How do I make the moral choice?’”¹²⁹

Like the Canons, the Code does not contain any broad statement that advocacy should be constrained by the interests of third parties, but it did include specific provisions that related to a lawyer’s obligation to respect the rights of third parties in some instances. For example, Ethical Consideration 2-30 warns lawyers not to accept employment when “the person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another.”¹³⁰ Also, Disciplinary Rule 4-101 permitted, but like the Canons did not require, a lawyer to reveal “[t]he intention of his client to commit a crime and the information necessary to prevent the crime,” which would in many instances impact the rights of third parties.¹³¹ The ethical considerations in the Code further provided:

In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.¹³²

One can infer that at times an action may be unjust because of its impact on third parties, although the Code did not explicitly state this.

D. The ABA Model Rules of Professional Conduct

While the ABA Model Rules of Professional Conduct (“Rules”) were not adopted until 1983¹³³—over a decade after Watergate—the events of Watergate were in many ways responsible for spurring the legal profession to revisit the Code of Professional Responsibility.¹³⁴ A group of lawyers headed by

¹²⁹ Thomas G. Bost, *The Lawyer as Truth-Teller: Lessons from Enron*, 32 PEPP. L. REV. 505, 514 (2004); see also MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 79 (1994) (describing the “amazing shrinking concept of the lawyer as an independent counselor”).

¹³⁰ MODEL CODE OF PROF’L RESPONSIBILITY EC 2-30 (1980); see also MODEL CODE OF PROF’L RESPONSIBILITY DR 2-109 (1980); MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(A)(1) (1980).

¹³¹ MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(C)(3) (1980); compare with CANONS OF PROF’L ETHICS Canon 37 (1908).

¹³² MODEL CODE OF PROF’L RESPONSIBILITY EC 7-9 (1980).

¹³³ While the Rules were first adopted in 1983 they have been amended numerous times. MODEL RULES OF PROF’L CONDUCT (2009).

¹³⁴ See, e.g., Rochvarg, *supra* note 4, at 67–68 (discussing the impact of Watergate on reforms in the legal profession); Robert W. Meserve, *Action 1972–73—American Bar Association*, 59 A.B.A. J. 986, 990 (1973) (“[T]he involvement of prominent lawyers in the

Robert Kutak, known as the Kutak Commission, worked for six years to draft the Rules.¹³⁵ Watergate also prompted the ABA to adopt a law school accreditation requirement that compels accredited law schools to provide students with legal ethics instruction.¹³⁶

The structure of the Rules differed from the Code. The Code contained canons, ethical considerations and disciplinary rules.¹³⁷ The Rules, however, abandoned this tripartite structure for a structure that contained black letter rules followed by explanatory comments for each rule.¹³⁸ Preceding the black letter rules is a Preamble that sets out broad guidelines regarding the lawyer's role and responsibilities. To the extent that the Rules set out aspirational principles as found in the ethical considerations of the Code, those principles are found in the Preamble and in the comments to the Rules.¹³⁹ A predominate goal of the Rules, however, was to legalize the regulation of the legal profession by adopting enforceable rules and moving away from ethical standards that contained unenforceable aspirations.¹⁴⁰

While the structure differed, the Rules, like the Canons and the Code, continued to emphasize the lawyer's respect for and adherence to the rule of law. The Preamble to the Rules states "[a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs A lawyer should demonstrate respect for the legal system and for those who serve it" ¹⁴¹

Watergate affair has heightened professional concerns about discipline.".)

¹³⁵ Rochvarg, *supra* note 4, at 68.

¹³⁶ See, e.g., Ronald D. Rotunda, *Teaching Legal Ethics a Quarter of a Century After Watergate*, 51 HASTINGS L.J. 661, 661 (2000); Clark, *supra* note 50, at 673. The Committee that drafted the ABA's 1908 Canons of Ethics had actually recommended in its 1907 report that ethics be taught in all law schools and that applicants to the bar be examined on that topic. Altman, *supra* note 85, at 2420-21.

¹³⁷ See Preface, *supra*, note 120.

¹³⁸ ABA, THE MODEL RULES AND THEIR DEVELOPMENT IN THE HOUSE OF DELEGATES, *supra* note 83, at 3-4 (discussing the change in the format and the rationale for the change).

¹³⁹ *Id.* at 10 ("Professor Geoffrey C. Hazard, Jr., Reporter of the Commission, noted that the Preamble was intended to set forth balanced and realistic statements about a lawyer's role and responsibilities.") Such aspirational principles can also be found in some of the comments to the rules, which at times discuss what a lawyer "should" do. *Id.* at 15. See also David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 56-57 (1995) (finding ethical aspirations in some of the permissive rules).

¹⁴⁰ See William H. Simon, *Conceptions of Legality*, 51 HASTINGS L.J. 669, 670-71 (2000); Luban & Millemann, *supra* note 139, at 46-51; Hazard, *supra* note 122, at 1241-42, 1253-55.

¹⁴¹ MODEL RULES OF PROF'L CONDUCT Preamble 5 (2009).

The Rules acknowledge that at times a lawyer's job will create conflicts "between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."¹⁴² While "remaining an ethical person" may be read to encompass a concern about the rights of third parties, the Rules do not explicitly articulate that consideration as part of the web of conflicts which a lawyer must sometimes confront.¹⁴³ This section states that sometimes the Rules will provide a direct answer to the conflict, but sometimes they will not, and the lawyer must be guided by the basic principles underlying the Rules.¹⁴⁴ The Rules further state that "[t]hese principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."¹⁴⁵ While third parties certainly have an interest in courteous and civil treatment, a clear principle affirming respect for the rights of third parties would include a broader articulation of their interests.

Like the Code, the Rules continue to contemplate that a lawyer's advice may include moral factors, although the moral independence of the attorney is not stressed as it was in the Canons.¹⁴⁶ Rule 2.1 states that: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, which may be relevant to the client's situation."¹⁴⁷ The comments to Rule 2.1 suggest that moral factors could include the impact on third parties:

*Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.*¹⁴⁸

¹⁴² MODEL RULES OF PROF'L CONDUCT Preamble 9 (2009).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* Respect for the rule of law is also embodied in other provisions of the Rules that are analogous to provisions in the Canons and the Code. For example, Rule 1.2(d) prohibits a lawyer from counseling a client to engage, or assisting a client in conduct that is criminal or fraudulent. *Id.* at R. 1.2(d).

¹⁴⁶ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009).

¹⁴⁷ *Id.*

¹⁴⁸ MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 2 (2011) (emphasis added); *see also*

Other provisions of the Rules also have an underlying concern for some rights of third parties. For example, Rule 3.4 prohibits a variety of activities that are deemed to be unfair to opposing parties and their counsel, such as unlawfully obstructing their access to evidence or falsifying evidence.¹⁴⁹ Rule 3.8 compels prosecutors to ensure that the accused have been advised of their right to obtain counsel and to be given the opportunity to do so.¹⁵⁰ Also, Rule 4.1 prohibits lawyers from making a false statement of material fact to any third parties during the course of their representation of clients.¹⁵¹

Significant changes in the Model Rules that resulted from Watergate included the confidentiality rules in Rule 1.6, which are implicitly driven by concern for the rights of third parties.¹⁵² Rule 1.6 defined a lawyer's duty of confidentiality more broadly than did the Code.¹⁵³ As the Kutak Commission originally proposed, however, Rule 1.6 permitted a lawyer to reveal a client's confidences in several situations that would benefit third parties, including

to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another; [and] to rectify the consequences of a client's criminal or fraudulent act in furtherance of which the lawyer's services had been used.¹⁵⁴

These exceptions in initial drafts, however, immediately became a subject of debate and amendment. "The debate focused on the problem of balancing the sometimes conflicting interests of

Russell Pearce, *How Law Firms Can Do Good While Doing Well (And the Answer is not Pro Bono)*, 33 FORDHAM URB. L.J. 211, 216 (proposing a new Model Rule that would restore lawyers' morally accountability); Kevin H. Michels, *Lawyer Independence: From Ideal to Viable Legal Standard*, 61 CASE W. RES. L. REV. 85, 126-30 (2010) (arguing that Rule 2.1 has been fairly dormant and that states should make its practical application more robust).

¹⁴⁹ MODEL RULES OF PROF'L CONDUCT R. 3.4 (2009).

¹⁵⁰ MODEL RULES OF PROF'L CONDUCT R. 3.8(b) (2009).

¹⁵¹ MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2009).

¹⁵² See, e.g., Rochvarg, *supra* note 4, at 68. Model Rule 1.13, which addressed a lawyer's duties when representing an organization, was another significant development post-Watergate. *Id.* The initial version of Rule 1.13 the ABA adopted was disappointing to many critics of the legal profession who had hoped for more radical reform after Watergate. *Id.* at 70. After Enron, those rules were revisited and amended again. *Id.* at 85.

¹⁵³ ABA, THE MODEL RULES AND THEIR DEVELOPMENT IN THE HOUSE OF DELEGATES *supra* note 83, at 48; see also Rochvarg, *supra* note 4, at 71.

¹⁵⁴ ABA, THE MODEL RULES AND THEIR DEVELOPMENT IN THE HOUSE OF DELEGATES, *supra* note 83, at 48. There was also an exception when a lawyer needed to disclose confidences to establish a claim or defense in a controversy arising out of the legal representation. *Id.*

lawyer, client and the public.”¹⁵⁵ Proponents argued that the proposed rule struck the right balance between a client’s right to have confidences protected and the public’s right to be protected from criminal acts.¹⁵⁶ Opponents, however, argued successfully that the exceptions were too broad and inhibited lawyer-client communication.¹⁵⁷ Thus, Rule 1.6, as adopted, contained limited exceptions that permitted a lawyer to reveal confidential information “to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.”¹⁵⁸ This was a narrower exception than the one in the Code, which permitted a lawyer to reveal the “intention of his client to commit a crime and the information necessary to prevent the crime.”¹⁵⁹

Rule 1.6, as adopted in 1983, was a disappointment to many lawyers who had hoped for more radical reform after Watergate.¹⁶⁰ The majority of states declined to adopt the rule as adopted by the House of Delegates.¹⁶¹ There were two subsequent efforts to amend Rule 1.6 to contain provisions similar to those proposed by the Kutak Commission, but both of them failed.¹⁶² It was not until 2003 that Rule 1.6 was amended to allow a lawyer to reveal confidences in situations originally contemplated by the Kutak Commission.¹⁶³ Since that amendment, Rule 1.6 now provides, in part:

b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 48–49.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 51. There also remained an exception when a lawyer needed to disclose confidences to establish a claim or defense in a controversy arising out of the legal representation. *Id.* See *id.* at 51 for a red-lined version of the proposed rule as amended.

¹⁵⁹ MODEL CODE OF PROF’L RESPONSIBILITY DR 5-101(C)(3) (1969); see also Rochvarg, *supra* note 4, at 71–72. The ABA also rejected the Code’s prior rule that required a lawyer to disclose a client’s fraud to try to rectify that fraud and, instead, prohibited such disclosures. *Id.*

¹⁶⁰ Rochvarg, *supra* note 4, at 70.

¹⁶¹ *Id.* at 73.

¹⁶² ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 1982–2005, at 115, 117 (2006) [hereinafter ABA, A LEGISLATIVE HISTORY]. Unsuccessful efforts to amend Model Rule 1.6 were first made in 1991. *Id.* at 115. Another round of unsuccessful efforts occurred in 2001. *Id.* at 117–32. See also Rochvarg, *supra* note 4, at 73.

¹⁶³ ABA, A LEGISLATIVE HISTORY, *supra* note 162, at 133–41.

interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.¹⁶⁴

It is not a coincidence that these amendments finally occurred in the wake of Enron, a financial scandal that also impacted the reputation of the legal profession.¹⁶⁵

III. THE LEGAL PROFESSION POST-WATERGATE

Many lawyers have correctly pointed out that the Code, which was the national model for a code of ethics at the time of Watergate, left no ambiguity about the impropriety of acts such as breaking, entering, perjury and obstruction of justice.¹⁶⁶ Many lawyers, however, were involved in these activities despite clear ethical guidance not to break the law.¹⁶⁷ In 1973, ABA President Robert W. Meserve wrote the following about Watergate:

This is much more than an ethical problem. No one needs a course in ethics to know that burglary or perjury is illegal or immoral. What is needed is an acceptance of a reasonable respect for law and a recognition that no one—however high or low his rank—is above it.¹⁶⁸

Thus, many lawyers suggested that revising the Code would not prevent future situations like Watergate.¹⁶⁹ Indeed, since the adoption of the Model Rules, there have been subsequent events involving lawyers that have once again damaged the reputation of the legal profession to varying degrees.¹⁷⁰

¹⁶⁴ MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2009). This amendment to Model Rule 1.6 was adopted at the ABA's Annual Meeting in 2003. ABA, A LEGISLATIVE HISTORY, *supra* note 162, at 133–34.

¹⁶⁵ See Rochvarg, *supra* note 4, at 85–86.

¹⁶⁶ See, e.g., Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 34–35 (2002) ("Most observers found it ludicrous to suppose that the massive misconduct among Nixon appointees and campaign contributors stemmed from their lack of familiarity with bar codes of conduct."); Interview with Chesterfield Smith, President, ABA, in S.F., Cal. (Feb. 25, 1974) *The Bar and Watergate: Conversation with Chesterfield Smith*, 1 HASTINGS CONST. L.Q. 31, 34 (1974) [hereinafter *Interview*] (disregarding suggestions that the Code needed to be revised in response to Watergate because "[b]reaking and entering, lying, obstructing justice, or perjuring oneself is a violation under any standard I've ever heard of"); Robert W. Meserve, *Our Profession & Watergate*, 2 STUDENT LAW. 9, 11, 60 (1973–74) ("Surely, it does not require a close reading of the Code of Professional Responsibility to support the proposition that breaking and entering is wrong, that perjury is wrong, or that bribery is wrong.").

¹⁶⁷ See *supra* Part I.

¹⁶⁸ Robert W. Meserve, *Watergate: Lessons and Challenges for the Legal Profession*, 59 A.B.A. J. 681, 681 (1973).

¹⁶⁹ See *supra* text accompanying note 166.

¹⁷⁰ See *infra* text accompanying note 179.

A small number of lawyers engaging in misconduct are inevitable.¹⁷¹ As Chesterfield Smith, the President of the ABA in 1974 said, “I would hope that someday [lawyers] could get to be lily-white, but realistically I don’t believe that’s possible.”¹⁷² Humans are not infallible and a minority of lawyers will always fall from grace regardless of the cultural and legal limits society imposes. Furthermore, attorney discipline, civil lawsuits and criminal lawsuits give society tools to hold such wrongdoers accountable for their actions, and to send a deterrent message to others. The legal profession should, however, continue to examine whether it can further improve itself through the rules it has adopted and the culture that it creates within the profession.¹⁷³ Even though it is a small number of lawyers who engage in conduct that diminishes the reputation of the legal profession, that small number has a profound impact on the public’s perception of the profession.¹⁷⁴ Any reduction in that small number should be of significant benefit to the public and the legal profession.

If the law plainly prohibited the conduct of many of the actors in Watergate, then what motivated their decisions? The conduct of the actors involved in Watergate has, in many instances, been explained by the context in which the actors were placed—government offices—and specifically the White House, with all of its power and prestige.¹⁷⁵ There is undoubtedly some truth to that, but the motivation to please a powerful client can arise in many other contexts than the White House. In today’s competitive business world, private attorneys must fight to retain the business of their clients or risk losing income and frequently jobs.¹⁷⁶ This can create incredible pressure to satisfy

¹⁷¹ Rotunda, *supra* note 136, at 661, 663–65 (listing some malpractice claims based on ethical violations).

¹⁷² See *Interview*, *supra* note 166, at 31.

¹⁷³ See Marianne M. Jennings, *The Disconnect Between and Among Legal Ethics, Business Ethics, Law, and Virtue: Learning Not to Make Ethics so Complex*, 1 U. ST. THOMAS L.J. 995, 997–98 (2004) (arguing that at the point that a client’s fraud begins “the codified ethical standards and legal prohibitions are inapplicable. Virtue is required and courage of convictions demanded.”).

¹⁷⁴ See Sandra Day O’Connor, *Foreword to RICHARD L. ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* vii (2008) (“It takes only a few betrayals, however, to seriously damage the reputation of lawyers, both individual and collective. If the legal profession is to prevent breaches of trust, it needs to understand how and why they occur.”).

¹⁷⁵ See, e.g., Richardson, *supra* note 79, at 268 (“To a staff associate, even a highly placed one, the prestige of the Presidential office can be awe-inspiring. In this context, it takes heroic effort for the subordinate to recognize that a President’s whims are not necessarily made of cast iron.”).

¹⁷⁶ See ABEL, *supra* note 174, at 58–59 (“[M]any lawyers feel pressure from clients to facilitate illegal activity. And 38 percent of Americans believe that ‘most lawyers would engage in unethical or illegal activities to help a client in an important case.’”) (footnotes

the demands of clients who are not bound by our professional rules of ethics or frequently even interested in hearing about them. There continues to be a danger that lawyers' self-interests create pressure to serve the demands of powerful clients and that this can at times compromise their judgment and ethics.¹⁷⁷ The Carnegie Foundation noted this danger in its 2007 report on legal education: "In many professional settings [the] lofty ideals of public spirit and service to clients can seem far removed from reality. The press of business demands . . . frequently focuses thoughts elsewhere than on the public purposes of the profession."¹⁷⁸

A brief overview of a couple of more recent stories involving lawyers will follow to explore, albeit briefly and anecdotally, other contexts where the lawyers' self-interest in serving clients lead to problematic conduct. Such conduct frequently has an adverse effect on third parties and, concomitantly, on the legal profession.

One of the more notorious recent events was the collapse of Enron.¹⁷⁹ While no lawyers were subject to any criminal charges or disciplinary action as a result of Enron,¹⁸⁰ many people raised questions about the role lawyers played in its demise.¹⁸¹ Enron's failure had a grave impact on the interests of third parties as "more than 4000 employees lost their jobs [and] thousands of investors also lost their life savings, as \$70 billion in wealth vanished."¹⁸² Enron's collapse mainly involved corporate

omitted); Rhode & Paton, *supra* note 166, at 26 ("The challenges of maintaining independent judgment are compounded in a competitive market where powerful clients can shop for expedient rather than for ethical advice.").

¹⁷⁷ Jerold S. Auerbach, *The Legal Profession After Watergate*, 22 WAYNE L. REV. 1287, 1288 (1976) (arguing that "Watergate demonstrated the attitude, all too prevalent in the modern history of the legal profession, that law should serve power"); *see also* Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1322–25 (2006) (discussing the impact of self-interest and group-thinking on ethical reasoning); Susan D. Carle, *Power as a Factor in the Lawyers' Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 118–20 (2006) (arguing for a model of ethical decision-making that considers the power of one's client in light of other interests at stake in litigation).

¹⁷⁸ CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 126–27 (2007).

¹⁷⁹ For an overview of the key facts relating to the collapse of Enron, *see* Rhode & Paton, *supra* note 166, at 13–17.

¹⁸⁰ *See* Lawrence J. Fox, *Can Confidentiality Survive Enron, Arthur Anderson, and the ABA?*, 34 STETSON L. REV. 147, 152 (2004) ("Nobody had found that there was a single lawyer who was aware of things that should have been reported up the corporate ladder and had failed to do so.").

¹⁸¹ *See, e.g.*, Richard Acello, *Enron Lawyers in the Hot Seat: Bankruptcy Examination Outlines Possible Causes of Action*, 90 A.B.A. J. 22, 22–24 (2004); Bernard S. Carrey, *Enron—Where Were the Lawyers?*, 27 VT. L. REV. 871, 871–72 (2003); Susan P. Koniak, *Who Gave Lawyers a Pass?*, *Forbes.com* (Aug. 12, 2002), http://www.forbes.com/forbes/2002/0812/058_print.html.

¹⁸² Rhode & Paton, *supra* note 166, at 9–10; *see also* Rochvarg, *supra* note 4, at 74.

officials, accountants and bankers, but lawyers were in the picture, too.¹⁸³ Enron had in-house and outside counsel, both of whom were advising it on the structuring of financial transactions and financial disclosure requirements.¹⁸⁴ Enron's accounting firm, Andersen, also had in-house counsel who became the center of a controversy regarding the timing of Andersen's destruction of documents.¹⁸⁵

Some legal commentators have argued that the lawyers should have disclosed their client's misconduct to the Securities & Exchange Commission.¹⁸⁶ Many have viewed this event through the lens of an attorney's obligations when representing an organization, as well as an attorney's duty of confidentiality.¹⁸⁷ Others have viewed the events through the lens of conflicts of interest.¹⁸⁸ For example, Enron's outside counsel relied on Enron's business for more than seven percent of its revenues—Enron was the firm's largest client.¹⁸⁹ "Over the years V&E [Vinson & Elkins, Enron's outside counsel] had represented Enron in a wide range of matters, with Enron paying the firm legal fees of over \$162 million in the five years ending with 2001."¹⁹⁰ The desire to keep that client satisfied must have been tremendous.

These are certainly valid perspectives from which to view the Enron scandal. But it is also worth thinking about whether the lawyers sufficiently considered the impact of their client's conduct on third parties when they were advising their clients. Did they consider the impact on all of the retirees who would be left with no income because of their client's fraud? Did they consider all of the jobs that would be lost when Enron collapsed? Certainly the interests of third parties may be legitimately injured during the course of economic competition and events such as mergers, downsizing, etc. But when the rights of third parties are injured because of fraud, the need for the lawyer to consider third parties' interests becomes particularly heightened. "As many legal ethics experts note, in cases of client misconduct, lawyers' professional norms of client loyalty often conflict with personal norms of honesty and integrity. To reduce the cognitive

183 Rochvarg, *supra* note 4, at 74–75.

184 Rhode & Paton, *supra* note 166, at 17, 19.

185 *Id.* at 21–24; *see also* Koniak, *supra* note 181.

186 Rochvarg, *supra* note 4, at 75.

187 *Id.*

188 Rhode & Paton, *supra* note 166, at 25.

189 *Id.*

190 Bost, *supra* note 129, at 506.

dissonance, lawyers will often unconsciously dismiss or discount evidence of misconduct *and its impact on third parties.*"¹⁹¹

The federal government's response to Enron—Sarbanes Oxley—embodies the idea that "every attorney owes an obligation to the public separate from an attorney's obligation to his client."¹⁹² This position received strong opposition from the legal profession.¹⁹³ The legal profession, however, has been more accepting of the lawyer's obligation to the public when the lawyer is a prosecutor. Model Rule 3.8 articulates special duties for prosecutors, and the comments to that Rule explain that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate."¹⁹⁴

The case that came to be known as the Duke Lacrosse rape case is a recent notorious example of a prosecutor who did not act as a minister of justice. Prosecutor Michael Nifong was the district attorney for Durham County, North Carolina when he filed rape charges against three lacrosse players at Duke University—all of whom were eventually declared innocent.¹⁹⁵ Nifong's overzealous prosecution of the case appears to have been motivated by a desire to please his "client," i.e. the people of Durham County who were soon going to choose whether or not to reelect him.¹⁹⁶ The Disciplinary Hearing Commission of the North Carolina State Bar found that prosecutor Nifong violated many rules in the Duke Lacrosse rape case, including Rule 3.8.¹⁹⁷ The Chairman of the Disciplinary Hearing Commission made several comments about Nifong's apparent motivation for his conduct:

[W]hat we have here, it seems, is that we had a prosecutor who was faced with a very unusual situation in which the confluence of his self-interest collided with a very volatile mix of race, sex and class But we can make no other conclusion that those initial statements that he made were to forward his political ambitions It's an illustration of the fact that character—good character—is not a constant. Character is dependent upon the situation. Probably any one of us could be faced with a situation at some point that would test

191 Rhode & Paton, *supra* note 166, at 32 (emphasis added).

192 Rochvarg, *supra* note 4, at 82.

193 *Id.* at 82–83.

194 MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2009).

195 N.C. State Bar v. Nifong, No. 06 DHC 35, Amended Findings of Fact, Conclusions of Law and Order of Discipline, at 2 (July 24, 2007) [hereinafter Nifong Order], available at <http://www.ncbar.gov/Nifong%20Final%20Order.pdf>.

196 *Id.* See also Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice"*, 76 FORDHAM L. REV. 1337, 1354–57 (2007).

197 Nifong Order, *supra* note 195, at 20–21.

our good character and we would prove wanting. And that has happened for Mike Nifong.¹⁹⁸

The Chairman also specifically discussed the victims of Nifong's misconduct, who were "the three young men to start with, their families, the entire lacrosse team and their coach, Duke University, the justice system in North Carolina and elsewhere."¹⁹⁹ The subsequent order that disbarred Nifong also discussed how his conduct harmed third parties:

Nifong's misconduct resulted in significant actual harm to Reade Seligman, Collin Finnerty, and David Evans and their families As a result of Nifong's misconduct, these young men experienced heightened public scorn and loss of privacy while facing very serious criminal charges of which the Attorney General of North Carolina ultimately concluded they were innocent.²⁰⁰

Watergate and the two examples discussed above do not suggest that the lawyers acted with a desire or motivation to harm the interests of third parties. Their motives differed in each situation, although to some extent they were all pursuing their self-interests by serving the real or perceived demands of their clients. The outcome of their conduct in each situation was similar—they all adversely impacted the interests of third parties and, concomitantly, the reputation of the legal profession. Perhaps encouraging lawyers to view their decision-making process through the lens of the impact on third parties, at least in part, could help improve lawyer decision-making and judgment.

IV. PROPOSED REFORMS TO THE MODEL RULES AND LEGAL EDUCATION

A. Reforms to the Model Rules

Reforms to the Model Rules alone are unlikely to change the culture of the legal profession, but they can be an important component.²⁰¹ As this article has suggested, the Rules should inculcate in lawyers not just a respect for the rule of law, which is paramount to a government based on laws, but a more humanistic respect for the interests of third parties. Viewing conduct through this lens could provide three possible benefits.

¹⁹⁸ *Comments of Disciplinary Panel's Chairman*, N.Y. TIMES, June 17, 2007, <http://www.nytimes.com/2007/06/17/us/17duke-text.html?pagewanted=all>.

¹⁹⁹ *Id.*

²⁰⁰ Nifong Order, *supra* note 195, at 23.

²⁰¹ Rhode & Paton, *supra* note 166, at 31 ("Of course, reforming professional rules will not of itself transform professional culture Regulation is no substitute for internalized norms, but it can foster their development and reinforce their exercise.").

First, it could give a lawyer a perspective to view his or her conduct that could deter misconduct. Second, even if the conduct that will harm the interests of a third party is permissible, thinking about these implications may give lawyers a more tangible perspective to consider when they are advising their clients about the “right thing to do.” Third, again, even if the conduct that will harm the interests of a third party is permissible, thinking about such implications may cause lawyers to reflect on whether the current rules have struck the right balance between the interests of clients and the interests of third parties, or whether legal reform is appropriate.²⁰²

Scholars have written about the increase in lawyer regulation and the decrease in the demoralization of legal ethics over time.²⁰³ Whether or not a lawyer *should* be a moral advisor and/or independent moral actor has been a topic of debate in legal scholarship.²⁰⁴ Even if one did agree that a lawyer should be a moral advisor, in today’s world of moral plurality, there may not be agreed upon norms explaining what it means to be “moral,” which could meaningfully guide the actions of lawyers. “Morality” in early codes was strongly tied to Christianity, which is not of much assistance in today’s world of religious diversity in lawyers’ personal lives and secularism in the law. Thus, returning to broad notions of the lawyer as an autonomous moral actor may not provide much meaningful guidance. Instead of focusing on “morality,” as a guiding principle for lawyers, it may be more helpful if the Model Rules articulated more specific principles that elaborate on what it means to be a “moral” advisor or actor.

The Model Rules specifically guide lawyers to assess their conduct in light of compliance with the rule of law, compliance with their duties to their clients, and compliance with their duties to the administration of justice as an officer of the court.²⁰⁵

²⁰² For example, the recent case of Alton Logan, who two lawyers knew had been wrongfully convicted for twenty-six years because their client had confessed he was the real killer, has raised anew the debate over a lawyers’ duty of confidentiality to his or her client. See, e.g., James E. Moliterno, *Rectifying Wrongful Convictions: May a Lawyer Reveal Her Client’s Confidences to Rectify the Wrongful Conviction of Another?*, 38 HASTINGS CONST. L.Q. 811, 816–20 (2011); Harold J. Winston, *Learning from Alton Logan*, 2 DEPAUL J. SOC. JUST. 173, 173 (2009).

²⁰³ See, e.g., Altman, *supra* note 85, at 2398–99; Luban & Millemann, *supra* note 139, at 41–42.

²⁰⁴ See, e.g., Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1317–19 (2006). This debate is also sometimes framed as a debate between a client-centered and a justice-centered approach to lawyers’ ethical obligations. Carle, *supra* note 177, at 116–17. The Model Rules do state that when giving legal advice, a lawyer may refer to other considerations such as moral factors. MODEL RULES OF PROF’L CONDUCT R. 2.1 (2009).

²⁰⁵ *Supra* Part III.

The Model Rules, however, are fairly scant in their focus on assessing the impact of a lawyer's conduct on third parties.²⁰⁶ Thus, it may be beneficial if the Model Rules specifically advised a lawyer to consider the effects of his or her conduct on the rights of third parties as part of their ethical decision-making framework. "When the lawyer fully understands the nature of his office, he will then discern what restraints are necessary to keep that office wholesome and effective."²⁰⁷

The Model Rules and its predecessor, the Code, have served two main functions. One is to set out specific standards that can be enforced in disciplinary proceedings. The other is to set out the values and the moral or philosophical framework from which lawyers should approach ethical decisions.²⁰⁸ In this regard, perhaps the ABA's decision to eliminate the Canons' aspirational ethical considerations from the Model Rules was a loss. The Model Rules focused on setting out the black letter law regarding the conduct of lawyers in greater detail, but perhaps at the expense of the more nuanced and complex considerations of the role of the lawyer that were in the ethical considerations of the Code. Professor William H. Simon critiqued the Model Rules as follows:

The way we now tend to teach our students legal ethics in the courses that have been mandated in the wake of Watergate tends to emphasize relatively mechanical, unreflective rule-following at the expense of relatively complex contextual judgment The Model Rules were explicitly drafted for the purpose of creating black letter rules (that is the term that the drafters used) that obviate complex judgment. The predecessor code of the ABA actually had a series of norms that were designed to inspire complex judgment—the so-called 'ethical considerations'—aspirational norms that were eliminated by the Model Rules precisely to reduce legal ethics to a matter of black letter rule following.²⁰⁹

The idea of inculcating concerns for the interests of third parties as part of the ethical framework through which lawyers view their decisions and their advice to their clients would work better as an ethical aspiration that can inform a lawyer's approach to ethical decisions than as a rule that could be a basis for disciplinary enforcement.²¹⁰ This idea could be included by

²⁰⁶ The Model Rules do provide guidance about the treatment of third parties in specific situations. See *supra* Part III.

²⁰⁷ Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159 (1958).

²⁰⁸ *Supra* Part II.

²⁰⁹ Simon, *supra* note 140, at 670–71.

²¹⁰ See Tondel, *supra* note 39, at 296 (concluding that "[n]o Code amendment could give practical expression to that revulsion" caused by the crimes committed by lawyers

reintroducing something akin to the Code's ethical considerations or by incorporating it into the current Preamble to the Model Rules, which does set out the broad framework regarding a lawyer's role.²¹¹ For example, the Preamble could be revised to include this concept in Paragraphs 2 and 9 of the Preamble. The proposed additional language is in italics:

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others. *[As an officer of the legal system, a lawyer shall be loyal to the client. This should not, however preclude a lawyer from considering, as part of the lawyer's ethical decision-making, the rights and interests of third parties that may be adversely affected by either the lawyer's conduct or the client's conduct.]*²¹²

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system. *[These principles also include the lawyer's obligation as an officer of the legal system. While a lawyer's duty of loyalty to the client is usually paramount, the lawyer should consider whether a course of conduct taken by a client or on behalf of a client would adversely impact the interests of third parties. There are many times when this outcome is legitimate, but sometimes*

involved in Watergate); Susan D. Carle, *Power as a Factor in the Lawyers' Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 137 (2006) (discussing the discretion frequently exercised in lawyers' ethical decision-making and the inability of the positive law to determine what a lawyer should or should not do in every instance).

²¹¹ The Scope of the Rules states that the Rules do not "however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law." MODEL RULES OF PROF'L CONDUCT Scope 16 (2009).

²¹² MODEL RULES OF PROF'L CONDUCT Preamble 2 (2009).

*it can be a sign of illegal conduct by a client or misconduct by a lawyer. Even if the law allows for an outcome that adversely impacts the interests of third parties, a lawyer should still discuss with his or her client whether such an outcome is the right thing to do.]*²¹³

B. Reforms to Legal Education

In addition to considering revisions to the Model Rules, legal education would be an important component in training lawyers to consider the impact of their conduct on the interests of third parties as part of their ethical decision-making. In the wake of Watergate there have been differing views about the importance that law schools have historically placed on educating and training students in the matter of ethics.²¹⁴ Legal education continues to receive some criticism about how it teaches professionalism, which includes education about the law of lawyering, in addition to matters of morality and character.²¹⁵ Some legal commentators have criticized legal education, particularly the area of legal ethics, as being too morally neutral.²¹⁶ One law student commented, “[W]e don’t focus on what is right, we just talk about what is legally feasible.”²¹⁷

One commentator suggested that part of the circumstances leading to Watergate included legal education’s agenda of banishing emotionality from lawyers’ work.²¹⁸ The Carnegie Foundation’s 2007 report on legal education concluded that “[t]he kind of personal maturity that graduates need in order to practice law with integrity and a sense of purpose requires not only skills, but qualities such as compassion, respectfulness and commitment.”²¹⁹

Legal ethics pedagogy may benefit from the growing dialogue about teaching law students emotional intelligence. Emotional intelligence has been defined as “a set of emotional competencies involving self-awareness of emotions, empathetic awareness of the emotions of others, and the ability to use this awareness to

²¹³ MODEL RULES OF PROF’L CONDUCT Preamble 9 (2009).

²¹⁴ See, e.g., Burbank & Duboff, *supra* note 105, at 17 (commenting on the “apparent dearth of interest in and emphasis upon ethics exhibited by the fountainhead of legal training and conditioning, the law schools themselves”); compare with Weckstein, *supra* note 42, at 264 (countering allegations that legal education does not focus on ethics and asserting that “law schools do teach ethics, probably more and better than ever in history”).

²¹⁵ See CARNEGIE, *supra* note 178, at 136; see also Luban & Millemann, *supra* note 139, at 37–38.

²¹⁶ See CARNEGIE, *supra* note 178, at 149.

²¹⁷ *Id.* at 152.

²¹⁸ Andrew S. Watson, *The Watergate Lawyer Syndrome: An Educational Deficiency Disease*, 26 J. LEGAL EDUC. 441, 443–44 (1974).

²¹⁹ See CARNEGIE, *supra* note 178, at 146.

influence the behavior of others.”²²⁰ For purposes of this discussion, the concept of empathy is the most important and the following is a helpful definition:

“Empathy encompasses several related phenomena: (1) feeling the emotions of another; (2) understanding another’s situation or experience; and (3) taking actions based on another’s situation. Empathy involves ways of knowing and understanding and can serve as a catalyst for either action or restraint.”²²¹ In this broader view, empathy is an essential element of the concept of emotional intelligence. “Empathy, when it primarily involves sympathy, leads to helping behaviors and even altruism So viewed, that aspect of empathy has little role in actual adversarial proceedings.”²²²

Research supports the proposition that lawyers with high levels of emotional competencies are more successful persuaders, communicators, and influencers and should be “more likely to give high priority to other interests, such as improving the justice system.”²²³ This is important because lawyers have the daily opportunity in their practice “to set by their example, and even induce by their persuasion, standards of truth and right in our society at large[.]”²²⁴

Much work has been done on teaching legal ethics in context by using problems that give students an opportunity to address ethical issues through different roles.²²⁵ Problem-based teaching has also been identified as an important tool for teaching emotional intelligence.²²⁶ While current scholarship focuses largely on emotional intelligence regarding a lawyer’s understanding of his or her emotions and the client’s emotions,²²⁷ one way to foster the expansion of legal morality is to include, in legal ethics education, problems that focus on recognizing and

²²⁰ Montgomery, *supra* note 8, at 326.

²²¹ *Id.* at 337.

²²² *Id.*

²²³ *Id.* at 347.

²²⁴ Tondel, *supra* note 39, at 298. For this reason, how law firms teach young lawyers about ethics and values is also an important component of a lawyer’s education. See Ronald D. Rotunda, *Why Lawyers are Different and Why We Are the Same: Creating Structural Incentives in Large Law Firms to Promote Ethical Behavior—In-House Ethics Counsel, Bill Padding, and In-House Ethics Training*, 44 AKRON L. REV. 679, 703–07 (2011).

²²⁵ See, e.g., Clark, *supra* note 50, at 675 (discussing teaching legal ethics in context); Reaves, *supra* note 55, at 35 (discussing Professor Sam Dash’s approach to teaching legal ethics post-Watergate, where the materials should “constantly place the student in situations requiring role definitions [R]ole-playing is essential.”).

²²⁶ See Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL’Y & L. 1173, 1198–1200 (1999).

²²⁷ See, e.g., Jan Salisbury M.S., *Emotional Intelligence in Law Practice*, 53 ADVOCATE 38 (2010); Silver, *supra* note 226, at 1202–03.

empathizing with the interests of third parties. "To a large extent people behave as they are expected to behave, and their expectations arise less from what they are told than from the examples they observe."²²⁸

CONCLUSION

There is no one explanation that can account for lawyers' improper involvement in Watergate or for other events that have involved lawyers, harmed third parties, and tarnished the reputation of the legal profession. ABA President Robert Meserve suggested that "[t]he first lesson of Watergate for *us* then may be that we must constantly preserve our professional independence and detachment—not only from the overzealous *client* who seeks what is improper, but from the urgings of our *own* ambition and self-interest."²²⁹ As this article has argued, one way to do this may be to steer lawyers back to being morally accountable actors, but in a way that provides specific guidance about what it means to be "moral." Considering the impact of a course of action on the interests of third parties is one aspect of being a moral lawyer. The profession could start to inculcate the consideration of the interests of third parties as a component of a lawyer's decision-making process by reforms to the Model Rules and to legal education. In doing so, lawyers may be better enabled to fulfill one commentator's reflections about the role of the lawyer post-Watergate:

We are not the keeper of our clients' consciences, but neither are we mere technicians whose sole function is to assure that legal limitations are narrowly observed. . . . We fulfill the finest standards of our profession when our informed legal opinion is supplemented by judicious counsel. Without undertaking to preach to our clients, we can encourage them to ask us not just "is it legal?" but "is it right?"²³⁰

²²⁸ Weckstein, *supra* note 42, at 278.

²²⁹ Robert Meserve, *Our Profession and Watergate*, 2 *STUDENT LAW* 9, 60 (1973).

²³⁰ Richardson, *supra* note 79, at 271.

