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# How Lawyers Act in the Interests of Justice

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# HOW LAWYERS ACT IN THE INTERESTS OF JUSTICE

*Monroe H. Freedman\**

Professor Deborah Rhode is a commanding figure in the field of lawyers' ethics. She is widely knowledgeable, thinks deeply, and writes with grace and an enviable ability to turn a phrase. Of no less importance, she cares intensely about her subject, because she is seriously concerned about the people who are affected by how lawyers govern themselves. All of these qualities are reflected in her latest book, *In the Interests of Justice: Reforming the Legal Profession*.<sup>1</sup>

In addition, Professor Rhode has always been willing to confront difficult issues, and this book is filled with them. Since difficult issues generate controversial solutions, none of Professor Rhode's proposed solutions will satisfy everyone. Nevertheless, just about everything she writes is challenging and demands careful consideration, and one chapter ("Too Much Law/Too Little Justice: Too Much Rhetoric/Too Little Reform")<sup>2</sup> is a superb exposition and analysis of the supposed litigation explosion and related issues. Since there is little point in my trying to restate what Professor Rhode has done so well, however, I want to discuss here some disappointments and disagreements with the book.

## I. THE AMERICAN LAWYER'S CODE OF CONDUCT

A principal disappointment is that Professor Rhode uses the American Lawyer's Code of Conduct to typify what she views as an unmitigated and harmful commitment to zealous representation in ethics codes generally.<sup>3</sup> Before commenting on Professor Rhode's use of the ALCC, I should disclose that as Reporter for that code, I was

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\* Lichtenstein Distinguished Professor of Legal Ethics, Hofstra University Law School. I am grateful to Ellen Schaubert, Walter Schulman, Abbe Smith, and Ralph Temple for comments on an early draft. Any errors, of course, are attributable to their meddling.

1. Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* (2000).

2. *Id.* at 117-41.

3. *Id.* at 15. A typographical error attributes this Code to the American College of Trial Lawyers; in fact, it was sponsored by the Roscoe Pound/American Trial Lawyers Foundation of the Association of Trial Lawyers of America.

responsible for drafting virtually all of it. The ALCC was written in 1980 in an effort to influence the drafting of the ABA's Model Rules and, ultimately, the variations on the Model Rules in the states. (The twenty-eight member Commission on Professional Responsibility that approved the ALCC included Robert H. Aronson, Hugo A. Bedeau, Gary Bellow, Ira Glasser, Aryeh Neier, and Margie T. Searcy.)<sup>4</sup>

I should also note that Professor Rhode's book was not written to analyze and compare the various codes of lawyers' ethics and, in that regard, it would be unfair to criticize her for not doing a more thorough job of evaluating the relative merits of the codes. However, Professor Rhode does use the ALCC as emblematic of what is most wrong with those codes. In a colloquium of legal ethics scholars, therefore, I think it is appropriate to point out that the ALCC is in fact consistent with Professor Rhode's views in important respects, that it was forward-looking in ways that only recently are coming to be appreciated by the established bar, and that it is deserving of consideration and support by legal scholars.

Early in the book, Professor Rhode refers to the "conventional view" of the adversary system as it is "aptly summarized" in the American Lawyer's Code of Conduct.<sup>5</sup> That is, that "the most effective way to discover truth and preserve rights is through an adversarial process in which attorneys have 'undivided fidelity to each client's interests as the client perceives them.'"<sup>6</sup> Professor Rhode goes on to derogate that view. In doing so, however, she omits the beginning of the sentence that she quotes from the ALCC. The omitted passage expresses a rationale in terms of the high value that a free society places on the dignity and autonomy of the individual.<sup>7</sup>

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4. The Public Discussion Draft of the ALCC was published in June 1980. This is the only version that was voted on and approved by the Commission on Professional Responsibility.

5. Rhode, *supra* note 1, at 15.

6. *Id.* at 15; *see also id.* at 50 (citing Roscoe Pound-American Trial Lawyers Foundation, *The American Lawyer's Code of Conduct* 202 (Washington, D.C.: American Trial Lawyers' Foundation, 1981)).

An unapproved "revised draft" was published in May 1982, and is the version that appears in John S. Dzienkowski, *Professional Responsibility Standards, Rules & Statutes* 818 (1999-2000) and Thomas D. Morgan & Ronald D. Rotunda, *Selected Standards on Professional Responsibility* 429 (2001) [hereinafter Morgan & Rotunda]. According to the Chairmen's Introduction to the 1982 revised draft, only the approved Public Discussion Draft "bears the stamp of the Commission's original Reporter, Professor Monroe H. Freedman." *The American Lawyer's Code of Conduct* (Revised Draft 1982), *reprinted in* Morgan & Rotunda, *supra*, at 434. This is incorrect. The entire body of rules and comments of the 1980 Public Discussion Draft of the ALCC remains virtually unchanged in the 1982 version, except for occasional minor rephrasing of rules (*e.g.*, "attorney" for "lawyer"), reordering and renumbering of some rules, and the addition of a single rule, now 4.2 (placing a higher burden of competence on a lawyer who holds herself out as having special expertise). Also, in accordance with my original recommendation, the 1982 version omits Alternative B to Chapter I in favor of Alternative A.

7. *The American Lawyer's Code of Conduct* 202 (Roscoe Pound-American Trial

Also omitted from Professor Rhode's reference to the ALCC is its explanation that rules of lawyers' ethics should be drafted and interpreted to enhance the lawyer's role in protecting fundamental individual rights in our constitutionalized adversary system.<sup>8</sup>

Moreover, Professor Rhode repeats the same abridged quotation from the ALCC on a later page of her book, suggesting that the ALCC is typical of bar ethics codes which "make a virtue of expedience," protecting lawyers' "financial success and professional status" and disregarding what is "socially desirable."<sup>9</sup> "In many contexts," she adds, "the moral justifications for zealous advocacy are unconvincing."<sup>10</sup> This is certainly true. However, in some of the most compelling contexts that Professor Rhode gives as illustrations, the ALCC—alone among the ethics codes—would produce the results she favors, not the results that she deplors. That is, although the ALCC is strongly committed to zealous representation as permitted by law and the disciplinary rules, it restricts zeal in ways that the ABA codes do not; in addition, the ALCC limits lawyers' ability to take unfair advantage of clients. Unfortunately, however, Professor Rhode does not acknowledge these singular contributions, thereby allowing the inference that the ALCC is subject to the same criticisms as are the ABA codes.

For example, Professor Rhode properly criticizes the ABA's codes for forbidding a lawyer in many circumstances to reveal client confidences to save human life, while at the same time allowing a lawyer to reveal client confidences to collect the lawyer's fee.<sup>11</sup> Neither of these criticisms is applicable, however, to the ALCC. First, that code expressly forbids a lawyer to reveal client confidences to collect a fee.<sup>12</sup> As Professor Rhode notes, the fee-collection exception to confidentiality in the ABA codes allows clients to be pressured to pay unjustified fees or to drop legitimate malpractice claims in exchange for continued confidentiality.<sup>13</sup>

Second, ALCC Rule 1.4 (Rule 1.6 of the 1982 version) permits a lawyer to reveal a confidence to save a life.<sup>14</sup> Moreover, unlike the

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Lawyers Foundation, Public Discussion Draft 1980).

8. *Id.* at Preface.

9. Rhode, *supra* note 1, at 50.

10. *Id.*

11. *Id.* at 109-10; *see also*, Monroe H. Freedman, *Understanding Lawyers' Ethics* 102-07 ("The ABA's Incongruous Exceptions to Confidentiality") [hereinafter Freedman, *Understanding*]; Monroe H. Freedman, *Lawyer-Client Confidences Under the A.B.A. Model Rules: Ethical Rules Without Ethical Reason*, *Crim. Just. Ethics* 3 (Summer/Fall 1984).

12. *See* The American Lawyer's Code of Conduct Ch. 1 cmt., at 106 (Roscoe Pound-American Trial Lawyers Foundation, Public Discussion Draft, 1980).

13. Rhode, *supra* note 1, at 113.

14. *See* The American Lawyer's Code of Conduct 101-02 (Roscoe Pound-American Trial Lawyers Foundation, Public Discussion Draft, 1980); Morgan & Rotunda, *supra* note 6, at 437. I originally favored making this exception mandatory

ABA's Model Rules and Model Code, that permission is not conditioned on there being a future act of the client, nor must the client's act be unlawful in order to trigger the exception.<sup>15</sup> Thus, the lawyer would be permitted to reveal client confidences in most of the cases cited by Professor Rhode to illustrate the inadequacy of the present rules.<sup>16</sup> These illustrations include *Spaulding v. Zimmerman*,<sup>17</sup> where the defendant's lawyer withheld knowledge that the plaintiff was suffering from a life-threatening aneurysm; the case of the innocent person on death row who is about to be executed for a murder the lawyer's own client has committed; and the case of the client-company that has decided to ship defective dialysis machines that will kill some patients.<sup>18</sup>

Oddly, while ignoring the life-saving exception to confidentiality of the ALCC, Professor Rhode does refer approvingly to an early draft of the Model Rules (revised by the Kutak Commission) which, she says, would have "required lawyers to reveal conduct [*sic*] likely to present imminent physical danger to third persons . . ."<sup>19</sup> The reference, apparently, is to Rule 1.7(b) of the 1980 Discussion Draft of the Model Rules, which in fact would have required the lawyer to reveal confidences only to "prevent the client from committing an act" that would result in serious bodily harm. Thus, the early Model Rules exception would have forbidden the lawyer to disclose client information in either the aneurysm case or the death row case (where the clients are not going to commit any act at all), while the ALCC (which she ignores on this point) permits disclosure in both those cases.<sup>20</sup>

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rather than permitted. However, there are circumstances in which a lawyer should have discretion. For example, assume that a client's wife is terminally ill and in severe pain, and the client tells the lawyer that he has agreed with his wife to assist her in committing suicide. I do not believe that the lawyer should be required to inform on the client in such a case.

15. The effort has recently been gaining success to change the present rules in the Model Code and Model Rules to conform with ALCC Rule 1.4 (Rule 1.6 in the 1982 version). See Monroe H. Freedman, *The Life-Saving Exception to Confidentiality: Restating Law Without the Was, the Will Be, or the Ought to Be*, 29 Loy. L.A. L. Rev. 1631 (1996). The American Law Institute adopted it in the Restatement of the Law Governing Lawyers and the ABA did the same in the Model Rules in August 2001.

16. Rhode, *supra* note 1, at 106-07, 108.

17. 116 N.W.2d 704 (Minn. 1962).

18. When the ABA considered and adopted a provision similar to the ALCC's in August 2001, legal ethics specialists commented approvingly in *The New York Times*, saying that the ABA was just "playing catch-up." Sarah Boxer, *Lawyers Are Asking, How Secret Is a Secret*, N.Y. Times, Aug. 11, 2001, at B7 (quoting Charles Wolfram, emeritus ethics professor at Cornell Law School); Jonathan D. Glater, *Lawyers May Reveal Secrets of Clients, Bar Group Rules*, N.Y. Times, Aug. 8, 2001, at A12 (quoting Lester Brickman, ethics professor at Benjamin N. Cardozo School of Law). They did not mention, however, what it was that the ABA was catching up with, and I am not aware that any of the ethics scholars who were quoted ever supported the ALCC rule.

19. Rhode, *supra* note 1, at 113.

20. At the same time, the Model Rules proposal would have required the lawyer

ALCC Rule 6.5 limits further the scope of zealous representation by permitting the lawyer, in any matter other than criminal litigation, to withdraw from the representation if the lawyer comes to know that the client has “induced the lawyer to take the case or to take action on behalf of the client on the basis of material misrepresentations about the facts of the case, and if withdrawal can be accomplished without a direct violation of confidentiality.”<sup>21</sup> Illustration 6(d) of the ALCC explains that a lawyer in such circumstances could withdraw from the representation even though her doing so would adversely affect the client’s ability to meet important deadlines and even though the withdrawal would cause the other party (a government agency) to scrutinize the client’s filings more closely.<sup>22</sup>

Another significant limitation on lawyers’ personal and professional interests is ALCC Rule 8.9, which forbids a lawyer to “act as officer or director of a publicly held corporation that is a client of the lawyer, the lawyer’s partner or associate, or of any firm or attorney with whom the lawyer has an of counsel relationship.”<sup>23</sup> Such a practice jeopardizes the client’s confidences; it also puts the lawyer in a position to steer legal business to the lawyer or her firm and to prevent retention of other law firms regardless of whether that is in the best interests of the client. The ABA is beginning to catch up on the desirability of this provision as well. In 1998, the ABA issued an ethics opinion discouraging, but not yet forbidding, this practice.<sup>24</sup>

Yet another noteworthy restriction on lawyers in the 1980 ALCC is Rule 8.8, which forbids a lawyer to begin a sexual relationship with a client during the lawyer-client relationship.<sup>25</sup> The accompanying comment explains that the rule recognizes “the dependency of a client on a lawyer, the high degree of trust that a client is entitled to place in a lawyer, and the potential for unfair advantage in such a relationship.”<sup>26</sup>

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to reveal the client’s intention to assist his terminally ill and suffering wife to commit suicide.

21. The American Lawyer’s Code of Conduct 601 (Roscoe Pound-American Trial Lawyers Foundation, Public Discussion Draft, 1980).

22. *Id.* at 605-06. The Commission declined to include a provision in the Reporter’s draft that would have permitted the lawyer to withdraw any misrepresentation made by the lawyer if the misrepresentation is still capable of inducing detrimental reliance by a third party.

23. *Id.* at 802.

24. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 98-410 (1998).

25. The American Lawyer’s Code of Conduct 802 (Roscoe Pound-American Lawyers Foundation, Public Discussion Draft, 1980).

26. *Id.* at 805. In August 2001, the ABA also caught up with this provision of the ALCC. See Press Release, ABA, ABA Begins Action on Updating Ethics Rules, Adopts Election Administration Guidelines (Aug. 15, 2001) (reporting that the ABA House of Delegates had adopted a proposed rule prohibiting sexual relationships between lawyers and clients), <http://www.abanet.org/media/aug01/houseaction.html>; see also Monroe H. Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions*, 39 Vand. L. Rev. 275 (1986) (proposing ethical rules for

In sum, none of these significant limitations on zealous representation and on lawyers' personal, financial, and professional interests in the American Lawyer's Code of Conduct is acknowledged in Professor Rhode's book. This would be less disappointing if Professor Rhode had chosen to ignore the ALCC entirely. Since Professor Rhode relies on partial quotations from the ALCC as typifying how lawyers place their own interests over those of the public, however, I believe that she can fairly be faulted for ignoring these positive proposals.

A prime target of Professor Rhode's book, of course, is zealous representation of clients, and both the ALCC and I are unquestionably on the side of zeal.<sup>27</sup> A principal way that Professor Rhode would mitigate zeal is by having lawyers "counsel clients about the full range of ethical considerations that bear on particular decisions . . . ."<sup>28</sup> As noted earlier, Professor Rhode appears to disapprove particularly of the comment in the ALCC that says that in a free society, which places the highest value on the dignity and autonomy of the individual, lawyers serve the public interest by undivided fidelity to each client's interests as the client perceives them.<sup>29</sup> But here is what the ALCC says in the paragraphs immediately following that comment (which are also omitted by Professor Rhode):

That is not to say that the lawyer should ignore possible harm to other persons or to public interests, or to assume that the client's choices would be made in narrowly selfish terms. On the contrary, in counseling a client, the lawyer should advise the client fully of all significant consequences that might result from particular courses of conduct, and that advice should include moral and public interest concerns along with strictly legal ones. . . .

Just as it would be improper for a lawyer to impose other values on a client, so too the lawyer should not impose upon the client an adversarial attitude toward other people.<sup>30</sup>

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law professors, including a proscription on sexual relationships with students).

27. Professor Rhode occasionally uses the phrase "overzealous representation." Unfortunately, the word "overzealous" is sometimes used rhetorically (and without definition) to attack the ethic of zealous representation. Since zealous representation involves "seek[ing] the lawful objectives of [the] client through reasonably available means permitted by law and the Disciplinary Rules," Model Code of Prof'l Responsibility DR 7-101(A) (1981), we should define "overzealous" as conduct that goes beyond what is permitted by law and the Disciplinary Rules. Under that definition, I too disapprove of overzealous representation.

28. Rhode, *supra* note 1, at 18.

29. *Id.* at 50 (citing Roscoe Pound-American Trial Lawyers Foundation, *The American Lawyer's Code of Conduct 202* (Washington, D.C.: American Trial Lawyers' Foundation, 1981)).

30. *The American Lawyer's Code of Conduct 202* (Roscoe Pound-American Trial Lawyers Foundation, Public Discussion Draft, 1980).

In addition to urging that a lawyer “advise the client fully of all significant consequences that might result from particular courses of conduct,” and that the lawyer include in that advice “moral and public interest concerns,” the ALCC also emphasizes that the lawyer has “complete discretion” whether to accept a particular client who seeks to retain the lawyer. As I have explained elsewhere, it is precisely because lawyers have such discretion in choosing clients that we can properly be held morally accountable for the choices that we make: “Lawyers *are* morally accountable. A lawyer can be ‘called to account’ and is not ‘beyond reproof’ for the decision to accept a particular client or cause.”<sup>31</sup> It is only after exercising that discretion, after choosing to commit herself to the client, and after providing moral counseling to the client, that the lawyer is bound to serve the client’s lawful interests as the client perceives them.<sup>32</sup>

After rereading relevant portions of *In the Interests of Justice*, I am still unclear as to whether Professor Rhode disagrees with that position.<sup>33</sup> Professor William Simon certainly does, believing that a lawyer can properly sabotage a client’s lawful entitlements if the lawyer considers the achievement of the entitlements to be unjust, and that a lawyer can properly coerce a client to accept the lawyer’s moral view, in place of the client’s legal entitlements, by threatening to reveal the client’s confidences.<sup>34</sup> I think that Professor Rhode rejects this aspect of selectively nullifying a client’s lawful rights of which the lawyer disapproves, but she does not say so directly.<sup>35</sup>

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31. Freedman, *Understanding*, *supra* note 11, at 71, 66-70; *see also* Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 *Cath. U. L. Rev.* 191, 204-05 (1978); Monroe H. Freedman, *The Lawyer’s Moral Obligation of Justification*, 74 *Tex. L. Rev.* 111, 112 (1995) [hereinafter, Freedman, *Moral Obligation*].

32. These themes are developed at greater length in Monroe H. Freedman, *Understanding Lawyers’ Ethics*, Ch. 3 (“The Lawyer’s Virtue and the Client’s Autonomy”). This chapter is an elaboration and updating of Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 *Cath. U. L. Rev.* 191 (1978). *See also* Freedman, *Moral Obligation*, *supra* note 31.

33. *See*, for example, Rhode, *supra* note 1, at 18, where Professor Rhode says that lawyers should “avoid assisting actions that compromise accepted moral values,” and that their actions must “satisfy commonly accepted ethical principles.” Perhaps she intends for lawyers to do that either by rejecting cases that would produce immoral results, or by counseling clients against pursuing such objectives, and, failing that, withdrawing if the lawyer can do so either with the client’s consent or where there would be no material harm to the client. If so, she and I are in agreement. Or perhaps she means that lawyers should refrain from asserting legal entitlements of clients that would produce immoral results without informing the clients of what is happening. If so, we disagree.

34. *See* William H. Simon, Essay, “Thinking Like a Lawyer” About Ethical Questions, 27 *Hofstra L. Rev.* 1, 6 (1998); William H. Simon, *Ethical Discretion in Lawyering*, 101 *Harv. L. Rev.* 1083, 1142 n.129 (1988).

35. Professor Rhode does reject Simon’s selective-nullification position with regard to rules that interfere with a client’s interests in ways that the lawyer considers to be unjust. *See* Rhode, *supra* note 1, at 77-78. As discussed *infra*, Part II, however, she then adopts a modified version of it.



## II. MORAL DECISION-MAKING BY LAWYERS

I move now from disappointment<sup>36</sup> to a fundamental disagreement. Professor Rhode believes that lawyers can act justly, or morally, or ethically, or in the public interest (she uses all of these phrases) by making decisions in a “contextual moral framework.”<sup>37</sup> Lawyers, she says, should “assume greater moral responsibility” in how they conduct their practice, and should “act on the basis of their own principled convictions, even when they recognize that others could in good faith hold different views.”<sup>38</sup> This sounds both commendable and innocuous. As shown below, however, Professor Rhode means by this that lawyers should overlook or override rules of law in order to advance their own views of justice.

Professor Rhode insists that this does not lead to a double standard<sup>39</sup> but, inescapably, it does. Moreover, it is not the people that Professor Rhode and I would most want to benefit—the poor and the disadvantaged—who would benefit from this kind of decision-making. Indeed, Professor Rhode makes this very point in rejecting Professor Simon’s notion that lawyers can properly disregard laws whenever they don’t produce results that comport with the lawyer’s sense of substantial justice. “If the bar’s history is any guide,” she recognizes, “the clients most likely to benefit from such decision making would not be the poor and the oppressed.”<sup>40</sup>

The inevitability of a double standard is demonstrated by Professor Rhode’s discussion of how her proposal would work in practice.<sup>41</sup> Here is one illustration. When she was working in a legal aid office Professor Rhode had a deserving client who needed certain benefits. It “appeared obvious,” however, that the client had undisclosed income that made her ineligible for the benefits (“technically

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36. One other disappointment. Professor Rhode purports to describe “Monroe Freedman’s rationale for disclosing the law before discussing the facts.” Rhode, *supra* note 1, at 98. What she then provides is an excerpt from two sentences in an article written a third of a century ago. What she omits is any discussion or citation to Chapter 7 of *Understanding Lawyers’ Ethics* (“Counseling Clients and Preparing Witnesses”). Along with other justifications for a lawyer’s giving legal advice to a client before eliciting information, that chapter relates witness-interviewing to the literature of behavioral psychology regarding memory. Those psychological studies show that witnesses, completely honestly, have a strong tendency to recall past events in ways that are consistent with what they understand to be in their self-interest. Thus, an uninformed witness could mistakenly recall information in a way that is not only contrary to the witness’s own interests but that is incorrect. See also Monroe H. Freedman, *Lawyers’ Ethics in an Adversary System* Ch. 6 (“Counseling the Client: Refreshing Recollection or Prompting Perjury?”) (1975).

37. Rhode, *supra* note 1, at 79.

38. *Id.* at 213, 58.

39. *Id.* at 79.

40. *Id.* at 78.

41. I confess that when it is Professor Rhode who is making the contextual moral decisions, they come out in ways with which I warmly sympathize.

ineligible” is the phrase that Professor Rhode uses).<sup>42</sup> Professor Rhode’s solution,<sup>43</sup> “compatible with the contextual ethical framework” she is proposing in the book, was to “advanc[e] justice without violating formal prohibitions” and without engaging in “illegal conduct.”<sup>44</sup> She accomplished this by the simple expedient of “selective ignorance.”<sup>45</sup> That is, she avoided available information that would have “clearly revealed” the client’s undisclosed income.<sup>46</sup> Thereby, she evaded “knowing” about her client’s “obvious” undisclosed income.<sup>47</sup>

There are at least three ironies here. The first is that Professor Rhode is correct in saying that the conduct was entirely “ethical,” at least as far as the Model Rules are concerned. That code disingenuously defines “knowledge” as “actual knowledge,” which has in turn been defined as requiring an outright admission from the client.<sup>48</sup> Also, the Model Rules impose no obligation on a lawyer to investigate. Thus, just as Professor Rhode did, lawyers can manage to avoid “knowing” the information that triggers crucial ethical obligations.<sup>49</sup>

The second irony is that this is the very kind of conduct that Professor Rhode denounces when done on behalf of clients for whom she lacks sympathy. She undoubtedly would condemn, for example, defense lawyers in a products liability case who similarly contrive not to have “actual knowledge” about the smoking gun document that is sure to be demanded in discovery,<sup>50</sup> just as she condemns those who

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42. Rhode, *supra* note 1, at 77.

43. The solution was actually devised by Professor Rhode’s supervisor, but Professor Rhode adopts and approves the solution as a prime example of the kind of ethical conduct she is advancing in the book.

44. Rhode, *supra* note 1, at 77.

45. *Id.* at 78.

46. *Id.*

47. *Id.* at 78, 77.

48. Model Rules of Prof’l Conduct, Terminology (1983); Freedman, Understanding, *supra* note 11, app. B, at 139-41.

49. By contrast, the American Lawyer’s Code of Conduct, Introductory Comment on “Knowing” defines knowing as follows:

[A] lawyer knows certain facts, or acts knowingly or with knowledge of facts, when a person with that lawyer’s professional training and experience would be reasonably certain of those facts in view of all the circumstances of which the lawyer is aware. A duty to investigate or inquire is not implied by the use of these words, but may be explicitly required under particular rules. Even in the absence of a duty to investigate, however, a studied rejection of reasonable inferences is inadequate to avoid ethical responsibility.

The American Lawyer’s Code of Conduct 9 (Roscoe Pound-American Trial Lawyers Foundation, Public Discussion Draft, 1980); see also Monroe H. Freedman, *A Proposal for Different Ethical Standards for Criminal and Civil Practice*, 31 Hofstra L. Rev. (forthcoming 2002); Freedman, Understanding, *supra* note 11, app. B, at 139-41.

50. See Rhode, *supra* note 1, at 86-87.

bury such documents in the middle of a warehouse of files that the opposing lawyer is then invited to look over.<sup>51</sup>

Indeed, double standards are enhanced by double-speak. Take the phrase “evasive strategies,” which Professor Rhode uses sometimes with approbation and sometimes with disapproval.<sup>52</sup> Attorneys whose clients she favors are described as “inventive lawyers” who have “found” (not “devised”) “evasive strategies” that are not “technically unlawful.”<sup>53</sup> But when lawyers for clients whom she disfavors engage in similar kinds of “evasive strategies” that are not unlawful, they are condemned for their “self-righteousness” and for “appear[ing] to believe that procedural niceties need not be observed if they are on the side of the angels.”<sup>54</sup>

Of greater importance, and the ultimate irony, is that those self-righteous lawyers might be doing exactly what Professor Rhode has written her book to encourage lawyers to do. When I drive, I frequently listen to right-wing talk-radio hosts like Rush Limbaugh and Bob Grant. It not only helps pass the time, it keeps me aware of the fact that there really are people out there, including lawyers, who believe that development of oil, gas, and lumber is always more important than forests and endangered animals, that taxes (especially on wealthy people) are an evil, and that products liability litigation destroys self-reliance and personal responsibility.<sup>55</sup>

In fact, in a perverse way, Rush Limbaugh agrees with Deborah Rhode, who says: “An impoverished mother struggling to escape welfare stands on different ethical footing than a wealthy executive attempting to escape taxes.”<sup>56</sup> I once heard Limbaugh read a comment by just such a mother, who said, “How do they expect me to go to school and feed my kids [on a reduced welfare check]?” Limbaugh’s contemptuous answer was, “It’s simple, Lady. We don’t. Go out and get a job, and stop living on other people’s tax dollars.”

Lawyers who share those kinds of moral values will warmly embrace Professor Rhode’s call to “assume greater moral responsibility” in how they conduct their practice.<sup>57</sup> They will eagerly “act on the basis of their own principled convictions, even when they recognize that others could in good faith hold different views.”<sup>58</sup> And they will inventively find evasive strategies to help their clients to despoil the environment, to evade taxes, and to defeat claims by

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51. *Id.* at 83-84.

52. *See id.* at 78, 83.

53. *Id.* at 78.

54. *Id.* at 85.

55. Of course, the *Wall Street Journal* editorial and op-ed pages would do as well, but I can’t read when I’m driving.

56. Rhode, *supra* note 1, at 79.

57. *Id.* at 213.

58. *Id.* at 58.

people injured by products known by the manufacturers to have been defective.

The best way to help the poor and the oppressed, therefore, is not through justifying “evasive strategies” on their behalf. Rather, it is by providing increased funding of legal services, in order to give access to the legal system to those who are now excluded from it. Thus far, the established bar has failed to make an adequate effort to educate the public about the critical need for legal services on behalf of poor and middle-class citizens.<sup>59</sup>

I agree with Professor Rhode, of course, on her major premise: Lawyers have special obligations to act in the interests of justice. In a free society, however, we lawyers act in the interests of justice not by acting as a self-appointed moral elite, but by serving our clients zealously within the rule of law. We act in the interests of justice by counseling our clients about the moral as well as the legal consequences of what they want to do. And we act in the interests of justice by using all means that are lawful and reasonably available to help our clients to advance and to protect their interests as the clients, after proper counseling, perceive their interests to be.<sup>60</sup> In short, working within the rule of law in our constitutionalized adversary system, we enhance our clients’ autonomy as free citizens in a free society. That is how lawyers act in the interests of justice.

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59. *See Id.* at 60-63, 207-10.

60. The norm that lawyers should give their clients zealous representation within the law and the disciplinary rules does not preclude favoring significant changes in what is allowed by the law and the disciplinary rules. *See, e.g., supra*, Part I, *supra*. My principal concern in that regard is that any changes should not present a threat to the proper functioning of the adversary system.