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1-1-2003

# A Response to Russell Pearce

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Recommended Citation
Humbach, John A., "A Response to Russell Pearce" (2003). *Pace Law Faculty Publications.* Paper 87.
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# A Response to Russell Pearce by John Humbach

**by John A. Humbach***

There is not very much to criticize in what Professor Pearce[1] has said about the MacCrate Report.[2] Mostly, therefore, I will just amplify some of the points that I regard as among the most important. Before that, however, I want to mention some quibbles.

First, I have always been bothered a bit when people describe the lawyer's role as that of a hired gun.[3] The term "hired gun" is (if you'll pardon the expression) loaded. It does not, moreover, correctly capture either the good or the questionable of what lawyers actually try to do when representing their clients. Real hired guns are, by definition, persons willing to do violence to the law, or at least to do violence. A willingness to do violence or to break the law is not, however, characteristic of lawyers. On the contrary, lawyers almost uniformly see their role as seeking to obtain their clients' goals *within* the boundaries set by the law, and lawyers certainly do not typically see themselves as open to doing violent acts.

What the "hired gun" metaphor attempts to capture is, I think, the fact that lawyers often try to help their clients obtain a legal advantage (or avoid a disadvantage) that the substance of the law does not warrant. This is a problem, as I will discuss a bit later,[4] but the problem is not that the lawyer intentionally goes beyond the limits that the law or lawyer ethics prescribe.

At another point Professor Pearce has made an analogy between sports figures and lawyers, and with that I must also

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1. Russell G. Pearce, *MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values*, 23 PACE L. REV. 575 (2003).

2. A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM—REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MacCrate Report].

3. Pearce, *supra* note 1, at 591.

4. *See infra* text accompanying notes 24, 27-36.



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quibble. He observes that nobody much cares when a star athlete is a lamentable role model, as long as the athlete "continues to star," and he considers this phenomenon to be evidence that people tend to rank skills ahead of values.[5] This ordering of skills over values is, in his view, particularly unfortunate when done in evaluating lawyers, as he thinks the MacCrate authors have done. I am not so sure the MacCrate authors have in fact mis-ordered skills and values,[6] but in any case the analogy of lawyers to athletes is questionable. The crucial distinction is that an athlete's role-model shortcomings typically have little to do with the athlete's professional excellence on the field while, by contrast, our concern with lawyers' ethics is almost entirely concerned with their behavior *qua* lawyers. Indeed, when an athlete is caught up in a scandal that *does* go to the essence of the sport, people tend to be *very* critical. Remember Rosie Ruiz, the woman who came out of nowhere to win the 1980 Boston Marathon? Who can forget how roundly she was condemned when it turned out later that she had traveled most of the route on the subway.[7] She broke the rules and we did not laud her victory, just as we would not laud a lawyer who breaks the legal or ethical rules in pursuit of a client's interests.

Another quibble relates more directly to Professor Pearce's criticism of the MacCrate authors' decision to place the discussion of values *after* skills in the Report. Professor Pearce stated that, by such placement, the report "signaled" that values have a lower priority than skills[8] in the MacCrate pantheon. The report's authors deny any such prioritization and they have an explanation for their ordering of the discussion.[9] The reason for analyzing skills first, the authors say, is that a familiarity with the various skills is essential to a proper understanding of the values.[10] For example, the Report asserts, "familiarity with

5. Pearce, *supra* note 1, at 586.

6. *See infra* text accompanying notes 8-10.

7. Dick Heller, *Ruiz Ended Up as Big Loser in '80 Boston Marathon Ruse*, THE WASH. TIMES, Apr. 21, 2003, at C12.

8. Pearce, *supra* note 1, at 586.

9. "[T]he order in which skills or values are presented does not reflect any views about their relative importance in the practice of law or in the process of preparing for practice." MacCrate Report, *supra* note 2, at 137.

10. *Id.* at 135-37.

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Skill §§ 1-10 is essential for understanding the ideal of competent representation which is discussed in Value § 1."[11]

I have an example of my own. Consider the MacCrate Report's Value § 2, entitled "Striving to promote justice, fairness, and morality."[12] A person is likely to misunderstand Value § 2 unless he or she has first taken account of what the MacCrate Report regards as included in (and *excluded from*) the lawyer's fundamental skill of "problem solving."[13] The text of Value § 2 states that lawyers should be committed to "counseling clients to take considerations of justice, fairness, and morality in account" in the client's decisions and actions[14]–undoubtedly a fine commitment. Yet, the MacCrate Report's detailed description of the problem solving task, in Skill § 1, is *barren* of any suggestion that lawyers should make any effort at all to figure out what the relevant "considerations of justice, fairness, and morality" might be.[15] One wonders: How much impact can the lawyer's commitment to justice, fairness, and morality really have unless such considerations are treated as an integral part of the "problem" the lawyer is supposed to solve?

The Report's description of the problem solving skill is pivotal because, presumably, it reflects the authors' general view of what kinds of "problems" are important to carrying out the lawyer's essential role. A crucial early step in problem solving—likely to delimit the potential of everything that follows—is "generating alternative solutions and strategies."[16] However, when a lawyer is making "an inventory of the full range of alternative possible solutions," the only express requirement is that the lawyer include those alternatives that are "consistent with the practicalities of the client's situation."[17] One is left simply to wonder: What about the practicalities of *others'* situations. Do the legitimate interests of persons *other than* the client have any central place in the lawyer's thinking? Or is the scope of the lawyer's role (and problem solving) essentially confined to

11. *Id.*
12. *Id.* at 213-15.
13. *See* MacCrate Report, *supra* note 2, at 141-51 (Fundamental Skill § 1).
14. MacCrate Report, *supra* note 2, at 213 (Value § 2.1(b)).
15. *See* MacCrate Report, *supra* note 2, at 141-48.
16. MacCrate Report, *supra* note 2, at 14-43.
17. MacCrate Report, *supra* note 2, at 144.

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assuring "justice, fairness, and morality" only towards one's own client?

At this point, I suppose, many lawyers might be inclined to take strong exception—perhaps echoing the lines of Lord Brougham's infamous dictum that "hazards and costs to other persons . . ." are of no concern to the advocate, who "must not regard the alarm, the torments, the destruction which he may bring upon others."[18] Maybe this is so, but, if it is, then the "value" of promoting justice, fairness, and morality has, in practice, a rather crabbed and abnormal meaning. Nevertheless, that is indeed the meaning that seems to emerge if one seeks an "understanding" of Value § 2 by reference to the prior discussion of the problem solving Skill § 1, as described in the MacCrate Report.

Indeed, the MacCrate Report does not shrink from such a reading. It appears to assume, as do most lawyers, that a lawyer's work should be almost entirely aimed at "obtaining the most beneficial consequences for the client."[19] As Professor Pearce points out, "[m]ost lawyers view themselves as advocates who pursue the self-interest of their clients single-mindedly."[20]

There are, however, certainly other possible ways to view the lawyer's role, for example as a "peacemaker," advocated by former Chief Justice Warren Burger. "In their highest role," the late Chief Justice wrote, "lawyers should be the healers of conflicts and, as such, should help the diverse parts of a complex, pluralistic social order function with a minimum of friction. Lawsuits ought to be the last resort—like war."[21] Quoting Abraham Lincoln, the Chief Justice continued: "'Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real

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18. Lord Henry Brougham statement in connection with his defense in the trial of Queen Caroline, *quoted in* STEPHEN GILLERS, REGULATION OF LAWYERS 395 (6th ed. 2002).

19. MacCrate Report, *supra* note 2, at 149 (in Commentary to Skill § 1 Problem Solving, quoting David R. Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67, 77 (1979)).

20. Pearce, *supra* note 1, at 591.

21. Warren E. Burger, *Remarks of Warren E. Burger, Chief Justice of the United States at the Dedication of Notre Dame London Law Centre: The Role of the Lawyer Today*, 59 NOTRE DAME L. REV. 1, 2-3 (1983).

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loser—in fees, expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man.'"[22] In other words, a lawyer's focus should not be to "pursue the self-interest of their clients single-mindedly" but, instead, it is also properly part of the lawyer's "problem solving" to determine how the legitimate interests of others might best be coordinated with the client's own goals and aims. As a peacemaker, a lawyer would try to bring people together, truly to resolve disputes—not just bring the coercive force of the law down on adverse parties so they will back away from their disputations. In our exaggerated version of the adversary system, however, using the law to drive opponents into submission is precisely what many think they should do. In the prevailing conception of the adversary system we are not our brothers' keepers; we have no role in "promoting justice, fairness, and morality" to them.

I strongly agree with Professor Pearce that the MacCrate Report missed a key opportunity when it failed to provide a strategy for countering this prevailing understanding of the lawyer's role.[23] Essentially, the Report contents itself with observing that "[w]hen, as often happens, [that] a lawyer encounters a situation in which some of the options available for solving a client's problem would result in unfairness or injustice to others, the lawyer should counsel the client to act in a manner 'that is morally just.'"[24] What, however, does this mean? What if, for example, a lawyer can get the client a result she would be more or less satisfied with while *fully meeting the concerns of justice, fairness, and morality* all around, but also has a shot at getting even more. Perhaps the lawyer sees a way to get the client 100% of her fondest dreams even though, according to the substance of the law, she would be warranted in receiving only ninety percent. Or, a lawyer might see a way to get the client an unwarranted legal advantage by employing means that are legal but, shall we say, morally questionable—such as by moving to exclude evidence that is truthful but "harmful" to the client's interest. What should the lawyer do?

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22. *Id.* (quoting Abraham Lincoln, Notes for Law Lecture (July 1, 1850), *in* II COMPLETE WORKS OF ABRAHAM LINCOLN 142 (J. Nicolay & J. Hay eds., 1894)).

23. *See, e.g.,* Pearce, *supra* note 1, at 590-91.

24. MacCrate Report, *supra* note 2, at 214.

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Here is an example. Suppose the client is selling his house, and the contract calls for an engineer's report, dated no earlier than five days before the closing, showing the furnace to be in working order. Suppose such a report has been prepared, and it is ready for delivery at the closing. Suppose then the client tells the lawyer confidentially that, *following* the engineer's inspection, the furnace conked out, and it has to be repaired. The lawyer knows that, at worst, the client would only have to knock a few hundred dollars off the sales price, or agree to put an amount into escrow and pay for the repair. But the client wants it all, now. The client wants to close the deal (take the buyer's money) in silence. Because of the small amount involved, there is virtually no chance of repercussions. There is respectable authority to the effect that the lawyer would commit no legal wrong by going ahead with the client's wishes.[25] What would *you* do?

From the description of problem solving in the MacCrate Report, this situation does not seem even to *raise* a "problem" within the scope of the lawyer's problem solving, at least none that a lawyer would have to consider. Only a lawyer could see "justice, fairness, and morality" in this way, of course, but this *is* the way many of us see them. Isn't it?

I mentioned earlier Professor Pearce's observation that the MacCrate Report seems to rank skills over values. However, the descriptions of skills in the Report are in fact *packed* with values—embedded with values. That is to say, each of the various skills is, without exception, *a skill for pursuing some particular values*. The problem is this: The values that are embedded in the MacCrate Report skills may not be the law's values, but they may instead be the values of an insular profession—a profession that takes it upon itself to *frustrate* the values expressed in the substantive law whenever doing so might serve a client's private interests.

25. Schatz v. Rosenberg, 943 F.2d 485 (4th Cir. 1991). Holding that defrauded party in a sale of stock has no cause of action against lawyers who "failed to tattle on their client for misrepresenting his personal financial condition." *Id.* at 491 (citing Barker v. Henderson, 797 F.2d 490, 497 (7th Cir.1986) ("Neither lawyers nor accountants are required to tattle on their clients in the absence of some duty to disclose. To the contrary, attorneys have privileges not to disclose.")).

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When I hear suggestions that more should be done about teaching values in law school, I am always a little astonished. I would have thought off hand that the law is just about *all* values, and that the teaching of law is basically nothing *but* the teaching of values.[26] So when the MacCrate Report counsels the teaching of values, the question that naturally arises is, which values? Should the emphasis in law school be on lawyer values or the values of the law? Should we stress the values of "self-interested advocates who pursue the self-interest of their clients single-mindedly" or the values of "justice, fairness, and morality" that are embedded in the law, values that exist for the benefit of all and not just our clients?

Stating this question differently, what should law schools be telling the students that the lawyer's job is: to try to get the client whatever the client wants (as long as the means are legal and permitted by lawyer ethics) or to work towards achieving the gold standard of legal justice—the substance of the law, applied to the events that actually occurred? Is it the lawyer's job to try, if possible, to get a legal advantage for the client that the substance of the law does not mean for the client to have, even at the cost of substantive justice to another?

These are the bread and butter issues: A client comes in and says "I've caused some big harm, and I don't want to have to pay damages." Or, "I've made this contract, and I want you to find me a way to get out of it." Or "I've been written out of mom's will, but I want you to see if you can get me something anyhow." Or "My neighbor has this easement over my land; I want you to get rid of it." The situations are endless. Sometimes the lawyer will tell the client that there is no case; that putting up a fight would be frivolous.[27] What if, however, the lawyer sees a way to prevail—by taking advantage of some procedural wrinkle or by a making a flat-out play on one or more of the well-known imperfections of that most human of systems, the legal system?[28]

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26. I should specify here that I am referring primarily to the substance of the law and not so much the procedural *machinery* that exists to carry out the intendment of that substance.

27. And, of course, a violation of the lawyer's ethics. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2002).

28. For a more extended discussion of opportunistic advocacy based on the imperfections in the law and legal system, especially its procedures for finding

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The values we inculcate in students are often inherent in the way we teach. In our "Socratic" dialogues, what do we tell our students to ask themselves when faced with a difficult case or hypothetical? Don't we tell them to ask: "If this were our client, what could we do for her? What are the possibilities? Here is a person with a serious legal problem; how can we get her out of it—so she won't suffer the consequences that the law prescribes for what she did?"

Of course, posing questions like these may be one of the most effective ways to make students bear down on a problem, to make them really *think*. Nonetheless, as we use these kinds of question to impart legal-analysis skills, don't some values come along at the same time?

Ultimately, the problem of values for the legal profession seems to always come aground on the deep contradiction between the lawyer's role as loyal guardian of the client's interests and the lawyer's role as an officer of the court—as a guardian of justice. The problem emerges from the high value our society places on the rule of law while, at the same time, maintaining a certain skepticism about government (and, hence, law). The skepticism we have about government leads us to desire access, in times of need, to the services of independent legal representatives, advocates who will single-mindedly take our side. Therefore, even though it is widely acknowledged that the rule of law is essential to the very survival of our system, when you put all of the MacCrate skills together, what you end up with is this: If your client is in a legal pickle, you have to try to get him out. Winning is the thing. It is not the private lawyer's primary job to make sure the law's embedded values are put into force.

This endemic conflict in the visions of the lawyer's role (loyal advocate for the client vs. officer of the court) perhaps means it would have been almost impossible for the MacCrate Report to address values more comprehensively. Arguably, then, the problem is not that it gives too little priority to values but rather, that, in its lengthy description of skills, it stealthily elevates the values of victory (for the client) over the values of

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truth, see John Humbach, *Abuse of Confidentiality and Fabricated Controversy: Two Proposals,* 11 PROF. LAW. 1 (2000).

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"justice, fairness, and morality" that are embedded in the substantive law itself.

Stated in a different way, the MacCrate report devalues doctrine. To be sure, the report endorses the learning of doctrine and the acquisition of skills in legal research and analysis, where doctrine is put to work. Essentially, though, the report treats the law's substantive prescriptions as just another tool in the lawyer's arsenal, as a resource to serve clients interests—as just another tool to win. It does not treat the law's substantive doctrines as the embodiment and sovereign expression of that true democracy-driven justice to which every citizen, especially lawyers, ought to loyally adhere and carry into effect. It is true, of course, that even democracy-driven justice can produce occasional laws that are "wrong" and run counter to some broader conception of "justice, fairness, and morality." But the operating assumption in a democracy ought to be the opposite. In any case, the recognition that laws can be wrong hardly provides a *general* warrant to frustrate their substantive intendment.

Let me conclude with mention of a concrete case, one that I teach in my course in property law. In my thirty years of teaching property law, I have come to wonder at the number of cases in the casebooks where somebody is trying to assert some legal technicality or interpretation in an effort to take away somebody else's property rights—to get a result which, pretty manifestly, would be at variance with most people's conceptions of "justice, fairness, and morality." What surprises most, as I reflect on these cases, is how frequently the aggressors actually win. It sometimes seems to me that nobody's property is safe as long as there are sharp-eyed lawyers out there who are clever enough to figure out how to get it. Is there any chain of title that does not include at least one crucial deed or will which, with a little imagination, can be busted—or, at least, cast in enough of a shadow to pry loose a substantial settlement? At any rate, many, many property cases taught in law school are set up in exactly this sort of way.

For a long time I simply accepted that this is the way it is. In our adversary system, we are not our brothers' keepers, and if there is a legal way to win, then winning must be right. More recently, though, I have begun asking my students "Is it mor-

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ally right to try to win, to get somebody else's property away from them, just because you can?"

The case I want to share here is a fairly recent case from New York's Court of Appeals, *Symphony Space v. Pergola Properties, Inc.*[29] The case involved a real estate investor who wanted to donate the use of a theater in Manhattan to a not-for-profit corporation dedicated to the arts. Reduced to its essentials, the arrangement was this: The donor-investor transferred legal ownership of the building containing the theater to the not-for-profit, for a price of $10,010.00 (by the way, if you are unfamiliar with Manhattan real estate prices, that price was *very* low). As part of the deal the donor-investor leased back the non-theater portions of the building for $1 per year. Also, it was agreed that the donor would be entitled to get the building back in the future for a price roughly equal to the original $10,010 plus an inflationary increment (a maximum of $28,000 after 25 years).[30]

What created the question was the investor's "option" to buy the property back. The non-for-profit sued to have the buy-back option declared invalid, and it won. The New York Court of Appeals, saying the case presented a "novel question,"[31] held that the buy-back option was void under the rule against perpetuities.[32] The effect of this legal victory was that the whole building became the *permanent property* of the not-for-profit, causing a financial loss of over $20 million to the investor that had been providing it with the free use of space.[33] In short, the not-for-profit scored a $20 million chunk of property by getting a court to nullify its side of an arrangement under which a benefactor had allowed it to use a theater for free. The not-for-

29. 669 N.E.2d 799 (N.Y. 1996).

30. *Symphony Space*, 669 N.E.2d at 800-01. Actually, payment of all but $10 of the purchase price was deferred, so the not-for-profit obtained the use of the space for, essentially, no out-of-pocket purchase price whatsoever. *Id.* The reason for the complex arrangement was so that no real estate taxes would have to be paid on the portion of the property used by the non-for-profit. Without this arrangement, use of the theater would have cost the not-for-profit (or somebody) $30,000 per year in real estate taxes—which, as a matter of state policy, the not-for-profit should not have to bear. N.Y. REAL PROP. LAW § 420-a (McKinney 2000).

31. *Symphony Space*, 669 N.E.2d at 800.

32. N.Y. EST. POWERS & TRUSTS LAW § 9-1.1 (McKinney 2002).

33. The original donor's successor in interest. *Symphony Space*, 669 N.E.2d at 802.

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profit's lawyers succeeded in obtaining this result by asserting a "novel question"[34] concerning a technical point of law, a point which had blindsided everybody.

Now, apart from the strictly property issues in this case (primarily, the application of New York's rule against perpetuities to commercial options), several other questions arise. First, it should be observed that the case turned on a particular interpretation of the option agreement, an interpretation that apparently was not *necessitated* by its language. In other words, even using the same substantive rules of law, the case could probably have been decided differently, thus preserving the rights of the investor. Specifically, instead of interpreting the option agreement as creating one single (and totally void) option with a number of exercise dates, the court could have interpreted it as creating four separate options—three of which would have been valid and one not. The buy-back agreement provided for option "closing" dates in the years 1987, 1993, 1998 and 2003.[35] Only the last of these four years (2003) could have run afoul of the rule against perpetuities.[36] Since the other three "closing" years would all fall within the perpetuities period, and the *Symphony Space* case was decided in 1996, the "four-separate-options" interpretation would have left the investor with time to exercise the third of the four options and avoid the expropriation. Instead, however, the Court of Appeals interpreted the agreement as creating a single option, which it then promptly declared to be unenforceable.[37] In other words, faced with at least two possible interpretations of the agreement's language, the Court of Appeals picked the interpretation that made the buy-back void.

The question that I address in class is this: Assuming the case could have been decided differently using the same law—that the option could have been interpreted as four separate options, not one big void one—does it "promote justice, fairness, and morality" for a lawyer to argue for an interpretation that

34. *Id.* at 800.

35. *Symphony Space*, 669 N.E.2d at 801. It provided that the option could be exercised in certain other events, as well. *Id.*

36. "Where . . . the parties to a transaction are corporations and no measuring lives are stated in the instruments, the perpetuities period is simply 21 years." *Id.* at 806.

37. *Id.* at 650.

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would make the option unenforceable—to argue for an interpretation that would frustrate the agreement that the parties manifestly had in mind? Many of my students express the view that arguing for such an interpretation would be perfectly proper and, I suspect, most lawyers would agree. After all, isn't it the job of the *other side* to make the "four-separate-options" argument, and up to the Court of Appeals to decide between the two? In the adversary system, the argument continues, the lawyers for the not-for-profit should worry only about maximizing the interests of the not-for-profit.

Perhaps this is truly the system we have, and perhaps it is the best that can be devised. Yet, I would maintain, a primary reason for our profession's bad reputation is not that lawyers are "dishonest" (most are not), but that the public perceives that lawyers have no compunction at all about trying to get "windfalls" for their own clients and care hardly one whit about "justice, fairness, and morality" for anybody else. The public perceives that, in cases less dramatic than *Symphony Space*, lawyers frequently try to get their clients advantages (such as property rights) that they know very well their clients are not meant to have under the substance of the law. Scoring off a business counterpart or benefactor might be very clever, but only a lawyer is likely to think it is an example of "striving to promote justice, fairness, and morality."[38] As I like to ask my students, "Is this case okay by you? Does the profession get a better reputation when it manages to help people pry major pieces of property off of other people, all neatly within the rules of law and lawyer ethics?"

There are also a number of follow-up questions, not directly presented by the *Symphony Space* case, but thought provoking for students. Suppose for example that, when the original theater deal was being negotiated, the lawyers for the not-for-profit *knew* that the fourth closing year (2003) would run afoul of the rule against perpetuities, but they just sat by silently and let their client's benefactor poison its own buy-back deal. Would that make a difference? Or would the same lawyer "values" apply in that situation as well, *viz.* that in the adversary system we're not our brothers' keepers? Or, to take it further, suppose

38. MacCrate Report, *supra* note 2, at 213 (Value § 2).

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the not-for-profit's *own* lawyers were the ones that proposed adding the fourth closing year, 2003. Should *that* make a difference? Should it matter whether the not-for-profit's lawyers *knew* they were proposing a provision that would make the buyback fail? After all, one could argue, if the not-for-profit's lawyers did *not* make such a proposal, perhaps they would not be being quite as "loyal" to their client as they should, not going for the very best deal the other side was willing to agree to. Hmm.

These and other subsidiary scenarios make the *Symphony Space* case a very fertile jumping-off point for examining the role of ethical considerations of "justice, fairness and morality" in the context of a lawyer's work, both as a litigator and as a negotiator. Looking at such scenarios is, I suppose, what is meant by teaching legal ethics by the "pervasive method." Each year I have students who think that the not-for-profit ought to get the whole building under all of the various scenarios, and others who think it should not win under any of the scenarios. Some see "taking advantage" of an obvious blunder as reprehensible, others as part of the lawyer's stock in trade. The question I have, in the end, is this: Which of them will make the better lawyers?

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