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2009

## Shifting Paradigms of Lawyer Honesty

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### Recommended Citation

John A. Humbach, Shifting Paradigms of Lawyer Honesty, 76 Tenn. L. Rev. 993 (2009),  
<http://digitalcommons.pace.edu/lawfaculty/639/>.

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## SHIFTING PARADIGMS OF LAWYER HONESTY

JOHN A. HUMBACH\*

*Another lawyer . . . who deals with a lawyer should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar.*<sup>1</sup>

Imagine what it would be like to live in a world of truly honest lawyers. The lawyers in such a world would represent their clients zealously and strive as mightily as lawyers anywhere to advance their clients' legitimate interests. But, as truly honest lawyers, they would never deliberately distort the truth or withhold information in an effort to mislead others, nor would they take advantage of others' obvious mistakes. They would never try to persuade others to believe things that neither they nor their clients believe. On the contrary, the lawyers in such a world would take pains to ensure that the people they deal with never have reason to feel deceived, deluded, or betrayed. When in court, these truly honest lawyers would, at the very least, follow the ethical requirement to take "reasonable remedial measures" to prevent fraudulent or criminal conduct related to the proceeding.<sup>2</sup> More than that, however, they would never "bring or defend a proceeding, or assert or controvert an issue," unless they truly believe (or, at least, they believe that their clients believe) that there is a basis not merely on the admissible evidence but also in actual fact.<sup>3</sup> In both transactions and in litigation these truly honest lawyers not only would never engage in conduct involving misrepresentation or other deceit<sup>4</sup> but, in

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1. Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 589 (1975).

2. MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2009).

3. Cf. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2009). The current Model Rules state that lawyers must have a basis in "fact" for proceeding, *id.*, but it appears this rule is properly understood to mean "admissible evidence" rather than actual "fact." For example, a lawyer is free to assert a privilege or other evidentiary rule in an effort to obtain victory even though the lawyer knows that the client almost certainly would not prevail on the substance of the law if the tribunal were apprised of all the relevant facts. Stated differently, a lawyer is not ethically prohibited from using evidentiary or procedural rules to keep out evidence just because the lawyer knows that, deprived of the evidence in question, the tribunal will almost certainly reach a counterfactual conclusion on a critical point. If it looks reasonably possible that a case or issue can be won on a procedural or evidentiary point, then Rule 3.1 does not prevent the lawyer from trying to do so just because the lawyer knows that the client's basic claim or defense is, in point of actual fact, without substantive merit. See MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 1 (2009); see also *infra* text accompanying notes 121–181.

4. Both are currently banned, nominally at least, under Model Rule 8.4(c). MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2009). However, although the Model Rules language prohibiting "misrepresentation" and "deceit" appears very broad, there seems to be a considerable sentiment

addition, they would never purposely fail to disclose facts necessary to correct misapprehensions known to have arisen in the matter.<sup>5</sup> They would never seek, by selective nondisclosures, objections to evidence, or the like, to lead the law astray.

Our own world is, of course, not such a world. The ABA's Model Rules of Professional Conduct contain a number of prescriptions for honest dealing,<sup>6</sup> but relatively few people outside the legal profession consider the honesty and ethical standards of lawyers to be very high.<sup>7</sup> This is not because most lawyers are habitual liars, for it is probably true that they are not.<sup>8</sup> Rather the distrust of lawyers almost certainly has more to do with the deliberate efforts of lawyers to play the societal role that they think they must—a role that they see as intrinsic to the adversary system. It is a role in which keeping secrets can be more important than revealing truth,<sup>9</sup> loyalty to client-defined objectives is elevated over commitment to justice,<sup>10</sup> the advocate's proper function is seen to be

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against applying these “catch-all” prohibitions unless the lawyer's conduct also falls within a specific lawyer-code provision that states the elements of an offense. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. c (2000).

5. Cf. MODEL RULES OF PROF'L CONDUCT R. 8.1(b) (2009). Actually, the high standard of candor contained in this rule applies only to lawyer disciplinary matters and applications for admission to the bar, and its force is substantially undermined by an exception for information relating to the representation of a client—which is likely to include just about everything material that the lawyer is likely to know. *Id.*

6. See, e.g., MODEL RULES OF PROF'L CONDUCT 1.2(d), 1.16(b)(3), 3.3, 3.4, 4.1, 8.1(b), 8.4 (2009).

7. Gallup polls on honesty and ethics show that Americans place lawyers among the lowest rated professions. See, e.g., David W. Moore, *Nurses Top List in Honesty and Ethics Poll*, GALLUP NEWS SERVICE, Dec. 7, 2004, <http://www.gallup.com/poll/14236/Nurses-Top-List-Honesty-Ethics-Poll.aspx?>. The poor reputation of lawyers for honesty and ethics appears, moreover, to have been fairly durable, at least in the recent past. See John A. Humbach, *Abuse of Confidentiality and Fabricated Controversy: Two Proposals*, 11 PROF'L LAW. 1, 1 (Summer 2000).

8. At any rate, my own experience (albeit undocumented) is that lawyers' professional propensity to avoid outright falsehoods is, if anything, well above the average.

9. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2009) (A lawyer shall not “fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, *unless disclosure is prohibited by Rule 1.6* [confidentiality].”) (emphasis added).

10. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009) (“[A] lawyer shall abide by the client's decisions concerning the objectives of the representation . . .”). By “justice” I am referring to *legal* justice, and I mean to set aside for the present purposes the difficult questions that can arise when laws are perceived to be morally unjust. These latter questions are important, to be sure, but the present focus is on the tensions that result when lawyers think they must endeavor to defeat the outcomes that the substance of the law prescribes. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 138 and *passim* (1998) (arguing that lawyers can avoid promoting legal injustice by taking a broader “contextual” view when making legal-ethics judgments).

winning rather than doing what is “right”<sup>11</sup>—especially if doing what is right would require the lawyer to become judge and jury of the lawyer’s own client. Lawyers do not generally view it as part of their professional role to be personally responsible for getting at the truth of the matter but, rather, to persuade others to believe or accept whatever interpretation of the raw evidence is most beneficial to the interests of their own clients. While telling lies is definitely out of bounds,<sup>12</sup> taking advantage of others’ mistakes and misapprehensions is not, and trying to bend others’ perceptions to the client’s best advantage is seen to be at the heart of good advocacy.

The low public opinion of lawyers’ honesty and ethical standards cannot, moreover, be blamed on the fact (if it is a fact) that lawyers are ignorant of or ignore the prescriptions of the applicable ethical codes.<sup>13</sup> The Model Rules of Professional Conduct, despite their various exhortations to honesty, leave ample room for an approach to adversary advocacy in which getting at the truth can be a lesser value than victory on the client’s behalf. This appears, at any rate, to be the accepted understanding of portions of the Model Rules that bear on the lawyer’s duty of diligence,<sup>14</sup> confidentiality,<sup>15</sup> scope of representation (the lawyer’s role),<sup>16</sup> meritorious claims and contentions,<sup>17</sup> and truthfulness in

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11. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2009) (“A lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”); MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 2 (2009) (“[L]awyers usually defer to the client regarding such questions as . . . concern for third persons who might be adversely affected.”); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 (2000) (“[A] lawyer may take any lawful measure within the scope of representation that is reasonably calculated to advance the client’s objectives *as defined by the client* . . .”) (emphasis added); SIMON, *supra* note 10, at 26 (observing that, under the dominant view “the client has a right to the type of lawyering it prescribes, even when such lawyering leads to injustice for others”).

12. MODEL RULES OF PROF’L CONDUCT R. 4.1(a) (2009); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 (2000) (setting out a lawyer’s obligations regarding “False Testimony or Evidence”).

13. While it may be true that many or most lawyers are not intimately familiar with the exact language of the Model Rules or other applicable codes, it is probably fair to say that most lawyers know their general substance, especially as regards the questions of honesty and truth to be considered in this article.

14. See MODEL RULES OF PROF’L CONDUCT R. 1.3, cmt. 1 (2009) (“A lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”); see also MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1980) (“A Lawyer Should Represent a Client Zealously Within the Bounds of the Law”). Even though in the ABA’s current Model Rules the reference to “zealous” advocacy is now in a comment rather than a rule, MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2009), its message remains one that most lawyers take seriously.

15. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2009). Rule 1.6 operates as a qualifier to other Model Rules and comments that, in their direct terms, would otherwise call for a higher standard of candor and “honesty.” See, e.g., MODEL RULES OF PROF’L CONDUCT R. 4.1(b), 8.1(b) (2009); see also MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 2, 1.16 cmt. 3 (2009).

16. MODEL RULES OF PROF’L CONDUCT R.1.2(a) (2009) (“[A] lawyer shall abide by a

statements to others.<sup>18</sup> Rules such as these seem to assume, if not actually prescribe, a vision of the adversary system in which lawyers work single-mindedly on behalf of their clients—a system in which lawyers can be trusted to pursue their clients’ interests vigorously but cannot, and should not, be trusted in much else.

Moreover, instead of prescribing a single standard of honesty for all situations, the Model Rules contain a multi-standard hierarchy of candor in which lawyers are required to be more honest in some situations than in others.<sup>19</sup> For example, lawyers have a higher duty of candor to the courts than they do to each other or to the public generally: To the “tribunal” the lawyer has a duty to take “reasonable remedial measures” whenever the lawyer knows that *anybody*, client or otherwise, intends to engage in or does engage in fraudulent or criminal conduct related to the proceeding,<sup>20</sup> and to take these measures “even if compliance requires disclosure of information otherwise protected by Rule 1.6.”<sup>21</sup> By contrast, when dealing with other lawyers or the public generally, the lawyer’s affirmative duty to speak is limited to cases of client fraud or criminality, and even then, the duty is subject to the confidentiality strictures of Rule 1.6.<sup>22</sup>

The Model Rules also prescribe a third level of honesty and candor, applicable with respect to disciplinary matters and admissions to the bar. Under this standard, a lawyer “shall not . . . fail to disclose a fact necessary to correct a misapprehension known by the [lawyer] to have arisen in the matter.”<sup>23</sup> In its general requirement, at least, this obligation is quite high, requiring lawyers not merely to avoid *causing* others to err in apprehending the truth, but also to

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client’s decisions concerning the objectives of representation . . .”).

17. MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt. 1 (2009) (ethical obligation “to use legal procedure for the fullest benefit of the client’s cause”). As observed *supra* note 3, the conception of “meritorious” in Rule 3.1 seems to rest more on whether a claim or defense is winnable on the available admissible evidence than on whether the actual underlying facts justify victory under substance of the law. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. d (2000) (defining a position as frivolous when there is “no substantial possibility that the tribunal would accept it”). Indeed, the whole story of the ways lawyers use the rules of evidence to keep out anything damaging and to get in anything that can sway the factfinder’s sympathies is a prime example of the “duty to use legal procedure for the fullest benefit of the client’s cause . . .” MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt. 1 (2009).

18. MODEL RULES OF PROF’L CONDUCT R. 4.1(b) (2009). As will be discussed *infra* text accompanying notes 87–120, it would appear that the meaning of Rule 4.1(b) has been modified considerably as a result of the 2003 amendment to MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (2009) (confidentiality).

19. See immediately following text and *infra* text accompanying notes 159–71.

20. MODEL RULES OF PROF’L CONDUCT R. 3.3(b) (2009).

21. MODEL RULES OF PROF’L CONDUCT R. 3.3(c) (2009). Rule 1.6 generally prohibits disclosure of any “information relating to the representation of a client.” MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2009).

22. MODEL RULES OF PROF’L CONDUCT R. 4.1(b) (2009).

23. MODEL RULES OF PROF’L CONDUCT R. 8.1(b) (2009).

correct them when the lawyer knows they have gotten it wrong, irrespective of whether the lawyer (or client) did anything to bring about the error.<sup>24</sup> The obligation is, however, subordinate to the lawyer's duty of confidentiality, which may appreciably undercut its impact.<sup>25</sup> Notably, though, a similar and apparently even higher standard of honesty applies to lawyer advertising material, which the Model Rules consider "false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."<sup>26</sup> This standard of honesty seems even higher than the disciplinary/admissions standard because it is not made subordinate to Rule 1.6 (confidentiality).<sup>27</sup>

Clearly the drafters of the Model Rules knew how to write rules that call for truly honest behavior, as they showed when it came to questions of lawyer advertising, bar admission, and discipline. However, they chose to write a different standard of honesty and candor when it came to fashioning the rule on "Truthfulness in Statements to Others."<sup>28</sup> Apparently what is good for potential clients and for the bar admission and disciplinary authorities is not so good, or at least not deemed necessary, for the members of the public generally.

The multi-level duty of candor in the Model Rules, with at least four different standards, has the effect, if not the purpose, of allowing lawyers in most situations to take advantage of misapprehensions "known . . . to have arisen in the matter"<sup>29</sup> instead of trying to correct such misapprehensions. This ability to take such advantage of others' mistakes is not, however, intrinsic to or an inseparable part of an adversary system. While the adversarial process presupposes that each side will labor mightily to present evidence favorable to it and to press for favorable inferences, an adversary system does not necessarily require calculated nondisclosure of unfavorable evidence or the urging of inferences known to be dubious or outright false.<sup>30</sup> It is only in an exaggerated

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24. *Id.*

25. Because the obligation is subordinate to Rule 1.6 (confidentiality), it may sometimes result in a higher and sometimes a lower level of candor than that which applies before a tribunal—depending on whether the information in question is protected by Rule 1.6. Nonetheless, to the extent that the recent amendments to Rule 1.6 significantly contract the reach of the duty of confidentiality, the scope of the lawyer's duty to warn under 8.1(b) is presumably expanded. *See infra* text accompanying notes 87–120.

26. MODEL RULES OF PROF'L CONDUCT R. 7.1 (2009); *see also* MODEL RULES OF PROF'L CONDUCT R. 7.1. cmt. 2 (2009):

A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

27. MODEL RULES OF PROF'L CONDUCT R. 7.1 (2009).

28. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1 (2009).

29. MODEL RULES OF PROF'L CONDUCT R. 8.1(b) (2009).

30. *See* Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 553–54 (1983) (arguing that the "paramount goal" of civil adjudication is "arriving at as

or extreme version of the adversary system that efforts to game the process, caginess about the evidence, the undermining of truthful testimony, and other such tactics would be considered normal and legitimate parts of the lawyer's task.

This is not to say that an exaggerated or extreme version of the adversary system is not without its uses (albeit some of them questionable). For example, an advocate who distracts from the truth or takes advantage of others' mistakes can cause the law to misfire by making it apply to counterfactual versions of events. By engaging in such strategies, lawyers can become powerful allies of people who would prefer to escape the legally-prescribed consequences of their acts or to obtain outcomes they are not entitled to under the substance of the law. Since many people may prefer to avoid the legally-prescribed consequences of their acts or to obtain legally unmerited benefits, one may suppose that there is a substantial demand for lawyers who are willing to apply their skills to make such outcomes possible. Moreover, the ability to hold oneself out simply as a "confidential advisor" gives lawyers a competitive advantage in the marketplace for consulting, an advantage that is not shared by others who provide similar services, such as accountants, management consultants, investment advisors, tax preparers, domestic counselors, realtors, and so on.<sup>31</sup> As Professor Daniel Fischel has pointed out, the bulletproof confidentiality supposedly required in our version of the adversary system gives lawyers a legal monopoly on confidential advising and this, in turn, allows lawyers to extract "monopoly rents" (higher fees) from their clientele.<sup>32</sup> However, a decidedly positive value of an exaggerated version of the adversary system is that it can serve as a bulwark to protect individuals and private interests against government. For a people who have been constitutionally

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accurate a reconstruction of the past event as is possible" and advocating a set of rules, such as those originally proposed by Marvin Frankel, requiring lawyers to reveal witnesses they do not intend to offer, to report untrue statements and material omissions, and to question witnesses "with [a] purpose and design to elicit the whole truth").

31. Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 5–6 (1998).

32. *Id.* ("unique advantage"). In principle, the bulletproof confidentiality "feature" of lawyer's services would be available only to communications that are also covered by the attorney-client privilege, a rule of evidence that is appreciably narrower in scope than the ethical duty of confidentiality. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Ch. 5 introductory note (2000); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 (2000). *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 296 and 242–311 (1986). Only information covered by the attorney-client privilege is immune to subpoena or other legal orders to divulge. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 (2000). However, even though a lawyer can be judicially compelled to reveal information that is protected by the ethical duty of confidentiality (absent a privilege), the need to obtain the required court orders and to show justification for them can operate as an enormous practical barrier to disclosure, with a corresponding enhancement to the market value of the lawyer's position as confidential advisor.

suspicious of government since the earliest days of the Republic,<sup>33</sup> having the laws unfailingly applied according to their tenor is not necessarily a good thing. It is something that may vary with the moral justness of the law.

Unfortunately, however, whatever may be the benefits of an extreme version of the adversary system, they often come at the expense of truth. For some, this is not necessarily a problem. It has been suggested, for example, that “in actual practice the ascertainment of the truth is not necessarily the target of the trial, [and] that values other than truth frequently take precedence.”<sup>34</sup> To be sure, the legal system implements a variety of policies that can serve as “barriers to information” and frustrate the search for truth.<sup>35</sup> Nonetheless, the decision to allow these barriers to exist is (or should be) a hard one. After all, people can be subjected to economic ruination, sent to prison, and even put to death<sup>36</sup> based on the erroneous conceptions of “truth” that emerge when relevant evidence is systematically excluded from consideration—such as when it is excluded based on an evidentiary “privilege.” However, even if there are some important policies that do justify barriers to information, it does not follow that just *any* policy will justify such barriers. In particular, neither the bar’s interest in receiving “monopoly rents” nor the wrongdoer’s interest in avoiding the law’s consequences would seem to present a strong policy basis for frustrating the search for truth. The interest of protecting individual and private interests against government may offer a philosophically more appealing justification for an exaggerated or extreme adversary system, since such a system literally condones the passive obstruction, and indeed some active obstruction, of government justice in the name of liberty and human dignity.<sup>37</sup> However, it is doubtful that a legal system could entertain a policy that supports such “obstruction” explicitly without either imposing very strict limits, such as the bounds of our constitutional rights, or engaging in profound self-contradiction.

There is no reason to believe that our own legal system contains any such explicit self-contradiction. Nevertheless, the multi-level duty of candor in the

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33. The Constitution, for example, contains numerous expressions of suspicion of government and of the need for citizens to be protected from government, ranging from the rights of the accused through the protections afforded to private property. *See, e.g.*, U.S. CONST. AMENDS. IV–VI (granting rights regarding illegal search and seizure, private property, due process, and self-incrimination, along with the right to counsel and a jury trial).

34. The Hon. Simon H. Rifkind, *The Lawyer’s Role and Responsibility in Modern Society*, 30 REC. ASS’N B. CITY N.Y. 534, 543 (1975).

35. *Id.* at 544–45. Rifkind lists, among other things, evidentiary privileges, constitutional exclusionary rules, and standards of witness “competence” to testify.

36. As the U.S. Supreme Court has pointed out, evidence of “actual innocence” is not in itself a basis to set aside a state death sentence once the judgment has become final. *Herrera v. Collins*, 506 U.S. 390, 393, 400 (1993). The Court was concerned about “the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases.” *Id.* at 417.

37. This is probably what Rifkind had in mind when he said that the adversary system is “good for liberty.” *Rifkind, supra* note 34, at 537.



Model Rules not only allows lawyers to take advantage of misapprehensions known to have arisen on the part of others, but also to take active steps to *induce* such misapprehensions—as long as the lawyer can do so without resorting to outright lies or evidence tampering. One of the lawyer's most valuable skills is the ability to weave stories that are false out of statements that are true. To reiterate, however, a policy that allows such tactics is not a necessary part of the adversary system. So why do the Model Rules leave so much room to make this possible?

The Model Rules are not the ethical rules that one would expect to find in a world of truly honest lawyers—not with their multi-level concept of candor and their various provisions allowing lawyers to subordinate the revelation of truth to the value of winning.<sup>38</sup> In a world of truly honest lawyers, members of the profession would never subordinate justice to victory by taking advantage of others' errors or misunderstandings, let alone seek—by selective disclosures or the like—to create such advantages. In other words, in such a world lawyers could be trusted. While truly honest lawyers can no doubt survive and possibly even thrive under a Model Rules regime,<sup>39</sup> they would not likely be the norm, nor would they be the sort of lawyers that are apparently presupposed by the Model Rules themselves. And, they would certainly not be the lawyers you would want if you deserve to suffer some legal sanction or if you desire to obtain some benefit that you do not legally deserve.

There are, however, signs that an evolution is occurring in the legal profession's view of honesty and the lawyer's role, as well as in the Model Rules. After twice rejecting a crime/fraud exception to the lawyer's duty of confidentiality, first in 1982 and then again in 2002,<sup>40</sup> the American Bar Association finally embraced a qualified crime/fraud exception in 2003.<sup>41</sup>

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38. See *infra* text accompanying notes 121–81.

39. See generally John A. Humbach, *The National Association of Honest Lawyers: An Essay on Honesty, "Lawyer Honesty" and Public Trust in the Legal System*, 20 PACE L. REV. 93 (1999) (discussing the competitive advantage that would be enjoyed by lawyers whom others could trust without reservation). See also William H. Simon, *Moral Freaks: Lawyers' Ethics in Academic Perspective* (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 09-215), available at <http://ssrn.com/abstract=1496988> (arguing that it is a common error to overstate the distance between ordinary law and legal ethics, especially as purposively understood).

40. See STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 69–71 (2004) (describing the legislative history of Rule 1.6). Irma Russell describes the 2002 rejection as “a partial triumph of an absolutist view of confidentiality.” Irma Russell, *Client Confidences and Public Confidence in the Legal Profession: Observations on the ABA House of Delegates Deliberations on the Duty of Confidentiality*, 13 PROF. LAW. 19, 19 (Spring 2002) (describing the original rule as, essentially, reflecting an absolutist view of confidentiality).

41. GILLERS & SIMON, *supra* note 40, at 71. The “qualification” of this qualified exception is that the crime or fraud must be such that it is “reasonably certain to result in [or has resulted in] substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.” MODEL RULES OF PROF'L CONDUCT R.

Notably, amendments to Rule 1.6 (confidentiality) may breathe a new and powerful life into Rule 4.1 (truthfulness to others), even though the language of the latter remains unchanged.<sup>42</sup> Perhaps the extreme adversarial vision of the American legal system that was built into the Model Rules is being taken out again. Perhaps, indeed, the Model Rules will soon evolve to the point where truly honest legal practice, more concerned with truth than persuasion, with legal justice than mere victory, will be not merely permitted but actually fostered by the lawyers' code of ethics.

In the remainder of this article, the overall focus is on the duties that lawyers have under the Model Rules to warn others laboring under misapprehensions of material fact. We will begin with a look at the duty to warn of client fraud or criminality under the original version of Rule 1.6 (confidentiality) as it was understood before and after the recent amendments—particularly in light of ABA Formal Opinion 92-366 (on so-called “noisy withdrawal”).<sup>43</sup> This will be followed by consideration of a duty not to take advantage of others' misapprehensions of material facts, setting certain practices of lawyers against standards applied in the common law of larceny.<sup>44</sup> Finally, we will look at the ethical aspects of using the legal process proactively as part of an endeavor to induce a court to take property away from its owner and give it to somebody else.<sup>45</sup>

#### I. THE LAWYER'S DUTY TO WARN OF CLIENT FRAUD OR CRIMINALITY (“NOISY WITHDRAWAL”)

Before the Model Rules were adopted, the ABA's model ethical standards did not require lawyers to keep client information confidential if disclosure was necessary to prevent the client from committing a crime.<sup>46</sup> Instead, in the pre-Model Rules days a lawyer was ethically permitted (though not required) to disclose a client's secrets in order to protect the potential victims of a client's criminal fraud.<sup>47</sup> However, in adopting the Model Rules in 1983, the ABA

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1.6(b) (2009). For a further description of these changes, see Amanda Vance & Randi Wallach, *Updating Confidentiality: An Overview of the Recent Changes to Model Rule 1.6*, 17 GEO. J. LEGAL ETHICS 1003 (2004).

42. See *infra* text accompanying notes 87–120.

43. *Id.*; see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 366 (1992) (hereinafter Formal Opinion 92-366).

44. See *infra* text accompanying notes 121–211.

45. See *infra* text accompanying notes 212–73.

46. ABA CANONS OF PROF'L ETHICS Canon 37 (1937), reprinted in AMERICAN BAR ASSOCIATION, COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 323–24 (1997) (“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.”); MODEL CODE OF PROF'L RESPONSIBILITY DR 4–101(C)(3) (1979) (“A lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime.”).

47. See MODEL CODE OF PROF'L RESPONSIBILITY DR 4–101(C)(3) (1979).

decided to break with this tradition. The House of Delegates voted to reject proposals that would have retained lawyers' broad ethical liberty to disclose client information in order to prevent their client's crimes.<sup>48</sup> Instead, the ABA adopted a very narrow "crime" exception to the duty of confidentiality, applying only in cases where the client's criminal activities were "likely to result in *imminent* death or substantial bodily harm."<sup>49</sup> There was no exception at all for cases of client frauds or crimes that would merely cause serious financial losses or damage to property interests. The lawyer's ethical duty of confidentiality had reached a new modern high.

Nevertheless, ten years later, in 1992, the ABA's Standing Committee on Ethics and Professional Responsibility recognized in Formal Opinion 92-366 that lawyers sometimes are not merely permitted but ethically *required* to make certain disclosures of confidential client information in order to avoid "assisting" in a client's prospective crime or fraud.<sup>50</sup> This obligation was discovered to be rooted in existing Model Rule 1.2(d), which declares: "A lawyer shall not . . . assist a client, in conduct that the lawyer knows is criminal or fraudulent . . ."<sup>51</sup> The formal opinion reasoned that sometimes the lawyer may be unable to meet this ethical prohibition against "assisting" a client's crime or fraud by merely withdrawing from representation.<sup>52</sup> A typical situation where this inability might occur is when the client is planning to use documents previously drafted by the lawyer in order to carry out a post-withdrawal fraud or

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48. See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 32 (6th ed. 2002) (hereinafter GILLERS). Under the January 1980 draft of the pertinent provision, "a lawyer may disclose information about a client . . . to the extent it appears necessary to prevent or rectify the consequences of a deliberately wrongful act by the client." *Id.* Under the subsequent May 1981 draft, the scope of the permission to disclose would have been substantially narrower than under the 1980 draft, though still unacceptably generous from the standpoint of the ABA:

[A] lawyer may reveal [confidential] information to the extent the lawyer believes necessary . . . to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in . . . substantial injury to the financial interest or property of another [or] to rectify the consequences of a criminal or fraudulent act in the commission of which the lawyer's services had been used.

*Id.* (first alteration in original). It too was rejected.

49. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1997) (former version, now superseded), reprinted in AMERICAN BAR ASSOCIATION, COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 27 (1997). An excellent analysis of the original and revised versions of the "bodily harm" exception is found in Russell, *supra* note 40, at 19–21 (describing the original rule as, essentially, reflecting an "absolutist view of confidentiality").

50. Formal Opinion 92-366, *supra* note 43.

51. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009).

52. Formal Opinion 92-366, *supra* note 43; see also MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2009) (requiring a lawyer to withdraw from representation if "the representation will result in a violation of the Rules of Professional Conduct or other law." An example would be if the representation would assist the client in committing a crime or fraud in violation of Rule 1.2).

crime.<sup>53</sup> In situations such as this, the only way the lawyer can avoid assisting the client's wrong may be a so-called "noisy withdrawal," that is, a withdrawal accompanied by notice to the affected parties and, even, an express disavowal of prior work product.<sup>54</sup> The Committee's majority located this requirement of noisy withdrawal not in any one rule but in the interplay between several different rules, specifically those relating to confidentiality,<sup>55</sup> withdrawal,<sup>56</sup> and the scope of representation.<sup>57</sup> In short, the disclosure requirement of Formal Opinion 92-366 emerges when, due to the continuing effects of the lawyer's prior representation, disclosure is the only way for the lawyer to avoid "assisting" the client's crime or fraud.

The formal opinion was based on certain assumed facts, which in highly simplified form are: A lawyer has represented Client, a small corporation, for several years.<sup>58</sup> About a year ago, Client obtained a \$5 million bank loan, and in that connection, the lawyer provided the customary opinion letter.<sup>59</sup> The letter stated that all of Client's outstanding sales contracts were enforceable obligations against Client's customers.<sup>60</sup> Now two senior officers of Client have just told the lawyer that for the past several years they have been creating phony purchase orders.<sup>61</sup> These phony orders make Client's sales figures look much greater than they actually are and, also, make the lawyer's opinion letter inaccurate.<sup>62</sup> Nevertheless, Client intends to continue using the letter fraudulently in its ongoing dealings with the bank, including an existing line of credit, and possibly in a future major loan as well.<sup>63</sup>

In a world of truly honest lawyers this kind of situation would not present any quandary at all, much less one that calls for a request for expert ethics advice with a sharply divided opinion as the result.<sup>64</sup> Not only has an innocent person fallen into a trap that the lawyer helped to set (albeit unconsciously), but the client's intention to continue making use of the lawyer's letter means that the trap is an ongoing menace into the future. Whatever the lawyer's absence of fault in the first instance, it simply would not be truly honest to leave victims in the traps that one has created, let alone leave the traps lying around to be blundered into again. The client has not merely told a serious lie and obtained millions of dollars by doing it, but the lawyer's past services are helping the

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53. See Formal Opinion 92-366, *supra* note 43.

54. *Id.*

55. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009).

56. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2009). See *supra* note 52 for excerpt.

57. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009).

58. Formal Opinion 92-366, *supra* note 43.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. The formal opinion was accompanied by a strong dissent, discussed *infra* text accompanying notes 80-84.

client advance similar “interests” in the future. If the client cannot be persuaded to reveal the lie, then the truly honest lawyer would have to do so.

The formal opinion did not, however, go quite this far. It concluded that, based on the Model Rules, the lawyer would have to make a disclosure in a situation like this, but the rules would not require or even permit the lawyer to explain the truth.<sup>65</sup> They would not allow the lawyer to set things straight or to provide whatever facts might be reasonably required to correct the client’s crime or fraud or to prevent it in the future.<sup>66</sup> On the contrary, the “disaffirmance should . . . go no further than necessary to accomplish its purpose of avoiding the lawyer’s assisting the client’s fraud.”<sup>67</sup> If the client can carry out its criminal or fraudulent scheme without making further use of the lawyer’s assistance or past work, then so be it. The point of a noisy withdrawal is, it seems, not so much to protect the public as to keep the lawyer clean, under Rule 1.2(d). It does not prevent the clients from committing fraud but merely prevents them from conscripting their lawyers into “a *de facto* continuation of the representation even if the lawyer has ceased to perform any additional work.”<sup>68</sup>

The reasoning of the formal opinion began with an admission that the Model Rules nowhere *explicitly* authorize the disclosure that the opinion decides is required.<sup>69</sup> The opinion noted, however, that a comment to Rule 1.6 (confidentiality) clearly presupposed that the rule would allow noisy withdrawals.<sup>70</sup> According to the comment in question, Rule 1.6 does not prevent a lawyer from “giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.”<sup>71</sup> The formal opinion treated this comment’s apparent exception to confidentiality as a correct interpretation of Rule 1.6 even though, only six months before adopting the comment, the ABA had refused to adopt a draft of Rule 1.6 that would have permitted such disclosures explicitly.<sup>72</sup> The rejected draft, which would have continued the general spirit of the traditional rule, permitted disclosure in cases of client fraud or crime as an explicit exception to

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65. Formal Opinion 92-366, *supra* note 43.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* (“[T]he text of [Rule 1.6 (confidentiality)] itself contains no exception that would permit her to reveal the fraud to the bank, . . . to the new law firm the company has retained, or to anyone else. Nor is disclosure explicitly authorized by any other ethical rule.”).

70. *Id.* In a subsequent amendment in 2003, the ABA has since deleted the supporting language in question from the comment, apparently because a similar passage had previously been added in 2002 to the comments to Rule 1.2 and Rule 4.1. *See infra* note 84 and accompanying text.

71. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.6 cmt. 14 (2003), reprinted in AMERICAN BAR ASSOCIATION, COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 40 (2003).

72. Formal Opinion 92-366, *supra* note 43.

the duty of confidentiality.<sup>73</sup> However, in an effort to square the comment's language with the rejection of the draft 1.6, the formal opinion pointed out that the comment's interpretation of Rule 1.6 (to allow noisy withdrawal) was "substantially narrower" than the much broader permissions to disclose that the rejected draft would have conferred.<sup>74</sup> Indeed, the formal opinion questioned whether allowing noisy withdrawal really constituted an "exception" to confidentiality at all.<sup>75</sup> It was, rather, simply "the inevitable consequence[] of one rule's operation upon another" and "a recognition that fulfillment of the lawyer's obligations under Rules 1.16(a)(1) and 1.2(d) may have the *collateral effect of inferentially* revealing a confidence."<sup>76</sup>

Notably, the crucial language of the comment on which the formal opinion relied was<sup>77</sup> *permissive* rather than mandatory.<sup>78</sup> Nowhere did the comment state that lawyers might ever have an ethical "duty" to disclose client information in order to avoid assisting in clients' crime or fraud. However, in the course of the formal opinion's line of reasoning, the comment's permission to disclose got transmuted into a *duty* to disclose when the circumstances make disclosure the only way the lawyer can avoid having his or her work product used to assist a crime or fraud.<sup>79</sup>

It probably would go too far to say that Formal Opinion 92-366 settled the issue of noisy withdrawal. For one thing there was a strong dissent, which rejected the notion that the lawyer's past work product is the equivalent of current and continuing "representation."<sup>80</sup> By rejecting this notion, the dissent

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73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* (emphasis added). Rule 1.16(a)(1) states that "[A] lawyer . . . shall withdraw from the representation of a client if . . . the representation will result in [sic] violation of the rules of professional conduct or other law . . . ." MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2009). Rule 1.2(d) states that "[a] lawyer shall not . . . assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ." MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009).

77. The past tense is used here because the comment in question has since been amended. *See supra* note 70.

78. Formal Op. 92-366, *supra* note 43. ("Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.").

79. *Id.* In line with the opinion's reasoning, before there can be a permission to disclose under the comment to Rule 1.6, there would have to be an obligation to disclose under Model Rules 1.16(a)(1) and 1.2(d). *Id.* Accordingly, there can be a permission to disclose only where there is a duty to disclose. *Id.*

80. *Id.* (dissent). The dissenters did not agree that a client's post-withdrawal use of a lawyer's work product constitutes continuing representation. *Id.* Because the dissent rejected the notion that "past completed representation" could be "miraculously resurrected and revived into a current representation," the dissent did not see the use by the client of an "old opinion letter" as representation—ergo, there could not be the predicate "representation" requiring further withdrawal, "noisy" or otherwise. *Id.* "Model Rule 1.16(a)(1), thus, clearly contemplates mandatory withdrawal only if future ongoing representational services will be improperly used

was able to conclude that disaffirmances of work-product should neither be required nor permitted.<sup>81</sup> Another reason the formal opinion does not settle the issue of noisy withdrawal is that it was, in the final analysis, only the view of a committee within a private organization, and it may well be at odds with the strong stance towards confidentiality that most lawyers hold. Among practitioners, the core value that lawyers do not squeal on clients runs deep, and different lawyers may reach their own, alternative syntheses of the various applicable rules. A technical objection to the majority's conclusion is that it is very hard to reconcile with the comments to Rule 4.1, which specifically deals with the problem of disclosures to avoid "assisting."<sup>82</sup> The comments to that rule, both at the time of the formal opinion and now, expressly *subordinate* the lawyer's duty to disclose to the duty of confidentiality.<sup>83</sup> Finally, there is the awkward point that crucial comment language on which the majority relied has been removed from Rule 1.6 and relocated to comments on other rules<sup>84</sup> where it may no longer be so easy to treat as an "interpretation" of Rule 1.6.

The most problematic feature of the formal opinion is, however, its essentially binary character. The lawyer under the assumed facts had already concluded that she could no longer continue representing this client and that she was required to withdraw under Model Rule 1.16(a).<sup>85</sup> The only question

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by the client. Only then would a 'noisy withdrawal' be permissible." *Id.*

81. *Id.*

82. See MODEL RULES OF PROF'L CONDUCT R. 4.1(b) cmts. 2–3 (2009); see also *supra* note 9 for relevant text of rule.

83. Former comment 3 to Model Rule 4.1 read: "The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6." MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 3 (1992) (amended 2003). The current version of the comment is similar. See MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 3 (2009).

84. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 10, 4.1 cmt. 3 (2009); see also *supra* note 70. In the comments to Rule 1.2, the language reads: "It may be necessary [to avoid 'assisting'] for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like." MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 10 (2009). While this addition to the comments to Rule 1.2 is arguably even more empowering than the language that was removed from Rule 1.6, the relocation of the thought from 1.6 to 1.2 makes it far less obvious that the language should be treated as an interpretation of Rule 1.6. For one thing, it would be odd to find such a significant interpretive qualification of Rule 1.6 set out in the comments to an altogether different rule. Moreover, in the new comment to Rule 1.2, the language in question is immediately followed by the reference "See Rule 4.1." *Id.* Since the duty to volunteer information under Rule 4.1 is made expressly *subject to* the duty of confidentiality of Rule 1.6, so too, arguably, are the duties to "give notice" and "disaffirm" under Rule 1.2. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 10, 4.1 cmt. 3 (2009). At least, the comment that expressly mentions those duties seems, with its reference to 4.1, to imply as much. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 10 (2009). In other words, the net result may be that, in those circumstances where Rule 1.6 requires confidentiality, noisy withdrawal may arguably no longer be permitted and the duty not to assist by silence is now qualified by the duty of confidentiality (albeit a more limited duty under the recent amendments to Rule 1.6). See *infra* text accompanying notes 87–120.

85. Formal Opinion 92-366, *supra* note 43.

left for her was what, if anything, she was permitted or required to say about her former client in the course of withdrawing. It is far more likely that a lawyer will encounter the problem of client misconduct in circumstances that are rather less dramatic than a \$5 million fraud committed in a single, relatively large transaction. What, for example, of all the little “crimes or frauds” that a corporate client’s personnel might commit in the course of cutting corners on the innumerable rules and regulations—from employee safety and protecting the environment to financial and securities reporting, maintaining needed permits, and all the rest—that are a part of doing business in a modern regulatory state? The trouble with Formal Opinion 92-366 is that it seems to presuppose that the lawyer either succeeds in getting the client to get into full legal compliance or the lawyer must get out—mandating withdrawal at least with respect to any legal services in which the lawyer might be deemed to “assist.”<sup>86</sup> However, real life is not quite so binary; it is not so clear-cut in the choices it presents. For clients doing business in a modern regulatory state, the ways of breaking the law are so numerous, and competitive pressures to shade the truth so intense, that it may be relatively unusual for lawyers to withdraw their assistance every time they know (or ought to know) that their clients’ ongoing operations are not in full and punctilious compliance with all the many laws.

Whatever its weaknesses and uncertainties, however, Formal Opinion 92-366 is clear authority for the proposition that the Model Rules as originally promulgated by the ABA did impose a duty to warn, after a fashion, of a client’s impending crime or fraud. The warning was not permitted to be specific, nor could it presumably even be phrased as a warning *per se*. Nevertheless, the Model Rules did impose a duty to speak, as a last resort, when a lawyer’s pre-existing work product was going to be used by a former client in a future crime or fraud.

## II. THE LAWYER’S DUTY TO WARN UNDER MODEL RULE 4.1 AFTER THE RECENT AMENDMENTS

Prior to 2003, there were two very narrow classes of explicit exceptions to the duty of confidentiality in Model Rule 1.6, namely (1) to prevent death or substantial bodily harm,<sup>87</sup> and (2) to protect the lawyer.<sup>88</sup> The Model Rules did

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86. *Id.* The formal opinion did allege the possibility that a lawyer could withdraw as to the “matters relating to the fraud” (or crime?) without severing the entire relationship. *Id.* However, that particular gambit may seem fairly unrealistic for many who are in-house counsel and probably would not work very well for outside counsel either.

87. See GILLERS & SIMON, *supra* note 40, at 69–71 (history of Rule 1.6); see also Russell, *supra* note 40, at 19 (discussing remedial changes to Rule 1.6). The “death or bodily harm” exception was expanded in 2002 from an ultra-narrow exception (for cases of “imminent” death or substantial bodily harm threatened by a client’s crime) to a considerably broader one (for cases of “reasonably certain” death or substantial bodily harm, from whatever cause”). GILLERS & SIMON, *supra* note 40, at 69–71.



not, however, explicitly obligate or even permit a lawyer to disclose client confidences in order to prevent fraud or otherwise to protect the financial or property interests of others. As previously mentioned, this sweeping breadth of the Model Rules' confidentiality duty was in sharp contrast with the ABA's earlier Model Code and Canons of Professional Ethics.<sup>89</sup> However, in 2003 there was a return to something approximating the traditional contours of the confidentiality duty when the ABA approved extensive amendments to Model Rule 1.6. Under these 2003 amendments:

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

...

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial 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 . . . .<sup>90</sup>

In other words, with certain qualifications, the newly modified Rule 1.6 now explicitly permits lawyers to reveal confidential client information in order to prevent, mitigate, or rectify financial or property injuries due to the client's crime or fraud.<sup>91</sup> The main pre-requisites for the exception are, first, that the injury in question must be "substantial" and second, that the client must have used the lawyer's services "in furtherance of" the crime or fraud.<sup>92</sup>

By using the word "may" in the introductory clause, this new amendment to Rule 1.6 appears to *permit* but not *require* lawyers to disclose client information for the protection of others.<sup>93</sup> However, when the newly amended version of Rule 1.6 is read in combination with the already existing language of Rule 4.1(b), the Model Rules now indeed appear to charge lawyers with an ethical *obligation* to disclose. Specifically, under the relevant language of Rule 4.1, "[i]n the course of representing a client a lawyer shall not knowingly . . . (b) fail to disclose a material fact when disclosure is necessary to avoid

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88. Sometimes referred to as the "self-defense" exceptions, these allow the lawyer to breach confidentiality to the extent the lawyer reasonably believes necessary to collect the fee or otherwise to mount an effective case in litigation with a former client. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) & cmts. 10–11 (2009); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 (2000); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §6.7.8 (1986).

89. *See supra* text accompanying notes 46–47.

90. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2009).

91. *Id.*

92. *Id.*

93. *See id.*

assisting a criminal or fraudulent act by a client, *unless disclosure is prohibited by Rule 1.6.*<sup>94</sup> Although the language of Rule 4.1 has not changed, the newest amendments to Rule 1.6 have radically altered the practical meaning of its final clause, viz. “*unless disclosure is prohibited by Rule 1.6.*”<sup>95</sup>

Under the pre-2003 version of Rule 1.6, the main thrust of Rule 4.1(b) was essentially swallowed up by its final clause. While the subsection’s first twenty-one words seemed to mandate a fairly wide range of disclosures of material facts, the final clause cut down the duty to disclose to the point where it was, as a practical matter, miniscule. Nearly all useful information that a lawyer is likely to possess would normally be “information relating to the representation” of a client and, therefore, locked up under Rule 1.6.<sup>96</sup> To the extent that such information could not be revealed under Rule 1.6, it could not be revealed under the final clause of 4.1(b) either.<sup>97</sup> And because the former version of Rule 1.6 had no crime or fraud exception, the reference to Rule 1.6 utterly cramped the apparent sweep of Rule 4.1(b), permitting the disclosure of practically nothing.<sup>98</sup>

Under the new version of Rule 1.6, however, the reach of Rule 4.1(b) has now been dramatically expanded. Rather than forbidding lawyers to divulge client information concerning client crimes or fraud, the new Rule 1.6 now broadly permits such disclosures.<sup>99</sup> Since Rule 4.1(b) *requires* its disclosures when Rule 1.6 *permits* them, a new and wide-ranging “duty to warn” has emerged.<sup>100</sup> Whenever a lawyer believes that a Rule 4.1 disclosure is reasonably necessary to “prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another, and in furtherance of which the client has used or is using the lawyer’s services,” then disclosure by the lawyer seems not merely *permitted* by Rule 1.6 but *required* under a joint reading of Rules 1.6 and 4.1.<sup>101</sup> That is, at least, what the words say.

Although some commentators agree with this reading,<sup>102</sup> including inferentially an opinion of the Massachusetts Committee on Professional

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94. MODEL RULES OF PROF’L CONDUCT R. 4.1 (2009) (emphasis added).

95. *Id.*

96. MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2009).

97. MODEL RULES OF PROF’L CONDUCT R. 4.1(b) (2009).

98. The main exception would seem to be for situations where a failure to disclose would actually be illegal. For example, under current Rule 1.2(d), which was added in 2002, the failure to disclose would cause the lawyer to personally commit a fraud. *See United States v. Cavin*, 39 F.3d 1299, 1308–09 (5th Cir. 1994) (describing a number of circumstances to be considered in deciding whether a lawyer’s failure to divulge potential damaging facts would constitute fraud by the lawyer).

99. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2)–(3) (2009).

100. MODEL RULES OF PROF’L CONDUCT R. 1.6, 4.1(b) (2009).

101. *See* MODEL RULES OF PROF’L CONDUCT R. 1.6, 4.1 (2009).

102. Thomas D. Morgan, *Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers’ Professional Conduct*, 17 GEO. J. LEGAL ETHICS 1, 7 (2003) (“Corporate lawyers thus are now required by Model Rule 4.1 to disclose outside the

Ethics,<sup>103</sup> there is at least one important commentator who does not. The one who does not is, moreover, the Reporter for the Task Force of Corporate Responsibility, the committee that recommended (or, more precisely, re-recommended) the 2003 amendments to the ABA's House of Delegates.<sup>104</sup> According to Reporter (and Professor) Lawrence Hamermesh, the Task Force certainly had "no intention or expectation that it was recommending a mandatory disclosure obligation."<sup>105</sup> Indeed, the Final Report of the Task Force says exactly that.<sup>106</sup> Nonetheless, one is tempted here to advert to Justice Holmes's famous dictum on using legislative history in statutory interpretation: "I don't care what their intention was. I only want to know what the words mean."<sup>107</sup> And the words—that is to say the words that were presented to and adopted by vote of the ABA House of Delegates—are diametrically opposed to the idea that the lawyer's disclosure obligations under Rule 4.1(b) are merely permissive. By modifying Rule 1.6, the ABA has taken the lid off the pot in Rule 4.1(b).<sup>108</sup>

The Task Force was, of course, literally correct in saying that it did not recommend creating any new mandatory disclosure obligation, for the obligation in question was already in the existing language of Rule 4.1(b).<sup>109</sup> The new amendments to Rule 1.6 are, in themselves, merely permissive. What is more, the range of situations in which Rule 1.6 permits disclosure appears to be significantly broader than the range in which Rule 4.1(b) would *require*

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corporation any 'material fact . . . necessary to avoid assisting a criminal or fraudulent act by a client.' It would be hard to make the point much more clearly.") (alteration in original). Cf. Jolyn M. Pope, *Transactional Attorneys—The Forgotten Actors in Rule 1.6 Disclosure Dramas: Financial Crime and Fraud Mandate Permissive Disclosure of Confidential Information*, 69 TENN. L. REV. 145, 169–70 (2001) (recognizing the interpretation, but recommending deletion of Model Rule 4.1(b) to eliminate required disclosure).

103. See Mass. Comm. on Prof'l Ethics, Op. 2 (1999) (interpreting the similar confidentiality exception in the requirements of Rule 8.3 (Reporting Professional Misconduct)).

104. Lawrence A. Hamermesh, *The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct*, 17 GEO. J. LEGAL ETHICS 35, 35 (2003).

105. *Id.* at 54 n.92.

106. REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY 53 n.94 (2003), available at [http://www.abanet.org/buslaw/corporate\\_responsibility/final\\_report.pdf](http://www.abanet.org/buslaw/corporate_responsibility/final_report.pdf).

107. Letter from Justice Oliver Wendell Holmes, quoted in Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947).

108. I do not mean here to be facile about taking parties' intent seriously and carrying their intentions into force to the greatest extent possible. See *infra* text accompanying notes 252–73. However, it seems to me that, in the present context, the intentions that count are those of the "legislators" who had the legal power to vote on and adopt the measure, not the intent of the "legislative staff" personnel who originally wrote it. If the intention of those voting cannot be known, then their intention should be taken to be that which can reasonably be imputed to them based on the wording that they approved.

109. See MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2009).

disclosures.<sup>110</sup> To the extent that their ranges differ, it can quite properly be said that the 2003 amendments enacted a new zone of permission to disclose within which there is no corresponding duty to disclose.<sup>111</sup> For instance, the chief relevant qualifier of Rule 4.1(b) is “necessary to *avoid assisting* a criminal or fraudulent act by a client,”<sup>112</sup> whereas the relevant qualifier of Rule 1.6(b)(2)–(3) is “in furtherance of which the client has used or is using the lawyer’s services.”<sup>113</sup> These qualifiers are not necessarily synonymous.<sup>114</sup> Another example of the difference in range emerges from the permission in the new Rule 1.6 to disclose client information to “prevent, mitigate or rectify” client crime or fraud, or its consequences.<sup>115</sup> By contrast, Rule 4.1 mandates disclosure only to “avoid assisting” a client’s crime or fraud. It is debatable whether “assisting” always necessarily includes any failure to “prevent, mitigate or rectify.”<sup>116</sup>

Another way in which the ranges differ is due to the gap that exists between the set consisting of “criminal or fraudulent” acts under Rule 4.1,<sup>117</sup> and the somewhat smaller set consisting of “crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another” found in Rule 1.6.<sup>118</sup> Even after the 2003 amendments, Rule 1.6 still prohibits—as much as it ever did—disclosures of client information with

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110. See MODEL RULES OF PROF’L CONDUCT R. 1.6, 4.1(b) (2009).

111. This distinction is noted by Ms. Pope, who sees the remedy as deletion of Rule 4.1(b). Pope, *supra* note 102, at 170 n.141.

112. MODEL RULES OF PROF’L CONDUCT R. 4.1(b) (2009) (emphasis added).

113. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2)–(3) (2009).

114. For example, a lawyer who obtains the release of a professional pickpocket on bail could not, I think, be considered to have “assisted” in the client’s subsequent pocket picking without a radical re-thinking of the defense lawyer’s duties in arraignments. Nonetheless, the services provided by the lawyer at the bail hearing might be seen as being “in furtherance” of the pickpocket’s trade. Cf. *United States v. Cueto*, 151 F.3d 620, 631 (7th Cir. 1998) (sentencing lawyer to eighty-seven months after engaging in “traditional litigation-related conduct” in an endeavor, later deemed “corrupt,” to prevent a successful prosecution of his client on gambling charges).

115. See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2009).

116. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(3) (2009); see also Formal Opinion 92-366, *supra* note 43, which appeared to take the view that a lawyer would not be “assisting” (and therefore not required to do a “noisy withdrawal”) unless the client was intending to continue putting the lawyer’s innocently provided legal services to nefarious use. In interpreting the analogous use of the word “assist” in 1.2(d), the formal opinion stated:

Similarly, under the injunction in Rule 1.2(d) that a lawyer shall not “assist a client in conduct the lawyer knows is criminal or fraudulent,” the term “assist” must be reasonably construed to cover a failure to repudiate or otherwise disassociate herself from prior work product the lawyer *knows or has reason to believe is furthering* the client’s continuing or future criminal or fraudulent conduct.

*Id.* (emphasis added).

117. MODEL RULES OF PROF’L CONDUCT R. 4.1 (2009).

118. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2009).

respect to small-impact frauds or crimes, viz. those that produce only minor injuries or none at all.<sup>119</sup> Thus, it seems a fair hypothesis that, for a substantial proportion of actual situations, the 2003 amendments to Rule 1.6 have no application at all, and the pre-2003 rules (including Formal Opinion 92-366) are still in full force, calling for mandatory noisy withdrawal (but only limited disclosures) for smaller injuries and required disclosures to avoid assisting for substantial-injury situations.

Nevertheless, for those cases in which a client's crime or fraud has resulted in or is reasonably certain to result in substantial injury to the financial interests or property of another, the 2003 amendments to the Model Rules have made an important advance in the direction of truly honest lawyering. Even if one accepts the view of the Task Force, a lawyer now has, at the very least, permission to reveal information to the extent reasonably believed necessary to "prevent, mitigate or rectify" a client's fraud or crime that the lawyer's services have been used to further.<sup>120</sup> And accepting the clear import of the language itself, a lawyer now has a duty to reveal.

### III. WHAT MAKES "HONESTY" SO COMPLICATED?

We have already seen that what counts as being honest has varied over time under the Canons, the Model Code, and now the Model Rules and their recent amendments. And this is not to mention the variations in the ethical content of lawyer honesty that exist from state to state.<sup>121</sup> Then there are the arcane analytical contortions employed in Formal Opinion 92-366, which addressed what might seem to be a fairly basic ethical point in a "cramped and legalistic way" rather than resort to high principles.<sup>122</sup> Law students sometimes wonder, when trying to absorb and remember materials such as these, why is honesty so complicated? What can explain all these convolutions and twists? They, who have not quite yet adopted the mindset of a lawyer, are surprised by all this intricacy: Why do lawyers have such a hard time parsing out what it means to be honest?

One of the complicating factors, if not the chief among them, is the vision that lawyers have of their own role under our prevailing version of the adversary system.<sup>123</sup> As that role is explained in the Model Rules and comments, "a lawyer shall abide by a client's decisions concerning the

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119. *See id.*

120. *Id.*

121. For example, New Jersey requires disclosures to protect the financial interests of others, and fifteen other states permit such disclosures. GILLERS & SIMON *supra* note 40, at 73–75.

122. GILLERS, *supra* note 48, at 620.

123. "One of the basic tenets of our adversarial legal system is that the lawyer owes the client loyalty and zealous representation. That duty includes . . . confidentiality: as a general rule, the lawyer may not divulge client confidences except in very limited instances." *United States v. Cavin*, 39 F.3d 1299, 1308 (5th Cir. 1994) (citation omitted).

objectives of representation,”<sup>124</sup> and then “take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor”<sup>125</sup> by using “legal procedure for the fullest benefit of the client’s cause” within the limits of “[t]he law, both procedural and substantive.”<sup>126</sup>

Obviously, this vision of the lawyer’s central role leaves little room for reaching out to help the other side when it is about to make a blunder. On the contrary, it is a professional truism of current American legal practice that a lawyer has no general duty to volunteer.<sup>127</sup> In our version of the adversary system, there is no general obligation to disabuse an opposing attorney even when the lawyer knows the other attorney is making an obvious mistake or laboring under serious misapprehensions of fact or law.<sup>128</sup> In litigation, this lack of obligation means a lawyer does not have to call the opponent’s attention to an error even when the lawyer can be virtually certain that the error will make the process go wrong, producing an outcome that the law was not substantively supposed to produce,<sup>129</sup> in other words, a “miscarriage” of justice. In transactions, it means that a lawyer need not inform the opposite party of key

124. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2009).

125. MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2009).

126. *Id.*

127. MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 1 (2009) (“A lawyer . . . generally has no affirmative duty to inform an opposing party of relevant facts.”); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 387 (1994) (stating that there is no general duty to inform an opposing party and court that statute of limitations has run); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 375 (1993) (stating that a lawyer has no general obligation to disclose information adverse to the client in the context of a bank examination); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 cmt. e (2000) (stating that there is “no legal duty to make an affirmative disclosure of fact or law when dealing with a nonclient”); *cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. f & Reporter’s Notes cmt. f (2000) (recognizing greater duties to volunteer information in the case of lawyers representing government). *But cf.* ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 387 (1994) (finding no basis in the rules for holding a lawyer representing a government agency to a different standard).

128. The litigating lawyer must, of course, disclose “directly adverse” legal authority to the tribunal. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(2) (2009); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 111(2) (2000). But this requirement is of scant help to an adversary or negotiating counterpart when the parties are not currently litigating. What is more, depending on the circumstances of the disclosure, its timing, and so on, the disclosure requirement may be of little aid to the unaware opponent in a lawsuit.

129. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. b (2000).

A lawyer might know of testimony or other evidence vital to the other party, but unknown to that party or their [sic] advocate. The advocate who knows of the evidence, and who has complied with applicable rules concerning pretrial discovery and other applicable disclosure requirements . . . , has no legal obligation to reveal the evidence, even though the proceeding thereby may fail to ascertain the facts as the lawyer knows them.

*Id.* A comment to Rule 3.3 states that “[t]here are circumstances where a failure to make a disclosure is the equivalent of an affirmative misrepresentation,” MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 3 (2009), but nowhere is there a suggested general duty to volunteer.

circumstances which, if it were aware of them, would almost certainly change its mind about the terms of the deal, or doing the deal at all.<sup>130</sup> Indeed, most lawyers would probably understand it as their duty, both in litigation and transactions, to regard the mistakes and misapprehensions of the opposing side as *opportunities*, deliberately taking advantage of them whenever possible. This overall idea may even be thought of (erroneously, I think) as a core premise of the adversary system.

In an adversary system, each party is responsible for presenting, as forcefully and persuasively as it can, the facts and the law in the light most favorable to its own interest. This responsibility need not necessarily include a right (much less a duty) to take advantage of other lawyers' mistakes. In an exaggerated version of the adversary system, however, deliberately taking advantage of others' mistakes or misapprehensions is not only condoned but may even be considered admirable—a deft way to snatch victory from the jaws of defeat or to protect the interests of a client whose cause is a loser on both the law and the actual facts.

Consider, for example, the case of *Cotto v. United States*.<sup>131</sup> A child's hand was severely injured when it got caught in a conveyer belt operated by an employee of the United States Department of Agriculture.<sup>132</sup> A claim for compensation was filed against the government on the boy's behalf.<sup>133</sup> The government's lawyers adopted a typical stance of tort defense counsel and resisted paying the claim.<sup>134</sup> When the boy's lawyer resiliently failed to supply certain documentation demanded by the government, the case was dismissed with prejudice for failure to prosecute.<sup>135</sup> In seeking to reopen the judgment sixteen months later, plaintiffs contended that their earlier failure to make a timely motion or appeal should be excused because the government had continued to negotiate a settlement even after the judgment was entered.<sup>136</sup> However, the court rejected this contention saying (among other things) that even if the government had continued to negotiate, there was no evidence "indicating a pattern of *affirmative* action on the government's part which would have led a reasonably prudent person to believe that the dismissal order

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130. *See id.*

131. 993 F.2d 274 (1st Cir. 1993).

132. *Id.* at 276.

133. *Id.*

134. *See id.* There was some significant sentiment on the government side that the boy's claim should be compensated, but the posture taken by the lawyers was forthrightly defensive. *See id.* at 276, 281.

135. *Id.* at 277. It was apparently decided below, and accepted on appeal, that the missing documentation was necessary for "a substantiated, completed administrative claim" and, therefore, plaintiffs had failed to exhaust their administrative remedy as required before bringing suit under the Federal Tort Claims Act. *Id.* at 276–77. The court mentions photographs that the boy's lawyer "would supply" to the Department of Agriculture and adds that he "apparently believ[ed] that the photographs would satisfy DOA's curiosity anent the extent of injury. He was wrong." *Id.* at 276.

136. *Id.* at 277.

was something other than [final].”<sup>137</sup> The court ridiculed the notion that the government “acted in a Svengali-like manner, lulling them to sleep with settlement songs while the sands of time drained and the appeal period expired.”<sup>138</sup> All the government had done was stand by and allow the plaintiff’s lawyer to blunder along until any possibility of justice on the merits was lost.

The point about *Cotto* is not the magnitude of the lawyer’s strategic mistakes,<sup>139</sup> but what the opposing lawyers and the court did about them, and what those responses tell us about the lawyer’s role in our exaggerated version of the adversary system. The first thing we see is that the people who work in the justice system are not responsible for dispensing substantive “justice” the way that, for example, physicians dispense healing. Nobody in the *Cotto* process was personally responsible for seeing that both the boy and the government got what they substantively deserved, only that the applicable process rules were followed. Second, there is nothing wrong with seizing upon a “windfall defense”<sup>140</sup> that emerges due to the opposition’s errors or ineptitude. Finally, in an exaggerated version of the adversary system, no one would think that the government’s lawyers should feel any shame or receive the contempt of their peers for taking advantage of an opponent’s mistakes to deprive the mangled child of his day in court (and, most likely, substantial compensation). On the contrary, they won a substantively “difficult” case, ordinarily a matter for professional pride. In our exaggerated version of the adversary system, the mistakes and misapprehensions of the opponent are seen not as dangers to justice but as legitimate opportunities to further the interests of one’s own client—even including the interest in not paying damages that are substantively due. For a lawyer to disabuse the other side of the errors it is making would itself be regarded as a blunder,<sup>141</sup> even though taking advantage of these errors might produce a legal result that is unwarranted by the actual facts and substance of the law.<sup>142</sup>

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137. *Id.* at 279 (emphasis added).

138. *Id.* at 278.

139. Mistakes, at least, in the view of the court. *See id.* at 281.

140. The term is adopted from State Bar of Mich. Comm. on Prof’l and Jud. Ethics, Formal Op. CI-1164 (1987), available at [http://www.michbar.org/opinions/ethics/numbered\\_opinions/ci-1164.html](http://www.michbar.org/opinions/ethics/numbered_opinions/ci-1164.html) (defense counsel may present truthful but misleading evidence that exploits the complaining witness’s confusion as to the time when the criminal act took place) [hereinafter Mich. Formal Opinion CI-1164].

141. It could also, quite possibly, be a breach of the disciplinary rules. *See United States v. Cavin*, 39 F.3d 1299, 1309 (5th Cir. 1994); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 387 (1994); Mich. Formal Opinion CI-1164, *supra* note 140.

142. Of course, the “substance of the law” may always be debatable, and honest lawyers should always be free to advocate for whatever substantive legal rules and policies are in their clients’ best interests. That is to say, it is not dishonest for a lawyer to argue that the law on a given point is different from what the lawyer might personally think it is or, as an abstract matter, should be, as long as no dishonest use is made of the legal authorities and the arguments are not frivolous. *See MODEL RULES OF PROF’L CONDUCT* R. 3.1, 3.3(2) (2009). However, controversies about facts, including intentions of the parties, are of a different order. Unlike the



In short, in an exaggerated adversary system, the lawyer's job is to press client-defined interests by any means available within the bounds of the law and ethical rules.<sup>143</sup> In such a system, the absence of a duty to volunteer may seem almost inseparable from the lawyer's core responsibility to present his or her own side as persuasively as possible. And this can make true "honesty" very complicated.

There is, however, no intrinsic reason why an adversary system must allow lawyers to treat others' mistakes as strategic opportunities. Indeed, even while American lawyers do not currently have a *general* duty to volunteer relevant information to adversaries,<sup>144</sup> a number of cases have found such a duty in particular situations. The legal-ethics chestnut *Spaulding v. Zimmerman*<sup>145</sup> is not, strictly speaking, one of these cases, but it is nonetheless a good place to begin. During settlement negotiations in an automobile negligence case, the defense lawyers omitted to tell the injured plaintiff that he had an aortic aneurysm—a sort of physiological time bomb.<sup>146</sup> For some reason, the boy's own doctors had failed to notice this life-threatening condition.<sup>147</sup> According to the court, defense counsel kept the discovery of the aneurysm to themselves "knowing . . . that plaintiff under all the circumstances would not accept" the defendant's settlement offer had he been aware of it.<sup>148</sup> "By reason of the failure of plaintiff's counsel to use available rules of discovery," the plaintiff never properly asked the defendants if they had the relevant information.<sup>149</sup> As a consequence, the parties proceeded to reach an agreed settlement and obtained approval of the court, while the plaintiff was still in the dark as to his true medical condition.<sup>150</sup> The question in *Spaulding* was whether this settlement could later be vacated due to the defense lawyer's failure to reveal the aneurysm.<sup>151</sup>

The appellate court held that, under these particular circumstances, the lower court had the *discretion* (but was not obliged) to vacate the settlement.<sup>152</sup> "While no canon of ethics or legal obligation may have required [defense counsel] to inform plaintiff or his counsel . . . or to advise the court therein,"

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sources of the law, which are more or less equally accessible to all, the parties and the court typically have widely different abilities to get at the actual facts. Therefore, efforts to distort, distract from, or otherwise sideline the significance of the material facts of a matter are particularly pernicious to legal justice.

143. See *supra* text accompanying notes 124–28.

144. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 1 (2009); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 cmt. e (2000); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97, cmt f (2000).

145. 116 N.W.2d 704 (Minn. 1962).

146. *Id.* at 707–08.

147. *Id.* at 707.

148. *Id.* at 709.

149. *Id.*

150. *Id.* at 708.

151. *Id.* at 707.

152. *Id.* at 709.

their knowledge that the plaintiff was making a unilateral mistake of fact “opened the way for the court to later exercise its discretion in vacating the settlement.”<sup>153</sup> In other words, by not volunteering the critically material fact of the aneurysm, the defense lawyers created a legal vulnerability—that the settlement might later be declared voidable—but they did not violate any identified duty.

Although the appellate court was agnostic,<sup>154</sup> the lower court was quite definite on the lawyer’s duty to volunteer, asserting that defense counsel had *no* duty to disclose the aneurysm during the negotiations.<sup>155</sup> In saying this, however, the lower court made an interesting distinction: “There is no doubt that during the course of the negotiations, when the parties were in an *adversary relationship*, no rule required or duty rested upon defendants or their representatives to disclose this knowledge.”<sup>156</sup> But when “the procedure took on the posture of a joint application [for approval] to the court,” that adversary relationship ceased, at least with respect to “the facts upon which the Court could and must approve settlement.”<sup>157</sup> Even then, the lower court did not seem prepared to go so far as to say the defense lawyers had any *general* obligation to disclose, but it did say that, as an “officer of the Court,” counsel had a “duty to make full disclosure to the Court” when applying for court approval in settlement proceedings *involving a minor*.<sup>158</sup> In other words, the court felt it necessary to identify two special features of the case in order to justify imposing a “duty” to disclose the crucial fact of the aneurysm. First, the opposing party was a minor. Second, the context was an application to the *court* and no longer merely a private negotiation between adversaries.

The idea that lawyers have a higher duty of candor toward courts than toward adversaries is explicit in the Model Rules. For example, the lawyer’s affirmative duty to speak up under Model Rule 4.1(b) (to non-clients other than courts) is much more limited than the broad duty imposed under Rule 3.3(b) to “take reasonable remedial measures” whenever the lawyer knows that any person, whether a client or otherwise, intends to engage or does engage in criminal or fraudulent conduct related to adjudication.<sup>159</sup> And the obligations of candor to the courts apply “even if compliance requires disclosure of information otherwise protected by Rule 1.6,”<sup>160</sup> whereas the obligation to speak to others is specifically limited by Rule 1.6.<sup>161</sup> To be sure, the Model

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153. *Id.* at 710.

154. *See supra* text accompanying note 148.

155. *See Spaulding*, 116 N.W.2d at 709–10.

156. *Id.* at 709 (emphasis added).

157. *Id.*

158. *Id.*

159. MODEL RULES OF PROF’L CONDUCT R. 3.3(b) (2009). The corresponding range of the duty to speak under Model Rule 4.1(b) is limited to avoiding assisting the lawyer’s own clients in committing crime or fraud. MODEL RULES OF PROF’L CONDUCT R. 4.1(b) (2009).

160. MODEL RULES OF PROF’L CONDUCT R. 3.3(c) (2009).

161. MODEL RULES OF PROF’L CONDUCT R. 4.1(b) (2009).

Rules obligation of candor to the courts may not always be quite as high as the obligation that applies in disciplinary matters and admissions to the bar,<sup>162</sup> nor is it as high as that exacted in *Spaulding*,<sup>163</sup> but it does occupy a decidedly higher position than the standards under Rule 4.1 for the benefit of other lawyers and the public generally. Here again we see a kind of multi-level hierarchy of candor in the Model Rules, with the lowest level of honesty and candor owed to other lawyers and the public generally while higher levels are applicable to bar admissions and disciplinary matters, and to the courts.<sup>164</sup>

The idea that lawyer honesty means one thing in one context and something else in another is, perhaps, not entirely easy to accept. A case in which the court explicitly did not accept it is *Virzi v. Grand Trunk Warehouse and Cold Storage Co.*<sup>165</sup> The court in *Virzi* noted how *Spaulding* condoned defense counsel's omission to mention the aneurysm "during the course of negotiations" but then recognized that "a duty to disclose arose once the parties reached a settlement and sought the court's approval."<sup>166</sup> It also cited a state bar ethics opinion which declared that a lawyer owes "an affirmative duty of absolute candor and frankness to the court which transcends his private employment [by the client]."<sup>167</sup> From these and other sources, the court concluded that "[t]here is no question that plaintiff's attorney owed a duty of candor to this Court."<sup>168</sup> The court went even further, however, adding that, "[a]lthough it presents a more difficult judgment call, . . . the *same* duty of candor and fairness required a disclosure to opposing counsel, even though counsel did not ask."<sup>169</sup> "The handling of a lawsuit and its progress is not a game. There is an *absolute* duty of candor and fairness on the part of counsel to both the Court and opposing counsel."<sup>170</sup>

The last quoted sentence is a resounding endorsement of what has to be a basic principle of truly honest lawyering. The problem is that it is hard to recognize such a principle in the practices of the American adversary system today. Most lawyers would almost certainly be horrified to hear that they are ethically subject to an "*absolute* duty of candor and fairness" to opposing counsel.<sup>171</sup> That would seem to mean, at the very least, that a lawyer is expected to tell everything that the opponents would likely want to know even if they do

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162. MODEL RULES OF PROF'L CONDUCT R. 8.1(b) (2009).

163. *Spaulding*, 116 N.W.2d at 710.

164. See *supra* notes 19–27 and accompanying text.

165. 571 F. Supp. 507 (E.D. Mich. 1983).

166. *Id.* at 510. As discussed above, the appellate opinion in *Spaulding* did not explicitly recognize a "duty" to disclose, though the lower court's order appeared to do so. See *supra* text accompanying note 156; see also *Spaulding*, 116 N.W.2d at 709–10.

167. *Virzi*, 571 F. Supp. at 511 (quoting State Bar of Mich. Comm. on Prof'l and Jud. Ethics, Formal Op. 142 (1951)).

168. *Id.* at 512.

169. *Id.* (emphasis added).

170. *Id.* (emphasis added).

171. *Id.* (emphasis added).

not ask. No lies, certainly; but must lawyers volunteer information that is against our client's interests? That is not, I think, the way most lawyers believe they are supposed to practice law.

For all its broad principle, however, *Virzi* was not, in the context of its facts, an especially exceptional case. The particular bit of information that the *Virzi* lawyer had failed to disclose was that his client was dead.<sup>172</sup> And when it got to its actual holding, the *Virzi* court became considerably more qualified in its language, stating that a lawyer “owes an affirmative duty of candor and frankness to the Court and to opposing counsel *when such a major event as the death of the plaintiff has taken place*.”<sup>173</sup> This added qualification sharply cuts down the generous duty of candor that the court seemed to have in mind elsewhere in its opinion. After all, death is a uniquely “major” event—probably the most major event that most people personally experience. One is led to wonder what other events, apart from “such a significant fact as the death of one’s client,”<sup>174</sup> might also trigger the lawyer’s duty to volunteer information. It is hardly helpful for a court to say that lawyers have “an *absolute* duty of candor and fairness . . . to both the Court and opposing counsel”<sup>175</sup> if it means a duty that only applies in the most extraordinary of circumstances.

There is, however, another feature of *Virzi* that is perhaps even more troubling from the standpoint of honest lawyering. While the plaintiff’s death was certainly significant to the plaintiff, it did not appear to have any significance at all to the substantive merits of the case.<sup>176</sup> The death was not “caused by injuries related to the lawsuit, and did not have any effect on the fairness of the . . . award.”<sup>177</sup> Apparently, the only reason the court considered the death of the plaintiff to be such “essential information” was that the defense lawyer had expected the plaintiff to be such a strong witness on his own behalf.<sup>178</sup> Thus, although the death did not weaken the plaintiff’s case, it did weaken his counsel’s ability to present that case. By keeping the death a secret, plaintiff’s counsel deprived the defense of a strategic advantage—not an advantage that had anything to do with truth, to be sure, but one that had to do solely with winning. In other words, the plaintiff’s lawyer in *Virzi* was denounced, not for failing to supply information essential to get at truth, but for failing to supply information that the other side could use to resist a fair settlement. Even though the court stated that “[t]he handling of a lawsuit and its

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172. *Virzi*, 571 F. Supp. at 508; see GILLERS, *supra* note 48, at 626 (“Courts have consistently upheld discipline of lawyers who [fail to reveal] the death of their clients in litigation.” (citing *In re Forrest*, 730 A.2d 340, 344 (N.J. 1999))).

173. *Id.* at 512 (emphasis added).

174. *Id.*; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 Reporter’s Notes cmt. e (2000) (providing examples of a lawyer’s duty to volunteer information, though without setting forth any particular principle to explain them).

175. *Virzi*, 571 F. Supp. at 512 (emphasis added).

176. *Id.* at 511.

177. *Id.*

178. *Id.* at 512.

progress is not a game,”<sup>179</sup> it treated the withheld information in *Virzi* precisely as though a lawsuit *is* a game, one whose goal is not a “just” result but, instead, one where each side vies to get the best outcome for itself.

In sum, an exaggerated version of the adversary system can complicate honesty because complete candor is fundamentally inconsistent with the conception of the lawyer’s duty to prevail in the client’s cause by any means within the bounds of the law and ethical rules. As part and parcel of this conception, the lawyer’s duty to hold back information is not necessarily limited to protecting or advancing some *lawful* interest or objective of the client.<sup>180</sup> If the client’s personal goal is to avoid a prison sentence that the law prescribes for his act, to escape the obligation of a contract he made, to avoid paying damages for his tort, or to get out of paying lawful child support, the attainment of such a goal is presumably the client’s “cause” for purposes of the Model Rules.<sup>181</sup> And it would be the client’s cause for most lawyers as well. This means not only that the lawyer has no duty to volunteer material information to the other side when it is obviously misinformed, but also that lawyers must be on the alert to seize advantage from the other side’s blunders, or even to argue for interpretations of evidence or agreements that would turn reasonable past behavior, when viewed in retrospect, into blunders.

#### IV. A LITTLE PERSPECTIVE: *UNITED STATES V. ROGERS*

The question of when there is a legal duty to volunteer information is one that has nagged the law for many decades. The law of fraud is historically based on *misrepresentation* as opposed to mere “*non*”-representation.<sup>182</sup> In the law of

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179. *Id.*

180. The Model Rules place no explicit limits on the kinds of client’s “interests” that may be protected or advanced by lawyer confidentiality. *See* MODEL RULES OF PROF’L CONDUCT R. 1.6, 3.1 cmt 1 (2009). Although the Restatement says that lawyers need act only to advance the “lawful” objectives of their clients, the limitation to “lawful” was not repeated when it came to describing the lawyer’s duties of confidentiality. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 16(1), 60(1)(a) (2000). Instead, the Restatement seems to contemplate that the lawyer’s duty of confidentiality applies whenever there is a reasonable prospect that disclosure will “adversely affect a material interest of the client”—whether that interest be a lawful one or not. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(1)(a) (2000); *see infra* text accompanying note 184. Some examples appear in the next sentence in the text. As those examples should make clear, there are many circumstances in which a client may wish to escape or evade the behavioral norms, constraints and consequences prescribed by the substance of the law and, for success, would depend on the lawyer remaining discreet.

181. *See* MODEL RULES OF PROF’L CONDUCT R. 1.2(a), 3.1 cmt 1 (2009).

182. *See* the pre-2002 definition of “fraud” in the Model Rules, which expressly excluded “failure to apprise another of relevant information.” MODEL RULES OF PROF’L CONDUCT TERMINOLOGY (2001). The classic statement of the fraud concept is from *Peek v. Gurney*, where Lord Cairns stated that:

Mere nondisclosure of material facts, however morally censurable, . . . would in my opinion form no ground for an action in the nature of an action for misrepresentation.

contracts, a failure to inform another that he or she is making a unilateral mistake, though once a matter of controversy, is now fairly firmly established, at least as a basis for rescission.<sup>183</sup> Of course, even where there is no *legal* duty to speak up, silence may be widely considered to be less than completely honest.<sup>184</sup> Let us assume, however, that when the law regards tricky behavior as too reprehensible to allow, there is at least a presumption that the behavior is dishonest.

To supply some perspective, consider the court's reasoning in *United States v. Rogers*, a case in which the wrongdoer was not a lawyer.<sup>185</sup> The defendant in *Rogers* went to a bank with a check and told the teller he wanted to deposit part of it and receive the balance in cash.<sup>186</sup> The total amount of the check was \$97.92, and he asked to deposit \$80.<sup>187</sup> However, the teller misread the check and placed \$1126.59 on the counter, including two strapped packages of banknotes containing \$500 each.<sup>188</sup> The defendant picked up the \$1126.59 and departed.<sup>189</sup> He was later convicted of bank robbery.<sup>190</sup> On appeal, the court held that the "proof did support the conviction."<sup>191</sup>

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There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false.

Peek v. Gurney, (1873) 6 L.R.E. & I. App. 377, 403; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 161 & cmt. a (1981) (listing the "special situations" in which non-disclosure can be treated as equivalent to a misrepresentation); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 106, at 737–38 (5th ed. 1984).

183. RESTATEMENT (SECOND) OF CONTRACTS § 161 cmt. d (1981).

184. "A buyer of property, for example, is not ordinarily [legally] expected to disclose circumstances that make the property more valuable than the seller supposes." RESTATEMENT (SECOND) OF CONTRACTS § 154 cmt. a, 161 cmt. d (1981); RESTATEMENT (SECOND) OF CONTRACTS § 161 cmt. d illus. 10 (1981) (giving as an illustration a land buyer who enters into the contract without telling the seller that the land contains valuable mineral deposits, according to a government survey). In a similar vein, the Second Restatement of Torts would appear to allow persons to take knowing advantage of the "indolent, inexperienced or ignorant" or of persons whose "judgment is bad, or [who do] not have access to adequate information." RESTATEMENT (SECOND) OF TORTS § 551 cmt. k & illus. 6–8 (1977). The persons who take advantage of others in such situations may have contract rights that are legally safe from rescission, but how many people would knowingly trust such persons, or regard their sharp dealing as "honest"?

185. 289 F.2d 433, 434 (4th Cir. 1961).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 433–34.

191. *Id.* at 434. The conviction was, however, reversed and the case remanded because of an error in the charge to the jury:

The District Court went too far . . . when it told the jury it might convict if, though his initial receipt of the overpayment was innocent, the defendant thereafter formed the intention to, and did, convert the overpayment. . . . [C]ases in the United States and in

What the defendant did in the *Rogers* case was, to put it bluntly, knowingly take advantage of another person's mistake. The defendant did not "cause" the blunder; he did not say or do anything to distract the bank teller. He did nothing to lead her astray or otherwise induce her to err.<sup>192</sup> He simply saw that she was making a material mistake, realized that the mistake was to his advantage, and then silently availed himself of it. For that, he was guilty of a serious crime.

The pivotal legal question in *Rogers* was whether the defendant's acts would have constituted common-law larceny—the "felonious taking and carrying away [of] the personal goods [o]f another."<sup>193</sup> This question was pivotal because, under the relevant subsection of the "bank robbery act," the defendant would be guilty only if his actions would have constituted larceny "as that crime has been defined by the common law."<sup>194</sup> The court held that the defendant's actions did amount to common-law larceny.<sup>195</sup>

Now a key point about common-law larceny for present purposes is that it does *not* include "obtaining goods by false pretense."<sup>196</sup> In other words, the basis of the defendant's guilt was not that he had obtained the money by an affirmative misrepresentation of any kind. Rather, it sufficed for guilt that the defendant silently took advantage of another's blunder, which he did nothing to induce. As the court explained:

It has long been recognized, however, that when the transferor acts under a unilateral mistake of fact, his delivery of a chattel may be ineffective to transfer title or his right to possession. If the transferee, knowing of the transferor's mistake, receives the goods with the intention of appropriating

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England . . . have consistently held that, if there is a mutual mistake and the recipient is innocent of wrongful purpose at the time of his initial receipt of the overpayment, its subsequent conversion by him cannot be larceny.

*Id.* at 439 (footnotes omitted).

192. At any rate, the court did not think it legally important to mention such additional facts, if they existed. *See id.* at 434. They were not necessary for conviction or for the "larceny" theory of the case to apply. *Id.* at 438.

193. *Id.* at 438 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*230) (internal quotation marks omitted). Note that the defendant's crime did not constitute "robbery" in the conventional sense because the applicable statutory definition did not require that. *Id.* at 437. *See* 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 8.11, at 438, 445–51 (1986) (unlawful taking of property by force or intimidation). The essence of the crime was that the defendant committed larceny. *Rogers*, 289 F.2d at 437.

194. *Rogers*, 289 F.2d at 437.

195. *Id.* at 438. The court remanded the case for retrial with proper jury instructions, but noted that the evidence presented "proved the commission of [larceny]." *Id.* at 437–39.

196. *Id.* at 437. The essence of larceny in the common-law conception is that the "taking must be trespassory," that is "an invasion of the other's right to possession." *Id.* at 438 (emphasis added). If victims are duped by false pretenses into transferring their property voluntarily, then there is no "invasion." *See* LAFAVE & SCOTT, *supra* note 193, §8.1–2, at 327–32, 339–40, 342–43.

them, his receipt and removal of them is a trespass and his offense is larceny.<sup>197</sup>

Most non-lawyers would have no difficulty seeing that what Rogers did was wrong—essentially stealing. To obtain another's property by knowingly exploiting another's mistake is larceny even if<sup>198</sup> the person taking advantage did nothing to cause or contribute to the mistake.<sup>199</sup> For lawyers, however, it is a different matter. Lawyers treat the mistakes of others as *opportunities*, and seizing on those opportunities is one of the things that lawyers do. It is what lawyers call "no affirmative duty to inform an opposing party of relevant facts."<sup>200</sup>

The legal process offers numerous technical opportunities to obtain others' property when there is no substantive right to do so. Broadly speaking, such "robbery under the forms of law"<sup>201</sup> might consist of any effort at shrewdly gaming the legal process in order to obtain a judgment for money or other property from a person who has done no wrong. It is not, of course, robbery in the conventional, technical sense, nor even in the broader sense defined in the statute applied in *United States v. Rogers*.<sup>202</sup> Persons are not arrested for committing "robbery . . . under the forms of law."<sup>203</sup> They do not serve time. However, when people enlist the power of government to force innocent others to part with their property against their will, it would seem at the very least to be the moral analogue, if not the moral equivalent, of robbery in the more conventional mode.

Partially, these opportunities to make plays on the legal system and get something not substantively deserved come about because of the inevitable imperfections in any institution designed and operated by human beings.<sup>204</sup> Partially, they are inherent in the necessary complexities of the substantive rules and the system that exists to carry them out. Perhaps most of all, however, these opportunities exist for a reason that is neither inevitable nor necessary, namely that we largely embrace an exaggerated version of the adversary system, a version in which no one is personally responsible for getting at the truth and no

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197. *Rogers*, 289 F.2d at 438.

198. Indeed, technically, "only" if. *See supra* text accompanying note 196.

199. *Rogers*, 289 F.2d at 437–38.

200. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt 1 (2009).

201. The phrase is borrowed from *Loan Ass'n v. Topeka*, 87 U.S. 655, 664 (1874), where it was used in reference to a tax. The usage here is from the prevailing argument in a later case, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 397 (1922), where the phrase was employed to describe the effect of legislation that cut down private property rights.

202. *Id.*

203. *Loan Ass'n*, 87 U.S. at 664.

204. "All human institutions are imperfect—courts as well as commissions and legislatures." *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418, 465 (1890). "In consequence of the imperfection incident to all that is human, wrong may sometimes prevail in the purest and wisest judicial tribunals . . ." *Mt. Airy Ins. Co. v. Doe Law Firm*, 668 So.2d 534, 538 (Ala. 1995).



one is expected to volunteer to correct the misimpressions or mistakes of others. On the contrary, silently standing by and seizing advantage from others' obvious unilateral mistakes is practically endorsed, a seemingly inherent feature of the lawyer's duty of "zeal in advocacy"<sup>205</sup> and ethical obligation "to use legal procedure for the fullest benefit of the client's cause" within the limits of "[t]he law, both procedural and substantive."<sup>206</sup>

The opportunity to get other people's property away from them, and to do it *legally*, is obviously likely to have its attractions, and those who are so inclined may seek the assistance of lawyers to aid them in their pursuit of such "interests." According to the Model Rules, a lawyer is not required to assist a client with such a "cause,"<sup>207</sup> but the lawyer is permitted to do so.<sup>208</sup> Specifically, the rules state that "a lawyer shall abide by a client's decisions concerning the objectives of representation,"<sup>209</sup> and the comments note (seemingly with approval) that "lawyers usually defer to the client regarding such questions as the . . . concern for third person who might be adversely affected."<sup>210</sup>

For many years I have taught from first-year property casebooks that have consisted mostly of cases in which somebody was trying to get somebody else's property using the processes of the law. In a significant proportion of these cases, the basis for the claim was some mistake that had been made somewhere along the line (as opposed to, say, some wrong or breach of duty on the part of the defendant). To the naïve eye of a person not inured to the lawyer's view of honesty, these cases might seem like little more than a string of attempts to exploit legal technicalities or assert unforeseen interpretations in order take away other people's property rights.

As is usual among property professors (it is my guess), I have treated these standard casebook cases mostly as plain vanilla presentations of property law problems and of the reasoning that lawyers and courts typically use to resolve them. I thought nothing of formulating "Socratic" questions that roughly boiled down to: "Suppose you represented the plaintiff in this case—what legal arguments would you make to persuade the court to take the property away from the defendant and give it to your client?"

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205. MODEL RULES OF PROF'L CONDUCT R. 1.3, cmt. 1 (2009).

206. MODEL RULES OF PROF'L CONDUCT R. 3.1, cmt. 1 (2009).

207. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2009); *see* MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2009).

208. As long as the lawyer stays within the bounds of the procedural and substantive law and ethical rules: "[t]he law, both procedural and substantive, establishes the limits within which an advocate may proceed." MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 1 (2009). I take this to mean that a lawyer is permitted to invoke legitimate procedural and evidentiary rules in an effort to defeat a claim that has substantive merit. *See supra* notes 3 & 17.

209. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009). Otherwise the lawyer should bow out. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2009) (allowing the lawyer to withdraw if he or she finds the client's intentions "repugnant")

210. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 2 (2009).

A rich and interesting case that has appeared recently in casebooks is *Symphony Space, Inc. v. Pergola Properties, Inc.*, a contest over a valuable building in upper Manhattan.<sup>211</sup> The *Symphony Space* case does not merely have an outcome that is a bit stunning in its own right, but it is a very useful teaching case because of the several hypothetical variations that spawn readily off of it.

#### IV. *SYMPHONY SPACE, INC. v. PERGOLA PROPERTIES, INC.*

The case arose out of a moderately complex real estate transaction that was essentially donative in character.<sup>212</sup> In 1978, a representative of Symphony Space, Inc. approached a Manhattan real estate investor and expressed interest in using a theater located in one of the investor's buildings.<sup>213</sup> Symphony Space was a not-for-profit corporation dedicated to the performing arts.<sup>214</sup> The building in question consisted of approximately 58% theater space; the remainder was described as commercial space.<sup>215</sup> The investor's business goal had been to hold this and several adjacent buildings with a view to selling them later, after property values in the area increased and the existing commercial leases had expired.<sup>216</sup> Meanwhile, of course, the investor would have to pay the real estate taxes assessed against the buildings.<sup>217</sup> However, as an eligible not-for-profit corporation, Symphony Space was legally entitled to an exemption from property taxes for the portion of the building that it used.<sup>218</sup> Hence, the plan: The parties agreed that the investor would essentially *donate* the use of the theater to Symphony Space.<sup>219</sup> As a result, Symphony Space would get a venue for its performances and other needs at practically no cost, while the investor would no longer have to pay \$30,000 per year of property taxes on the theater facilities it was donating.<sup>220</sup>

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211. *Symphony Space, Inc. v. Pergola Prop., Inc.*, 669 N.E.2d 799, 800 (N.Y. 1996).

212. *Id.* at 800–01.

213. *Symphony Space, Inc. v. Pergola Prop., Inc.*, 631 N.Y.S.2d 136, 137 (App. Div. 1995).

214. *Id.*

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

216. *Id.* at 801.

217. *Id.*

218. *Symphony Space, Inc. v. Tishelman*, 453 N.E.2d 1094, 1096 (N.Y. 1983); *see also* N.Y. REAL PROP. TAX LAW § 420–a(2) (McKinney Supp. 2009). The Court of Appeals opinion stated that Symphony Space would receive a tax exemption on the “entire building,” not just the theater portion. *Symphony Space*, 669 N.E.2d at 801. This would appear, however, to be contrary to the applicable statute. N.Y. REAL PROP. TAX LAW § 420–a(2) (McKinney Supp. 2009). Indeed, in an earlier opinion, the Court of Appeals had made it clear that Symphony Space had “not requested tax-exempt status for the remaining part of the property which is used by a tenant and subtenants for a variety of commercial purposes.” *Tishelman*, 453 N.E.2d at 1095 n.1.

219. *Symphony Space*, 669 N.E.2d at 800–01.

220. *Id.* at 801.

In order to ensure Symphony Space received the tax exemption to which it was entitled, the parties structured the donation so that the not-for-profit would hold the legal title to both the exempt and non-exempt portions of the building.<sup>221</sup> Accordingly, the donor-investor transferred legal ownership of the theater building to Symphony Space for an essentially nominal price, about \$10,000.<sup>222</sup> Of this price, only \$10 was paid initially, and the remaining \$10,000 was spread out over twenty-five years, secured by a purchase-money mortgage.<sup>223</sup> Meanwhile, the donor-investor was required to make the payments on its *own* mortgage,<sup>224</sup> which covered the actual cost of acquiring the space. As part of the same deal, Symphony Space leased the non-theater portions of the building back to the donor for \$1 per year.<sup>225</sup> The upshot of this arrangement was to give Symphony Space “virtually cost free”<sup>226</sup> access to the theater while its benefactor retained use of the commercial parts of the building.<sup>227</sup>

In order to provide for the time when the arrangement was to unwind, the parties made an agreement under which the donor was supposed to have the right to buy the building back at certain times and on the occurrence of certain events.<sup>228</sup> The buy-back prices under this agreement were roughly equivalent to the original (nominal) purchase price plus an inflationary increment.<sup>229</sup> The manifest reason for this buy-back agreement was, of course, that it allowed the donor-investor to get its building back. After all, the donor-investor only intended to make a “loan” of the theater space, not to give away the whole building for all time. Everybody involved in the transaction must have understood that. Otherwise, the buy-back agreement would have made no

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221. See N.Y. REAL PROP. TAX LAW § 420-a(1)(a) (McKinney Supp. 2009); *Symphony Space*, 669 N.E.2d at 800–01. Apparently, without this arrangement, the use of the theater would have cost Symphony Space (or somebody) \$30,000 per year in real estate taxes—which, as a matter of state policy, a not-for-profit like Symphony Space should not have to bear. Cf. *Tishelman*, 453 N.E.2d at 1096.

222. See *Symphony Space*, 669 N.E.2d at 800 (\$10,010, for a substantial theater plus office space on upper Broadway in Manhattan).

223. *Id.* at 801.

224. *Id.* (in the amount of \$243,000).

225. *Id.* at 800–01.

226. *Symphony Space, Inc v. Pergola Prop., Inc.*, 631 N.Y.S.2d 136, 141 (App. Div. 1995).

227. *Symphony Space*, 669 N.E.2d at 801. Although Symphony Space presumably had to pay its own operating costs, such as heat and utilities, the donor retained “certain maintenance obligations.” *Id.*

228. *Id.* Essentially, the events consisted of defaults by Symphony Space, either by failing to make its (relatively small) required payments or failing to allow the investor to retain possession of the commercial portions of the building. *Id.* In addition, the donor could opt to buy back “at any time . . . during any of the calendar years 1987, 1993, 1998 and 2003.” *Id.*

229. The price would rise to a maximum of \$28,000 after 25 years. *Id.* at 800–01. Because payment of all but \$10 of the purchase price was deferred, Symphony Space acquired the use of the theater space for essentially no out-of-pocket purchase price whatever. *Id.*

sense. Years later, however, litigation Symphony Space challenged the validity of this crucial buy-back agreement,<sup>230</sup> and Symphony Space won.<sup>231</sup>

Saying the case presented a “novel question,”<sup>232</sup> the Court of Appeals held that the buy-back agreement was void under the Rule Against Perpetuities.<sup>233</sup> The novel question was whether New York’s Rule Against Perpetuities applies to commercial options, which is what the buy-back agreement created.<sup>234</sup> The court held that it does.<sup>235</sup> As a result, the whole building became the permanent property of Symphony Space, causing its erstwhile owner to suffer a financial loss of over \$20 million.<sup>236</sup> In short, by skillful advocacy, the lawyers for Symphony Space succeeded in scoring a \$20 million property interest from an innocent owner by persuading the court to nullify their client’s side of a two-way deal.

Now if this were simply a case of an illegal contract, as the Court of Appeals implied that it was,<sup>237</sup> there may have been little cause for concern. However, the case was not so simple. For even given the court’s conclusion on the purely legal issues, it certainly did not follow that it had to defeat the donor-investor’s interest in the property and give permanent ownership rights to Symphony Space.<sup>238</sup>

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230. *Id.* at 802.

231. *Id.* Symphony Space prevailed in the trial court on a motion for summary judgment, a decision that the Appellate Division and the Court of Appeals affirmed. *Id.* at 802.

232. *Id.* at 800.

233. *Id.*; see also N.Y. ESTATES, POWERS, AND TRUSTS LAW § 9-1.1(b) (McKinney 2002) (“No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved.”).

234. “This case presents the novel question whether options to purchase commercial property are exempt from the prohibition against remote vesting embodied in New York’s Rule Against Perpetuities.” *Symphony Space*, 669 N.E.2d at 800.

235. *Id.* (“[A]n exception for commercial options finds no support in our law.”).

236. See *id.* at 801–02. There had, in the meantime, been a succession in investors when, in 1981, the original donor sold its interest in the properties to the nominee of Pergola Properties. *Id.* at 802. Presumably, however, that purchase price appropriately reflected the arrangement for donation of use. For one thing, Pergola would have assumed that it was acquiring a valid option to terminate the space-donation arrangement on the agreed terms. Another feature of the donative arrangement that would have affected the price was that, by providing exemption from the property taxes, the donative arrangement presumably tended to *increase* the sale value of the building (and price to Pergola) by eliminating a substantial cost while sacrificing only a difficult-to-lease asset, namely, the space configured as a theater. See *id.* at 800–02.

237. *Id.* at 809.

238. To be sure, an unremitting Legal Realist might contend that no one could say the property had ever “really” been the defendant’s until a court had finally so decided. This is not, of course, the way most people think about property rights—that all ownership is indeterminate until adjudicated at law. At any rate, at the time the donation was originally structured, the plaintiff would almost certainly have agreed that the donor’s interests under the agreement amounted to a kind of de facto “ownership” with very substantial value. Indeed, to say the plaintiff did not view the donor as de facto owner under the original deal would be tantamount

The argument for Symphony Space had two critical links: First, the interpretive question of what the parties intended, and, second, the “novel” legal question of whether New York’s Rule Against Perpetuities applies to options in commercial transactions.<sup>239</sup> Although the court’s opinion focused mainly on the novel legal question, that legal question could only come into play after giving a particular interpretation to the buy-back agreement—an interpretation that was not necessarily required by its language. In other words, in order to win, the lawyers for Symphony Space not only needed to successfully raise a novel question of law, but they also needed to persuade the court to interpret the agreement in a certain particular way—a way that would render the agreement void. For even using the rule of substantive law that the court chose to adopt in answer to the “novel” legal question, the court still could have reached exactly the opposite ultimate conclusion by interpreting the agreement differently, thus preserving the rights of the investor. To see this, we must take a slightly closer look at the buy-back agreement.

As stated earlier, the agreement provided that the investor would be entitled to buy the building back for an essentially nominal sum at certain times and on certain events.<sup>240</sup> What concerned the Court of Appeals and implicated the Rule Against Perpetuities was the provision empowering the investor to make an “election” to buy the building back “at any time” during the years 1987, 1993, 1998, and 2003.<sup>241</sup> The problem was the last of these four buy-back years, 2003. The last buy-back year was more than twenty-one years following the creation of the option,<sup>242</sup> and this possibility of a post-1999 buy-back is what implicated the Rule Against Perpetuities.<sup>243</sup>

Under the particular facts of this case, said the court, “the perpetuities period is simply 21 years.”<sup>244</sup> Therefore, the agreement’s inclusion of the 2003 buy-back year had placed the property under a “Sword of Damocles”<sup>245</sup> for

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to saying that the plaintiff knowingly entrapped the donor in an elaborate con game—pretending to borrow when, in fact, they meant to keep.

239. See *Symphony Space*, 669 N.E.2d at 800, 809.

240. *Id.* at 801.

241. *Id.* An analogous problem was presented by the fact that the agreement also provided buy-back rights for certain contingencies that might occur more than twenty-one years after the agreement was made (e.g., default on the mortgage). *Id.* at 807. These contingent buy-back rights, exercisable after twenty-one years, would have been just as invalid as the 2003 buy-back. Therefore, with respect to them the same crucial interpretive question arises, namely whether these contingent buy-back rights should be interpreted to be separate options or integral parts of the *same option* as the buy-backs that were agreed upon for the years 1987, 1993, and 1998 (which fell *within* the twenty-one-year perpetuities period). See *id.* at 807–08.

242. *Id.* at 801, 806. The option was created in December 1978. *Id.*

243. *Id.*

244. *Id.* at 806. Because the parties to the transaction were corporations, the usual complicating factor of the Rule Against Perpetuities—so-called “measuring lives”—was absent, leaving only the basic twenty-one-year period as controlling. *Id.*

245. *Id.* at 805.

nearly four years too long.<sup>246</sup> Accordingly, said the court, “the option agreement is invalid.”<sup>247</sup>

While the court’s resolution of the “novel” perpetuities question may have been itself a bit of a surprise,<sup>248</sup> it did not dispose of the case. In order to say that the whole buy-back arrangement was invalid under the Rule Against Perpetuities, the court first had to interpret the parties’ agreement as creating only *one single option* (with several exercise dates and events) rather than a number of *separate* options. This was the critical interpretive question in the case. For if the agreement were interpreted to provide for a number of separate options, instead of one single option, then only those options exercisable after twenty-one years would necessarily be void under the Rule. The others, including the still extant option for 1998, would still be perfectly valid.<sup>249</sup>

The Court of Appeals pointed to nothing in the parties’ agreement that compelled the conclusion that it created only one unitary (and, thus, totally void) option. For all that appears in its opinion, the Court of Appeals could just as easily have interpreted the relevant subsection of the buy-back agreement<sup>250</sup> as creating four separate options. The first three of these would have been valid (being exercisable within the twenty-one years) and only the last one not. However, the interpretation selected by the Court of Appeals was to treat all the various buy-back rights as one single option, not as a number of separate ones. It read the parties’ agreement as creating a single option, which it then promptly declared to be unenforceable.<sup>251</sup> Faced with language that offered at least two possible interpretations, the Court of Appeals picked the interpretation that made the buy-back void.

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246. *Id.* at 808.

247. *Id.*

248. At the time that the buy-back agreement was made, the relevant statutory language was relatively new and not at all explicit on the question of commercial options. *See id.* at 803. At that time, moreover, the cases on which the Court of Appeals relied as interpretive precedents had not yet been decided. *See id.* at 803–04 (citing *Wildenstein & Co. v. Wallis*, 595 N.E.2d 828 (N.Y. 1992); *Metro. Transp. Auth. v. Bruken Realty Corp.*, 492 N.E.2d 379 (N.Y. 1986); *Buffalo Seminary v. McCarthy*, 451 N.Y.S.2d 457 (App. Div. 1982), *aff’d* 447 N.E.2d 76 (N.Y. 1983)). Prior to 1965, the New York Rule Against Perpetuities clearly did *not* apply to commercial options. *See Buffalo Seminary*, 451 N.Y.S.2d at 461. The change was effected (albeit implicitly) by the Legislature’s adoption, in 1965, of former Real Property Law section 43 (now N.Y. ESTATES, POWERS AND TRUSTS LAW § 9–1.1(b) (McKinney 2002)). *See Buffalo Seminary*, 451 N.Y.S.2d at 462.

249. The case was decided in 1996 and, therefore, under this interpretation the investor would have had sufficient time to exercise the 1998 option and avoid the expropriation. *See Symphony Space*, 669 N.E.2d at 799.

250. *See id.* at 801. “Section 3 of that agreement provides that Broadwest may exercise its option to purchase the property during any of the following ‘Exercise Periods’: ‘(a) at any time after July 1, 1979, so long as the Notice of Election specifies that the Closing is to occur during any of the calendar years 1987, 1993, 1998 and 2003 . . . .’” *Id.*

251. *See id.* at 808.

V. REFLECTIONS ON *SYMPHONY SPACE*

In teaching the ethical dimensions of *Symphony Space v. Pergola*, the first thing I stress is that, from all that appears, the lawyers for Symphony Space did exactly what most lawyers today think lawyers are supposed to do—indeed, what the current ethical rules seem to require.<sup>252</sup> A client came to them because it was faced with losing a valuable performance space, essential to its mission. The lawyers' job was to protect their client's interests, and they set about doing everything reasonably possible within the legal and ethical boundaries to save their client's possession.<sup>253</sup> From the court's opinion it is obvious that the lawyers for Symphony Space argued diligently for the most favorable interpretation of the existing legal authorities and operative agreements.<sup>254</sup> This is what lawyers do.

Still, the victory in *Symphony Space* must have felt particularly sweet. The main goal of the not-for-profit was to save its use of the concert hall.<sup>255</sup> But by an impressive advocacy effort, the lawyers managed not merely to preserve the right to use the hall but to turn things around to the point where Symphony Space ended up being declared the outright owner of the whole building.<sup>256</sup> What dedicated advocate, steadfastly loyal to the client's best interests, would not be justly proud of such an outcome?

Yet, there are nagging doubts. Was the case a spectacular victory of justice over the forces of injustice, or was it, perhaps, something else? The lawyers for Symphony Space were surely very clever to present the case as a "novel question" under New York perpetuities law and to persuade the court to interpret the parties' agreement in a way that would make it void. But, is this the sort of cleverness that redounds to the credit of the legal profession? By asserting what might easily be regarded as a legal "technicality,"<sup>257</sup> the lawyers for Symphony Space won the case, but does that mean the not-for-profit really was legally entitled to the building in the first place before the case ever came to court? In other words, did the court merely declare what was already legally true, that the not-for-profit unqualifiedly owned the building all along? Or is this a case in which a court was persuaded, in essence, to take property away from one person and give it to another?

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252. See *supra* text accompanying notes 121–81. Being in New York, the lawyers in this case were subject to the New York code, based on the American Bar Association's Model Code of Professional Responsibility, rather than the Model Rules. In relevant respects, however, the two share the same general vision of the adversary system and the lawyer's role in it.

253. See *supra* text accompanying notes 121–81.

254. It does not appear that, in this particular case, the facts were heavily contested but, of course, in many cases the outcome essentially turns on the "facts," *i.e.*, the inferences that are drawn from the raw evidence.

255. *Symphony Space*, 669 N.E.2d at 802.

256. See *id.* at 809.

257. And the Rule Against Perpetuities is surely a technicality.

In raising these questions in class, and considering what they might imply about lawyer ethics, I find it useful to try to fill in the space that lies between *Symphony Space* and *Rogers*, the “bank robbery” case described earlier.<sup>258</sup> Obviously, the two cases are different. First, there is every reason to believe that when the *Symphony Space* buy-back agreement was originally negotiated, everybody was acting with the utmost good faith and neither side was looking for an opportunity to pounce on the other’s blunder. The mistake (if it can be called such) was surely a mutual one, with both parties acting in the belief that the transaction they were structuring would be legally valid and enforceable according to their understanding.<sup>259</sup>

There is also another distinction between the two cases. The *Symphony Space* case does not present us with a lawyer quietly taking advantage of another person’s blunder, as did the defendant in *Rogers*. Rather, it was a case of lawyers actively trying to *convert* another’s prior choices *into* blunders, so to speak, by advocating for conclusions of law and an interpretation of an agreement that would make the buy-back arrangements something that neither party originally intended them to be, namely, empty verbiage. This strategy for getting another’s property is clearly not fraud (purposefully *inducing* another’s blunder), nor is it the sort of wrong that was condemned in *Rogers*. It lies elsewhere on the continuum.

To see the continuum more clearly, and some of the stopping points that lie along it, let us consider several spin-off hypotheticals from *Symphony Space*. In each of these hypothetical cases, it is assumed that the parties have worked out a tentative agreement similar to the one in the actual case, except that the tentative agreement provides for only three exercise years: 1987, 1993, and 1998—omitting the fatal exercise year 2003. It is assumed, as well, that it was already a settled (albeit somewhat obscure) point of law that the local Rule Against Perpetuities would apply to commercial options.<sup>260</sup> At this point in the negotiations, the several spin-off hypotheticals diverge:

#### A. Hypothetical 1—Inducing Blunder

Suppose that the lawyers for the not-for-profit proposed inserting 2003 as an additional buy-back year knowing that 2003 would exceed the perpetuities period and give their client a solid legal basis for later invalidating the entire buy-back agreement. They made this proposal in the hope that the other side

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258. See *supra* text accompanying notes 182–211.

259. In *Rogers*, the Fourth Circuit made clear that it would not be larceny if the defendant’s “initial receipt of the overpayment was innocent, [and] the defendant thereafter formed the intention to, and did, convert the overpayment.” *United States v. Rogers*, 289 F.2d 433, 439 (4th Cir. 1961).

260. As previously noted, in the actual case the relevant law consisted of legislation whose application to options was not at all settled at the time the parties made their agreement, and the previous law in New York would have clearly not applied to commercial options. See *supra* note 248.



would not notice the perpetuities problem and with the intention of eventually trying to wrest the whole building from the investor.<sup>261</sup>

Some students insist that this strategy is perfectly within the ethical bounds of “adversary” transactional practice. Maybe they are right. Isn’t it the job of each lawyer to know the law and to detect such risks to his or her own client? After all, in the adversary system we are not our brother’s keepers. My own conclusion is, however, that deliberately slipping a poison pill into an agreement with a view to facilitating a later escape from its burdens is tantamount to fraud. It is exactly the sort of submarine attack or subterranean tactic that earns the epithet “shark” or “rat.” It is not, at any rate, “truly honest.”

### B. Hypothetical 2—*Quietly Taking Advantage*

Now suppose that the lawyers for the *donor-investor* proposed adding 2003 as a buy-back year, oblivious to the fact that that this would exceed the perpetuities period and could invalidate the entire buy-back agreement. The not-for-profit’s lawyers saw the perpetuities issue but they decided that, because their client might later want to go for the whole building, they will say nothing.

This hypothetical is, in my opinion, essentially analogous to *Rogers* (certainly so if the not-for-profit in fact later made an effort to expropriate the whole building). Of course, students who side with the lawyer’s behavior in the first hypothetical have no trouble siding with what the lawyer does in this one. Others are drawn to agree with them, but on the theory that lawyers have no duty to volunteer—“no affirmative duty to inform an opposing party of relevant facts.”<sup>262</sup> However, it would be my conclusion (partially on the strength of *Rogers*) that this sort of game is ethically questionable. If silently taking the fruits of another’s blunder can be larceny, I doubt that it can be considered “truly honest,” as well.

### C. Hypothetical 3—*Turning Another’s Trust into a Blunder*

Let’s go back and suppose again that the lawyers for the *not-for-profit* proposed adding 2003 as a buy-back year. However, this time both they and the lawyers for the donor-investor were oblivious to the risk that adding this exercise year could jeopardize the validity of the entire buy-back agreement. The lawyers for the investor accepted the proposal, trusting that it has not been offered as a trap. Later, in an effort to seize the whole building, the not-for-profit’s lawyers urge the unexpected interpretation that the buy-back agreement calls for one single (and, therefore, void) option rather than a number of separate ones.

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261. Perhaps these hypothetical lawyers harbored the realistic hope that real estate practitioners have only a vague mastery of the Rule Against Perpetuities, which is primarily a trusts-and-estates rule.

262. MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 1 (2009).

Here, similarly to the actual case, no ethical cloud would lie merely for unconsciously *receiving* the advantage. So, the question concerns solely the propriety of *pressing* the advantage. This hypothetical bears earmarks of a host of real life situations in which people make deals, later change their minds, and then ask their lawyers to pore through the agreement to find some clause or interpretation of the agreement that will “get me out of this thing.” An ordinary commercial buyer who wants to get out of a contract with a seller is an example, though the buyer who wants to keep the goods but not pay for them may be a bit closer to the facts of *Symphony Space*.

*D. Hypothetical 4—Turning Another’s Reasonable Actions into Blunders*

Suppose finally that the lawyers for the *donor-investor* proposed adding 2003 as a buy-back year. Both they and the lawyers for the not-for-profit were oblivious to the risk that adding this exercise year could jeopardize the validity of the entire buy-back agreement. Later, in an effort to seize the whole building, the not-for-profit’s lawyers urge the unexpected interpretation that the buy-back agreement calls for one single (and, therefore, void) option rather than a number of separate ones.<sup>263</sup>

Here again, it is not the unconscious *receipt* of the advantage but the conscious decision to *press* it that raises possible concerns. But perhaps the ethical concern is justly less than in the preceding hypothetical. After all, in this example it was the *investor* who suggested the fatal provision in the first place and, in both the adversary model and our moral intuitions, people ought to have *some* responsibility for what they do, particularly for the results that they *initiate*. At any rate, I think that many in the profession today would say that a lawyer most definitely *ought* to seek out and take advantage of such openings inadvertently left by the other side, pursuing them “for the fullest benefit of the client’s cause” within the limits of “[t]he law, both procedural and substantive.”<sup>264</sup> But would a truly honest lawyer do so?

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263. The main differences between the last two hypotheticals and *Symphony Space* are that, in *Symphony Space* (1) we do not know who initially proposed the 2003 buy-back year, and (2) the relevant law was not merely unknown to the parties but unknowable, since the issue had not yet been settled at the time of contracting. See *supra* note 248. See generally *Symphony Space*, 669 N.E.2d 799. In other words, the parties’ mistake was not as to the existing state of the law but as to the future state of the law.

264. MODEL RULES OF PROF’L CONDUCT R. 3.1, cmt. 1 (2009). At the very least, before depriving the client of this juicy windfall opportunity, the Model Rules would seem to require that the lawyer communicate and consult with the client, and presumably abide by the client’s decision on how to proceed. See MODEL RULES OF PROF’L CONDUCT R. 1.2(a) & cmts. 1–2, 1.4 (2009).

VI. *PACTA SUNT SERVANDA*?— SHOULD WE LET THE AGREEMENT  
STAND?

People write down their agreements in order to achieve an added measure of security and predictability. Imperfections and “room for interpretation” in written agreements are rather like money left lying on the dining room table when guests are in the house. Unfortunately, however, unlike money left on the table, residual wiggle room in written agreements is virtually unavoidable. Therefore, imaginative and unexpected interpretations offer a fertile source of escape for those who regret their contracts. Making such a play on linguistic vagaries does not require the lawyer to engage in any of the false statements, misrepresentations, or “deceit” that the Model Rules prohibit.<sup>265</sup> Indeed, the Model Rules may even call for such plays on language as a part of diligent representation.<sup>266</sup> In our exaggerated version of the adversary system, the “first great duty of an advocate [is] to reckon everything subordinate to the interests of his client.”<sup>267</sup> Of course, it is not necessary to question every unexpected or seemingly imaginative interpretation. Truly honest people can have honest disagreements. Yet, one has to be troubled when people make deals where the intentions are clear, and later are able to find lawyers willing to target language with unforeseen interpretations to get them out of those deals. If the cases like these have any impact on the reputation of lawyers, it is because they make honest people feel like prey.

Notice that the question here most emphatically is *not* concerned with the lawyer who might find himself caught between what the law permits and what the lawyer considers to be morally right. A deviation between the law and the lawyer’s morality can present a real conundrum.<sup>268</sup> But much more common

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265. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 4.1(a), 8.4(c) (2009).

266. See MODEL RULES OF PROF’L CONDUCT R. 1.3, 3.1 cmt. 1 (2009).

267. *United States v. Cutler*, 58 F.3d 825, 840–41 (2d Cir. 1995) (quoting Lord Henry Brougham, with evident disapproval) (alteration in original). The court seemed more attracted to the riposte of Chief Justice Alexander Cockburn who responded, “to loud cheers from the distinguished assembly”:

[t]he arms which an advocate wields he ought to use as a warrior, not as an assassin. He ought to uphold the interests of his clients *per fas*, not *per nefas*. He ought to know how to reconcile the interests of his clients with the eternal interests of truth and justice.

*Id.* (alteration in original).

268. See generally Jane B. Baron & Richard K. Greenstein, *Constructing the Field of Professional Responsibility*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 37 (2001) (describing how the construction of legal ethics curriculum in law schools can promote a separation between legal ethics and moral reasoning); Stephen Gillers, *Can a Good Lawyer be a Bad Person?*, 2 J. INST. FOR STUDY OF LEGAL ETHICS 131 (1999) (noting that the institutional role of lawyers often requires them to place their clients’ interests above that of others, rather than simply exercise moral reasoning); David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873 (1999) (exploring the choice between law-centered and morality-centered theory in deciding what is the best approach to legal ethics); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005) (using memoranda on torture in

(and less discussed) is the conundrum presented by the everyday deviation that lawyers find between what the law intends and what the client wants. The person who commits a tort does not want to lose his home or assets to pay damages. The heir who is cut out of a will does not want to settle for merely a token legacy. The promisor who finds a contract burdensome does not want to compensate the other party for nonperformance. And so it goes for an infinitude of everyday legal “problems” that arise when people do things but do not wish to endure the consequences that the law prescribes. But is it the role of honest lawyers to hold themselves out as being there to “solve” these problems by helping people escape the consequences and limitations that the substance of the law means to impose?

The potential for deviation between what the legal system can be led to permit and what the substantive law affirms as “justice” is a focal point of much legal representation. By carefully working the evidence, inventively interpreting documents, and making clever use of the procedural possibilities, smart lawyers can help their clients avoid what the law intends for them. That is to say, the intricacies, inertias, and costs of the legal process lead to imperfections of operation, and skillful advocates can make deliberate plays on these imperfections with a view to making the process misfire or leading the law astray.<sup>269</sup>

Quite possibly, most lawyers today would accept without qualm that it is perfectly all right to press for interpretations of agreements that are in their clients’ current interests, even if different from their clients’ original intentions. Nevertheless, there is something in that view that seems to be counter to the very concept of “agreement,” and marks an important difference between a “truly honest” lawyer and a merely “ethical” one (in the Model Rules sense). The truly honest lawyer would never urge an interpretation of a contract with the deliberate objective of frustrating the agreed exchange that both parties manifestly had in mind.

Sometimes, of course, it will not be at all obvious exactly *what* the parties had in mind. As noted earlier, even the truly honest can have honest disagreements. In *Symphony Space*, for example, one may reasonably doubt that the parties ever had any actual contractual intentions on the question of whether the buy-back arrangement consisted of one single option or a number of separate ones. But such considerations are not always sufficient to dispose of

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a consideration of how lawyers can manipulate the law to overcome legal norms); W. Bradley Wendel, *Professional Roles and Moral Agency*, 89 GEO. L.J. 667 (2001) (reviewing ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* (1999)).

269. As Professor William Simon has rather delicately put it: “[E]ven in a relatively reliable procedure, the lawyer typically has opportunities to improve her client’s chances of success in ways that do no facilitate decision on the merits by the adjudicator.” WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 143 (1998). For my own discussion at greater length of some more specific strategies, see generally Humbach, *supra* note 7, at 1 (discussing abuse of confidentiality rules and the deliberate fabrication of controversy).

the question. The parties in *Symphony Space* may well not have had any real “intention” on the specific (and rather technical) single-option/multiple-options issue. But the lawyers for the not-for-profit could not have been unaware that the investor never intended to give away completely a piece of property worth \$20 million.

According to the standards of today’s exaggeratedly adversarial legal culture, one should praise the Symphony Space lawyers for advocating as they did. They had a client who had a big problem. They pursued what was, quite likely, the only really promising avenue for protecting their client’s interests—asserting a “novel question” of law and an unexpected interpretation of the relevant agreement.<sup>270</sup> The client retained them to find a way to save its use of the concert hall, and the lawyers considered it their job to find one, “defer[ring] to the client regarding such questions as the . . . concern for third persons who might be adversely affected.”<sup>271</sup>

There remains, however, a legitimate question as to what ought to be the standards of the profession as a whole. When a client comes in and says, “I’ve made this contract and now I wish I hadn’t,” or “they say we’re in breach and want to hold us liable,” what is the lawyer to do? Should not one of the first questions that the lawyer asks herself be: “Is the contract valid? Can I find some legal way that it won’t be enforced?” As noted earlier, the Model Rules are instinct with the idea that, in our adversary system, if there is a legal way to win, then winning must be right.<sup>272</sup> And, it needs to be said, the lawyers for Symphony Space *did* win.<sup>273</sup>

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270. That is to say, faced with the law as it was, the lawyers for Symphony Space may have had no realistic choice but either to throw in the towel—give up the theater—or go for the whole thing via the Rule Against Perpetuities. If their choices were thusly limited, of course, it would be a reproach to the state of the law, but if the lawyers saw no way to produce a “just” result, and had only a choice between two unjust ones, they can hardly be criticized for choosing the side of their own client.

271. MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 2 (2009).

272. See *supra* text accompanying notes 124–28.

273. Perhaps the most astounding thing, at least for persons unaccustomed to the convoluted ideas that lawyers have about justice, is not that the lawyers argued that the “buy-back” was invalid, but that the Court of Appeals agreed. The court showed no regret or doubt about the forced expropriation and, on the contrary, offered a long explanation as to why it was legally right to take away the investor’s property interest and give the whole building to Symphony Space. See *Symphony Space, Inc. v. Pergola Prop., Inc.*, 669 N.E.2d 799, 809 (N.Y. 1996). By not taking notice of the separate-option interpretation, the court produced a line of reasoning which, every step of the way, seems eminently logical and firmly grounded in both law and policy, leading to a conclusion which, simply put, the law seems to require. *Id.* Unfortunately, that is no guarantee of soundness. Persuasive arguments can be produced by skillful rhetoricians on both sides of almost any seriously contended case. As Jonathan Swift once reminded us, tweaking our profession with irony, lawyers have “the Art of Proving by Words multiplied for the Purpose, that *White* is *Black*, and *Black* is *White*.” JONATHAN SWIFT, *GULLIVER’S TRAVELS* 227 (Christopher Fox ed., Bedford Books St. Martin’s Press 1995) (1726).

Certainly, by one measure, victory is its own justification, and a legal victory left unrealized is like a ripe fruit left unpicked. However, the problem with treating victory as its own justification is that, if taken to its logical conclusion, nobody's property is safe as long as there is a sharp-eyed lawyer out there clever enough to figure out how to get it. For what skilled advocate cannot always think up some novel question of law or devise some unforeseen interpretation of an agreement? Is there any substantial chain of title that does not include at least one crucial deed or other link which, with a little imagination, cannot be robustly challenged—or, at least, cast in enough of a shadow to pry loose a substantial settlement? And what can be said of the vulnerability of property rights applies to *all* rights. This is not a question of a few charlatans but of highly principled advocates who, in loyal service to their clients' interests, pore through documents, records, testimony, and laws looking for ways to win.

## VII. CLOSING THOUGHTS

The legal process is unfortunately not perfect and, as a human institution, it never can be. It will always be possible that the process will make mistakes, producing outcomes that the substance of the law is not meant to produce. But the fact that mistakes *can* happen does not mean it is all right for lawyers to try to *make* them happen. It is not necessarily all right to get somebody else's property away from them, or to defeat their "rights," just because you can.

The ultimate question is: What counts as legal justice? Is it that which the substance of the law prescribes, or is it whatever result the legal process can be led to produce? It may be inevitable that the law's burden will be different for some people than it is for others. It may be that there will always be one set of rules for ordinary folks, who are simply expected to obey, while something else—something less burdensome—applies for those able to hire lawyers to engineer their escapes. Even if this divergence may be in some degree inevitable, however, it does not follow that it ought to be condoned, much less left a wide area to flourish as it is under the Model Rules. Discrepancies between legal outcomes and substantive justice erode the basis for public confidence in the Rule of Law. Justice should not be divided—one thing for some, another for others—all contingent on the lawyer's acumen and skill. In a world of truly honest lawyers, it would not be.