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CAN A GOOD LAWYER BE A BAD PERSON?

Stephen Gillers*

"In dreams begins responsibility."
— William Butler Yeats

Assume a just legal system in a constitutional democracy. Imagine a person wishing to achieve a lawful goal. Imagine a lawyer who agrees to assist her. If the lawyer uses only legal means consonant with the jurisdiction’s legal ethics rules, can a coherent theory of moral philosophy nevertheless label the lawyer’s conduct immoral? Can a good lawyer be a bad person?¹

Let us grant that laws may be inequitable or inequitably used, in even the most enlightened society. These may allow unjust ends or the use of unjust means. Legal and moral are not congruent terms. Let us also agree that a person may be judged immoral though she pursues a legal goal in a lawful way; and conversely, that some illegal acts—civil disobedience at certain times—may be judged morally worthy. Let us finally accept, that if a principal’s lawful conduct may be immoral, so may the conduct of an agent who knowingly assists it.

Even so, is there something special about legal agents that exempts them from these precepts? Can lawyers say: “You are mistaken. I am a lawyer. Your judgments do not apply to me. To all the others, perhaps, but not to me.”? Can they, as Murray Schwartz has put it, “file[e] a demurrer, rather than an answer, to the charge of immorality”?²

Those who answer “yes” may rely on attributes of the legal system within which lawyers work, especially its adversary dimension. That system, they might contend, is so special that as long as a lawyer acts within

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¹ The question inverts the opening sentence of Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976), which is: “Can a good lawyer be a good person?”

it, he or she must be insulated from moral accountability or the system won’t work as intended. Those who answer "no" or remain skeptical may question whether the legal system can offer an excuse in all cases. If a client cannot cite the lawfulness of his goals or tactics whenever the morality of either is challenged, why should the lawyer, who helps the client achieve the goals or invoke the tactics, fare better?

It is not the legality of the client’s goals or tactics that the lawyer sets up in defense, advocacy advocates might reply, but society’s pledge that lawful endeavors will not be frustrated for want of the legal knowledge required to achieve them. In aiding a client, even one who proposes a lawful act for which he might be morally criticized, the lawyer fulfills the promise implicit in the fact that the client’s conduct is lawful in the first place. The lawyer is unaccountable not because the client’s ends or means are lawful but because of the lawyer’s instrumental status. We could say that the lawyer saves society from hypocrisy, at times with psychic cost to the lawyer, who personally, if tacitly, may reprove the client’s conduct.

Skeptics might call this explanation facile. No lawyer is required to accept a client and generally does so for no noble purpose. The suggestion that the lawyer acts to help society fulfill a promise is belied by the fact that so many clients unable to purchase the lawyer’s time are turned away. Shall a lawyer who accepts a disreputable client anticipating compensation enjoy immunity from moral contagion because of her instrumental purpose if that purpose played no part in her decision? Or, if lawyers can rely on an instrumental purpose, can others whose assistance facilitates the client’s endeavor—for example, suppliers, advertising agencies, or lobbyists—do the same? If a product may lawfully be sold—let’s say military hardware to a brutal dictator—suppliers might argue that a weapons manufacturer should not be stymied, whether because no lawyer will secure an export license or because no supplier will provide raw materials. What is so special about the lawyer’s job that she is invulnerable to criticism while the supplier is not?

These issues have long been with us, perhaps since the first lawyer, or certainly the second. In recent years, they seem to have won more attention. Not only lawyers, but philosophers and lawyers philosophically inclined, have shown interest in taking the moral measure of the bar.3 This attention was inevitable. When the bar talks among itself about how its members ought properly to behave, and of rules it might

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enact to encourage such behavior, it cannot avoid adopting the language and (at least facially) invoking the concepts used by “real” ethicists and that, naturally, attracts the “real” ethicists’ attention. The attention is beneficial because the lawyers’ near-monopoly on the scope of their professional duty has often resulted in narrow and self-interested resolutions. Having persons trained in moral philosophy (and other disciplines) watch over the bar’s shoulder as it goes about defining its “ethics,” may not immediately alter the results—philosophers have not been invited on the governing boards of any bar groups known to me—but it may help expose duplicity if the results are touted as publicly beneficial.

While we wait to learn what, if any, influence moral philosophy will have on the rules that define acceptable lawyer behavior, I suggest that we can and should busy ourselves with the anterior question that titles this essay. That we can do so, is evident. But why should we? I offer two reasons. First, criticism of “good” lawyers—those who conscientiously obey the rules set down—for being “bad” people (or for doing “bad” things) may, if valid, hasten change in the rules the lawyers cite in defense. If a lawyer can be called “bad” while obeying the rule—ordinarily a “good” thing to do—then the rule will be shown to need adjustment. My second reason is logically antecedent to the first reason. We should decide whether it is ever valid to criticize a lawyer who does nothing “wrong,” measured by positive law and the professional responsibility rules that govern the lawyer’s behavior. Perhaps we will conclude that we must aim our criticism only (or nearly only) at the rules the lawyer obeys, and not the lawyer who obeys them, especially when disobedience can carry a heavy price. In fact, we may go further. We may decide that preservation of our legal system’s values requires us to

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4. The American Bar Association’s Model Rules of Professional Conduct (“Model Rules”) were adopted by its House of Delegates in 1983. The House is composed entirely of lawyers. The Model Rules serve as a blueprint for state ethics rules, which are promulgated by state appellate courts. Courts frown on legislative efforts to regulate lawyers. See, e.g., State ex rel. Fiedler v. Wisconsin Senate, 155 Wis. 2d 94, 454 N.W.2d 770, 773-774 (1990) (“Once an attorney has been determined to have met the legislative and judicial threshold requirements and is admitted to practice law, he or she is subject to the judiciary’s inherent and exclusive authority to regulate the practice of law.”). The predecessor ABA ethics document, the Model Code of Professional Responsibility (“Model Code” or “Code”), was adopted by the ABA House of Delegates in 1969 and served as a blueprint for state court adoption before promulgation of the Model Rules.

defend lawyers who obey the rules yet become targets of criticism from others (the public, the press, politicians), even while we challenge the rules they obey.

So then, can a good lawyer be a bad person? Let us distinguish, first, between a client's ends and the means employed to achieve them; second, between the behavior of the bar as an enterprise engaged in rulemaking and the behavior of individual lawyers who are required to obey the bar's rules; and third, between rules that mandate an act and those that commit the decision whether to engage in the act to the lawyer's discretion. I will try to draw these distinctions using the following hypotheticals. I do not expect that they address all cases or resolve all questions, but they should illustrate the utility of the proposed distinctions and advance our effort to answer the question at hand. Readers may disagree with my solutions to the hypothetical facts, yet find the categories they define analytically congenial.

Hypothetical I

(a) A week before trial, the defense lawyer's examining physician tells the defense lawyer for the first time that the tort plaintiff's injuries are probably much worse than plaintiff believes them to be. The discovery rules do not require revelation of this information. Plaintiff then offers to settle for a sum based on his assumption that his condition is not serious. 6

(b) In a tort action in which the plaintiff has suffered permanent injury, the plaintiff's lawyer learns, a week before trial, that the plaintiff has an unrelated terminal illness. The discovery rules do not require revelation of this information. The defendant then offers to settle for a sum based on his assumption that the plaintiff will reach the life expectancy identified in the mortality tables.

No ethical rule requires the lawyers in these examples to reveal the newly learned information if procedural rules do not. On the contrary, the rules will then forbid revelation. 7 Yet we can foresee inequitable results. There will be settlements far lower or higher than the facts warrant. Does the lawyer who remains silent in these circumstances behave immorally? Is he or she a bad person? I believe the answer must be no, even though we may conclude that the client acts immorally by instructing the lawyer to conceal the same information.

6. These facts are based on Spaulding v. Zimmerman, 263 Minn. 346, 116 N.W.2d 704 (1962). Professor Luban recounts them in The Good Lawyer and concludes supra note * at 115 that acceptance of the settlement offer cannot be justified.

7. DR 4-101(B); Rule 1.6(a). See also Restatement §112.
The lawyer works within a system of rules, adopted and enforced by the state. These constrain his behavior on pain of discipline, which can amount to denial of his livelihood. Much can be said against these rules, but there they are. It is asking too much to expect lawyers to risk their careers in order to assure the result that most nearly comports with truth. While a lawyer also works within a civil litigation system that touts discovery of truth as a leading (though surely not its only) goal, the system nevertheless, and for various reasons, pursues this goal through rules that at times, operate to suppress truth. Here is a compromise we've made. It is not for the lawyer to decide within each representation, whether the compromise ought to apply or whether its true intendment will be frustrated if it does. That resolution will often defy clear answer. Even philosophers disagree among themselves. Furthermore, there is moral value in having people honor their oaths to obey the bar's governing ethical document. And there is practical value in fulfilling the expectations of others, especially clients, that they will.

What if, instead, the lawyer does not reveal the information but declines to continue the representation? This is the other way out. While it will often not be possible (the withdrawal rules may not allow it), assume it is. We might then say, that the lawyer acts immorally if he fails to withdraw, instead of helping the client achieve a legal but (let us assume) immoral end. Another lawyer will then step in, but assume she also declines, as does the next and the next. This assumes that these lawyers also know the information. But it may be that they cannot know unless the first lawyer tells them. He cannot tell them without the client's permission. Chances are that sooner or later a lawyer will effect the settlements described in the hypothetical facts without having the information or that the client will do so without counsel.

But let us assume that all successor lawyers do learn the confidential information because the client, who doesn't want to deceive his own lawyer, tells them. This presents the question more purely. Then, either

8. "The [Model] Code is designed to be adopted by appropriate agencies ... as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules," Model Code, Preamble. "The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies." Model Rules, Scope [6].

9. Compare Murray Schwartz, The Zeal of the Civil Advocate. 1983 AM. B. FOUND. RES. J. 543 (arguing that truth is the primary objective of civil litigation and that a lawyer is morally blameworthy if she seeks lawful but immoral ends for a civil litigant), with Millard Ball, Wrong Experiment, Wrong Result: An Appreciatively Critical Response to Schwartz, 1983 AM. B. FOUND. RES. J. 565, 570 (rejecting the "laboratory" metaphor for civil litigation and arguing that "the truth of the judicial process is the truth of art and right action, of aesthetics and ethics. Truth in litigation is not to be ascertained; it is to be performed ... ").
all lawyers decline (because they subscribe to the same personal morality) and the client is unable to invoke his or her legal rights, or we require the "last lawyer in town" to accept the case. The last lawyer has two excuses to a charge of immorality: first, she had no legal choice; and second, since she was the last lawyer in town, by accepting the client, she fulfills the legal system's promise of representation, which is a value no predecessor lawyer could cite so long as there was one other lawyer to whom the client could turn.

This argument is too nice. It seems to me to amount to something else: namely, that the confidentiality rule on the facts of Hypothetical I is wrong. For if the only reason the last lawyer in town must and morally may accept the case, is so that the legal system can deliver on its promise, while everyone else can and morally must reject the case because the same promise works injustice, we should be examining the promise and not devising intricate but improbable stratagems to save us from our own handiwork. The real quarrel is with the profession that wrote the rule. The lawyer can set the rule up in defense but its collective authors cannot. The bar must rely on a different order of argument, including arguments drawn from moral and political philosophy.

Hypothetical II

(a) A man whose lifelong dream has been to open a restaurant persuades a billionaire cousin to lend him $100,000. The man is unsophisticated in business matters while the cousin is not. The man signs a demand note for the loan and opens the restaurant. Food critics give it excellent reviews; great success is predicted. Seeing this, the cousin calls the note, then brings an action on it, intending to acquire the restaurant in a foreclosure sale. The man goes to a lawyer who sees improbable defenses on the merits and who proceeds to make a series of nonfrivolous procedural motions calculated to gain time for her client until either the restaurant's cash flow is great enough to pay the

10. The phrase is used by Professor Schwartz in the first edition of The Good Lawyer, supra note *, at 111. I suppose we should amend it to say the last lawyer in town competent to handle the matter.

11. She could still decline, in an act of civil disobedience based on the moral repugnance of the client's case. If her refusal were in good faith, Professor Schwartz writes that "no important value of the system would seem to require enforced assignment of that lawyer" unless "refusals . . . became sufficiently widespread to threaten the assignment system," but this assumes "the probability that other lawyers would be willing to accept the assignment on grounds the recalcitrant lawyer found morally insufficient." The Good Lawyer, supra note * at 169. Consequently, the truly last lawyer in town would have to be sanctioned for her civil disobedience in order for the assignment system to work.

12. I do not here address whether the confidentiality rules should be changed to permit or require revelation of the information described in Hypothetical I. Perhaps the bar can defend its rule. The onus of defense rests with the bar, however, not the lawyer.
note or a bank loan can be obtained. The motions are either weak, with the lawyer expecting them to fail, or they are highly technical.

(b) While on her way home from her job as a housekeeper, a single mother of three children is hurt by falling debris at a construction site. She suffers permanent injuries that prevent her from resuming gainful employment. She sues the construction company. Its lawyer, recognizing only weak defenses on the merits, makes procedural motions of the kind described in II(a). These will have the effect of increasing pressure on the financially desperate plaintiff to settle for a fifth of what she could reasonably expect to recover at trial.

Hypothetical II posits two situations in which lawyers, with no realistic defense on the merits, make weak or technical procedural motions in order to delay plaintiffs’ efforts to vindicate their legal rights. The lawyer in II(a) means to buy time for his client to extinguish a debt. The delay in II(b) aims to force a financially desperate plaintiff to accept a modest settlement. Assume the motions are addressed to the sufficiency of service of process. One motion alleges that service was made by someone a month under eighteen years of age. If true, service was improper, but the motion must be counted as highly technical. Another motion makes a weak assertion that the agent served with process was not one identified in applicable law.

If the Code and the Rules mean to forbid this sort of “indirect” strategy, they certainly say so obscurely. I assume they permit the motions on the posited facts. The rules that identify the minimum age of a process

15. The Model Rules forbid making the motion “unless there is a basis for doing so that is not frivolous.” Rule 3.1. The hypothetical assumes that basis. The comment to Rule 3.1 ambivalently states that the “advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also has a duty not to abuse legal procedure.” Rule 3.1 comment [1]. The same comment characterizes an action as “frivolous” if it is “taken primarily for the purpose of harassing or maliciously injuring a person. Rule 3.1 comment [2] (emphasis added). Similarly, Rule 4.4 forbids a lawyer to use “means that have no substantial purpose other than to embarrass, delay, or burden a third person.” Rule 4.4 (emphasis added). The emphasized words continue the ambivalence, as does the italicized phrase in Rule 3.2, which requires a “lawyer [to] make reasonable efforts to expedite litigation consistent with the interests of the client.” Rule 3.2 (emphasis added). Drafts of the Rules referred to “the legitimate interests of the client. See, e.g., Rule 3.2 (Proposed Final Draft 1981) (emphasis added). Restatement §166, echoing Rule 4.4, forbids a lawyer who is representing a “client in a matter before a tribunal [to] use means that have no substantial purpose other than to embarrass, delay or burden a third person . . . .”

The comment to Rule 3.2 contains the strongest, but still qualified, language forbidding the motions: “Delay should not be indulged merely for . . . the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose.” Rule 3.2 comment (emphasis added). One may ask whether making the motions is “delay” or, instead, the invocation of a right that has the effect of causing delay; and also whether the advocate’s purpose is “merely” to frustrate the opposing client’s “attempt to obtain redress” or, instead, to afford his client the “fullest benefit” of the procedural rule.
server and the agents eligible to receive service either mean what they say or they do not. If they do, then a defendant must be able to challenge service when there is reason to believe these rules were ignored. The right to challenge, furthermore, does not accrue only to those defendants who can, in good faith, demonstrate a probable defense on the merits.

Nevertheless, even if law and the governing ethical document permit the motions, does the lawyer who makes them act badly by "frustrating an opposing party's attempt to obtain rightful redress or repose?" I believe the answer may be yes. On these facts, a good lawyer may be a bad person.

Hypotheticals I and II differ in two ways. Whereas Hypothetical I addresses the propriety of inaction (silence) in accord with an express requirement of inaction, Hypothetical II addresses the propriety of taking action (making the motions) that neither the Code nor the Rules expressly require. To infer a requirement, one must argue that a lawyer may not reject an effective and permissible strategy if her only reason for doing so is that she finds the strategy morally objectionable. The duty to represent a client loyally or zealously, the argument might go, means at least as much.

I realize that this argument is syllogistically possible. Further, we could certainly create a system of legal ethics in which it is valid. Then, the lawyers in Hypothetical II, and those in Hypothetical III below, would have no choice but to exercise the discretionary authority on the client's behalf. If so, they could not be criticized for doing so, although the rules that constrained them could be criticized. However, a proponent of a "mandatory" syllogism in the current rules—i.e., one in which

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Rule 3.1 comment. The Model Code contains parallel ambiguities. See DR 2-109(A)(1), (2); DR 7-102(A)(1), (2) (1979); see also FED. R. CIV. P. 11, which states that by signing a pleading or motion a lawyer "is certifying that to the best of [the lawyer's] knowledge, information and belief, formed after an inquiry reasonable under the circumstances [the pleading or motion] is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" (emphasis added). This seems stronger.

16. Rule 3.2 comment.

17. See supra, notes 7-8, and accompanying text.

18. The Rules require a lawyer to "abide by a client's decisions concerning the objectives of representation ... and ... consult with the client as to the means by which they are to be pursued." Rule 1.2(a). At its most expansive, this language would require the lawyer to initiate the consultation about means. The comment, however, also says that "a lawyer is not required to ... employ means simply because a client may wish that the lawyer do so." Rule 1.2 comment. The comment to Rule 1.3 states that "a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2." Rule 1.3 comment [1].

A duty to make the motions is easier, though not easy, to infer from the Code. See EC 7-7, 7-8, 7-9, 7-10; DR 7-101(A).
authority plus a duty of loyalty equals a “mandatory” duty—has a serious problem. The texts of the ethics codes don’t recognize it. I am aware of no primary authority that would support its application here or in the next Hypothetical. I also know of no judicial decision that has disciplined a lawyer or imposed civil liability on a lawyer for choosing not to take a discretionary action, though it might have benefitted the client to do so, because the lawyer found the strategy morally dubious.

Consequently, a lawyer may refrain from making the motions, even if requested to do so by her client, without violating either document. Because the tactic is discretionary, the lawyer who invokes it by making the motions is as morally accountable as the client on whose behalf she acts. I do not mean to say that the lawyer who makes the motions will necessarily have acted badly, but only that she stands in no better position than her client. Whether the conduct of a lawyer and client may be criticized morally hinges on the entire factual context, including the particular circumstances of the case and the behavior of the adverse client and lawyer. It may be that the conduct in Hypothetical II(a) can be defended, while the conduct in Hypothetical II(b) cannot.

In criminal cases, especially, a lawyer will usually act morally even though he delays trial by contending for nonfrivolous procedural rights. Some such contentions succeed. New rights are recognized, or old rights are applied, to better contain prosecutorial excess or to honor a constitutional value. These rights will evolve or be enforced only if defense lawyers insist. Who else will do it? Furthermore, judges are generally less passive in criminal than in civil contests, and so better able to forestall specious delay strategies.

An objection to the argument here is that it allows a lawyer to subordinate the client’s interests to the lawyer’s view of what is right without the client’s knowledge. That, in turn, disrespects the client’s autonomy. Even if the lawyer has the identified discretion—even if the “mandatory” syllogism is not part of our legal ethics codes—doesn’t the client have a right to know at the outset, perhaps in the retainer agreement, how the lawyer will exercise the discretion? Maybe the client wanted to hire a “junkyard dog” and is instead getting a “nice guy.” This is a valid objection, which I will address after discussing the next hypothetical.

Hypothetical III

(a) Months into unpleasant divorce negotiations between the lawyer for a wealthy man and the lawyer for his wife, the wife’s lawyer suggests that the couple proceed to file the papers needed to dissolve the marriage, reserving the economic issues for later settlement or
trial. The older and more experienced lawyer for the husband knows that divorce will divest the court of jurisdiction to hear the wife's support claims, effectively ending her legal entitlement to them. She also knows that the younger lawyer's malpractice insurance cannot be more than ten or twenty percent of the wife's support claim. Can the husband's lawyer nevertheless accept the offer without warning? Can she remind the wife's lawyer of the jurisdictional bar to his plan without asking her client to consent?

(b) A lawyer who does products liability work for an appliance maker is defending a claim brought by a single practitioner, on behalf of a consumer seriously burned when using the defendant's toaster. The case is on the trial calendar. Under the jurisdiction's rules, lawyers are informed by postcard and by notice in the local legal paper 60 days before a case is likely to be called for trial. If either lawyer informs the court within 30 days that the case is ready, it is continued on the trial calendar. If neither lawyer responds, the case is presumed settled and conditionally dismissed with prejudice. However, notice of the conditional dismissal is given by postcard and publication. Either lawyer then has 15 days to restore the case to the calendar on good cause shown. If neither does, the dismissal becomes final. When after the first notice, the plaintiff's lawyer does not tell the court that the case is ready for trial, it is conditionally dismissed with prejudice. Ten days after a second notice is sent and published, the plaintiff's lawyer calls the defendant's lawyer and explains that he was across the country with a hospitalized parent when the first notice was sent. His part-time secretary failed to call it to his attention. He returned to find the first and second postcards but immediately had to leave again when his parent suffered a relapse. He remains out of town and doubts he will be able to file his motion to restore in the five remaining days. Would the defendant's lawyer agree to ten extra days? The defense lawyer would not, in these circumstances, oppose a motion to restore, but he also knows that the 15 day period is jurisdictional. He can agree, even in writing, but it won't matter. The court will not be able to restore the case to the calendar. Can he nonetheless agree and even sign a stipulation to that effect? Or can he warn the plaintiff's lawyer without informing his client or seeking its consent?

Readers who disagreed with my conclusions in Hypothetical II—who believe that the duty of zealous and loyal representation in that hypothetical would require the nonfrivolous strategies even if the ethics rules do not specifically demand it and that, therefore, a lawyer cannot be called a "bad" person for doing so—should be tested by Hypothetical III. For now, the lawyer is positioned, through silence and acquiescence, to take advantage not of an acknowledged procedural right but of another
lawyer's certain ignorance. The opposing lawyers are not making a tactical decision. They are making a mistake. It is no answer, therefore, to ask (rhetorically) whether a lawyer who receives a pleading that omits an expected defense—a defense the recipient would have included and in fact feared—should call her opponent to clarify whether she intended the omission. Lawyers in that situation are entitled to assume that the opposing lawyer may have her own reasons for proceeding as she has. We cannot know the opposing lawyer's reasons and the sensible postulates of our adversary system would become effectively inoperable if we imposed a duty to discover whether the other lawyer’s decision was strategic or a mistake.

Hypothetical III is unquestionably a different case. Here, we are certain that simple ignorance, not tactics, has dictated the opposing lawyer’s suggestion or request. There can be no tactical explanation for the request. Does a lawyer have a duty to take advantage of this ignorance for the client’s benefit, especially if the client insists, and even though, as in paragraph (a), doing so may bankrupt the wife’s lawyer and end his career? Or does the lawyer have the discretion, even the moral obligation, to warn?

Hypothetical III is an easier case for me than Hypothetical II. In both parts of it, I believe the lawyer to whom the request is made has a moral obligation to correct the opponent’s ignorance. Certainly, the ethics codes give him or her that authority. They contradict the suggestion that the decision belongs to the client and is out of the lawyer’s hands.

A series of opinions of the American Bar Association Committee on Ethics and Professional Responsibility supports this conclusion. ABA Opinion 86-1518 posited the following situation:

A and B, with the assistance of their lawyers, have negotiated a commercial contract. After deliberation with counsel, A ultimately acquiesced in the final provision insisted upon by B, previously in dispute between the parties and without which B would have refused to come to overall agreement. However, A’s lawyer discovered that the final draft of the contract typed in the office of B’s lawyer did not contain the provision which had been in dispute. The Committee has been asked to give its opinion as to the ethical duty of A’s lawyer in that circumstance.

Analyzing the question under both the Model Rules and the Code, the opinion concluded:

The Committee considers this situation to involve merely a scrivener's error, not an intentional change in position by the other party. A meeting of the minds has already occurred. The Committee concludes that
the error is appropriate for correction between the lawyers without cli-
ent consultation.\footnote{19}

ABA Opinion 92-368 addressed a lawyer’s responsibility on receipt
of an opposing lawyer’s confidential information, inadvertently sent. (I
think of this as the case of the misdirected fax.) The Committee
concluded:

A lawyer who receives materials that on their face appear to be subject
to the attorney-client privilege or otherwise confidential, under cir-
cumstances where it is clear they were not intended for the receiving
lawyer, should refrain from examining the materials, notify the send-
ing lawyer and abide the instructions of the lawyer who sent them.

The Committee rejected the argument that the “receiving lawyer has an
obligation to maximize the advantage his client will gain from careful
scrutiny of the missent materials.”

Finally, ABA Opinion 94-382 considered a lawyer’s responsibilities
when he or she “is offered or sent, by a person not authorized to offer
them, materials of an adverse party that the lawyer knows to be, or that
appear on their face to be, subject to the attorney-client privilege of an
adverse party or otherwise confidential within the meaning of Model
Rule 1.6.” The Committee rejected the proposition that, if legal, the law-
ner is ethically free to receive and use the information for the advantage
of his or her client. Instead, it concluded that the lawyer

satisfies her professional responsibilities by (a) refraining from
reviewing materials which are probably privileged or confidential, any
further than is necessary to determine how appropriately to proceed;
(b) notifying the adverse party or the party’s lawyer that the receiving
lawyer possesses such documents; (c) following the instructions of the
adverse party’s lawyer; or (d) in the case of a dispute, refraining from
using the materials until a definitive resolution of the proper disposi-
tion of the materials is obtained from a court.

The procedure suggested would afford the adverse party a reason-
able and timely opportunity to resort to judicial remedies to determine
legal rights and allow the receiving lawyer, under appropriate circum-
stances, to use relevant materials in the prosecution or defense of an
action on behalf of her client. Courts confronted with similar disputes
in the past have been able to protect an adverse party’s legal interests
adequately by granting injunctive relief restraining the disclosure or
use of trade secrets and/or privileged materials; by entering protective
orders; or by fashioning other judicial relief.

\footnote{19. In a footnote, the Committee wrote that it does “not here reach the issue of the lawyer’s
duty if the client wishes to exploit the error.”}
This sampling of authorities, coupled with the earlier analysis of the
text of the rules themselves, should dispel any conclusion that a lawyer
must exploit another lawyer's ignorance or inadvertence. Further, the
ABA opinions tell us that for certain kinds of errors, exploitation will be
impermissible even if it is not illegal.20

Now I turn to the issue I deferred above. Must the lawyer who
would feel morally impelled to exercise his or her discretion to warn in
this hypothetical, or who would decline to make the motions in the prior
hypothetical, somehow alert the client at the start of the representation,
that he or she will exercise discretion in this way? After all, if the lawyer
exercised discretion not to warn on the facts of Hypothetical III, given
the jurisdictional nature of the mistakes, the client will benefit greatly
(and even more so than in Hypothetical II) once we assume, as I think we
must for purposes of our inquiry, that the court will not find a way
around the jurisdictional bar.

I used the word "somehow" in the prior paragraph because a thresh-
old question is how to formulate the disclosure a lawyer might give if
obligated to do so. One cannot anticipate all situations that may arise in
which the lawyer would exercise discretion to warn or to do (or refrain
from doing) a similar act that the lawyer believed to be morally neces-
sary. In Hypothetical III, for example, neither circumstance would be
predictable. So any warning would have to be generic, rather than spe-
cific, or generic as well as specific in the event that a specific issue were
apparent even at the start of the representation (as it might be in Hypo-
thetical II).

It is hard to argue against disclosure to clients to whom lawyers owe
fiduciary duties. Nor do I. So it is easy to say that a lawyer should tell a
client, if she will not make particular technical motions or pursue delay
when, at the time of retainer, these appear to be possible strategies in
which the lawyer will not engage on the facts of the matter. But what if
they don't appear as possible strategies? Should lawyers nevertheless be
required to tell clients how they approach the discretionary choices that
ethics rules and fiduciary duty law grant them? I don't believe that they

20. I recognize that the ABA Opinions do not directly support my argument for moral
responsibility to the extent that they mandate the particular conduct. It is only if the lawyer has
discretion can we ordinarily debate a moral duty. The extent to which the ABA Opinions quoted
here obligate, rather than authorize, the lawyer to behave in a particular way, is not entirely clear.
To the extent that they provide authority only and suggest how the lawyer should behave, rather than
how the lawyer must or must not behave, they create the conditions for moral autonomy and
responsibility. Further, even if an ethics opinion mandates conduct, students of legal ethics may
disagree with the opinion but nevertheless conclude that the conduct is permissible and morally
required.
should be required to do so as a general rule. Certainly, that is not required under today's codes. On the other hand, it makes good sense to have a conversation about such things with a new client. A conversation is more useful than boilerplate language in a retainer agreement. The specificity will depend on the context. This observation is part of a broader view that lawyers should, at the start of a litigation, negotiation, or other matter, talk to clients about how they practice in general and, more specifically, how they plan to conduct the client's particular representation. (Need for conversation would be underscored where a lawyer infers contrary client expectations.)

A tangential issue should be addressed before moving to the final hypothetical. What happens when a lawyer who weighs the morality of discretionary choices meets an adversary who does not? Isn't the client of the former lawyer disadvantaged? No, because the former lawyer is free to evaluate the opposing lawyer's practice (in the current matter or previously) when making the moral judgment. It may well be that the opponent's style will force a race to the cellar. On the other hand, that may only be necessary in dealing with the particular opponent. If there are other lawyers in the same matter, they should be able to behave differently toward each other than they are forced to behave toward the lawyer for whom the only consideration in exercising discretion is his client's (seeming) advantage. That lawyer is then isolated and the paradoxical result is that his client is likely to be worse off than if the lawyer had had a different attitude.21

Hypothetical IV

(a) A lawyer has grown wealthy representing defendants in major drug-importation cases. The defendants have no visible means of support, pay the lawyer large sums in cash, and have occasionally acknowledged their guilt. Many of the lawyer's clients are the same year after year. The lawyer scrupulously observes all of her obligations under the governing ethical document. Her effectiveness as an advocate before juries has resulted in a high acquittal rate.

(b) An American pharmaceutical company manufactures a drug that may not be sold in the United States except by prescription and when accompanied by extensive warnings. The company wants to export excess quantities of the drug to underdeveloped nations that lack prescription and warning requirements. Labels on the exported drugs will contain no cautionary language. An American lawyer

21. Some lawyers have told me that in their experience certain kinds of problems can usually be resolved in a frank conversation with the other lawyer, early in the representation, in which any offensive conduct is referenced and the opponent is asked how he or she wishes to proceed for the balance of the matter.
assists the company by (i) bringing an action to declare invalid a govern-ment effort to block shipment of the drug; (ii) defending an injunc-tive action brought by an advocacy health law office that wishes to stop the client from exporting the drug; or (iii) preparing the legal documents required to effect export of the drug.\textsuperscript{22}

These examples switch to the morality of a lawyer's conduct as judged solely by the clients' goals, not the lawyer's means. Assume that the lawyer in Hypothetical IV(a) knows that her clients earn their livelihood through large-scale drug trafficking and knows, too, that her legal assistance, though scrupulously ethical, has the effect of enabling them to continue to do so. Alternatively, in Hypothetical IV(b), we have a lawyer who assists a company wishing to export pharmaceuticals to underdeveloped countries for over-the-counter sale. The product may not be sold in the United States except by prescription, accompanied by warnings that will not appear on the exported drugs.

If we apply the discretionary test used earlier, both lawyers will be morally accountable because each has freely accepted the particular representation. In this view, only if the lawyer had been assigned by a court or was "the last lawyer in town" could he or she escape moral responsibility. Yet I do not believe an unqualified discretionary test for moral accountability is appropriate when ends and not means are evaluated. A different calculus is needed.

Criminal matters are a special case. There are many systems for determining legal guilt. Our society has fashioned one that presupposes a precisely defined role for the criminal defense lawyer.\textsuperscript{23} Judgments about the defense lawyer's morality must be strictly circumscribed by the premises of the system and the role the lawyer plays within it. These tell us that the defense lawyer does not defend her client's criminal activ-

\textsuperscript{22} Hypothetical IV(b) embellishes on the testimony of Dr. Leslie Lueck of the Parke-Davis Company, given before the Senate Small Business Committee on November 29, 1967. Evidence at the time suggested that the company's antibiotic Chloromycetin may have been responsible for several hundred deaths. Dr. Lueck testified that the Food and Drug Administration was justified in requiring that medical journal advertisements for the drug contain extensive warnings. A senator then asked a surprised Dr. Lueck why no such warnings appeared in British advertisements for the drug. Dr. Lueck's counsel, Lloyd N. Cutler, interjected that the British advertisement "meets all of what [the British] consider to be appropriate requirements." \textsc{Philip Stern}, \textsc{Lawyers on Trial} 146-48 (1980).

\textsuperscript{23} The Model Rules recognize that role. \textit{See} Rule 3.1, Rule 3.3 comment; \textit{see also} ABA Standards for Criminal Justice 4-1.1 (2d ed. 1980). In the textual discussion that follows, I do not mean to suggest that all parts of our system for determining criminal guilt or civil liabilities and rights are beyond moral criticism. The law prior to \textit{Gideon v. Wainwright}, 372 U.S. 335 (1963), which denied an indigent accused felon a constitutional right to counsel, was morally indefensible. My focus is the morality of the lawyer working within an essentially just system, not the morality of each component of the system itself.
ity. Rather, she defends the client against the charge of criminal activity. Although there may be a causal relationship in fact between the lawyer's aid and the success of an ongoing criminal enterprise, no causal relationship can exist in moral reasoning because the lawyer is fulfilling a public assignment, which we have plausibly assumed to be socially beneficial across the run of cases regardless of the consequence in any single case. Where a lawyer provides aid in observance of this assignment, there must be a break in the chain of moral responsibility.

Our system aims for the greatest number of accurate convictions, while avoiding inaccurate ones and protecting other values, some of them more cherished than convicting the guilty. We feel so strongly about these matters, and about the inability of the system to perform without the defense lawyer's presence, that our Constitution guarantees free counsel to indigent criminal defendants but to almost no one else. Not even in the most routine cases do we rely on the prosecutor to safeguard defendants' rights. The criminal defense lawyer monitors the government while it pursues those it most eagerly wants to convict. The more outrageous the alleged crime, the greater may be the state's temptation to ignore rights, and so the greater the need for the defense lawyer's special knowledge. Prosecutorial excesses are hardly unknown.

Unless lawyers represent clients like those in Hypothetical IV(a), we would be unable to perform one of society's most central functions—adjudicating guilt—in the manner we have chosen to do so. We afford defense counsel immunity from moral criticism so that our system will work as we conceived it. The lawyer is not free of moral accountability; the lawyer-in-the-system is.

Hypothetical IV(b) concerns civil representation. The lawyer is either bringing or defending a civil action, whose subject is the legality of the client's intention to ship potentially harmful drugs to underdeveloped nations, or he is helping the client with the legal paperwork required to effect the shipment. Assuming the client can be faulted for its

24. I exclude cases where the lawyer contends that the conduct is constitutionally protected.
26. See, e.g., Lassiter v. Dep't. of Soc. Services, 452 U.S. 18 (1981) (no automatic right to appointed counsel where hearing can lead to termination of parental rights and not to deprivation of physical liberty); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (no automatic right to appointed counsel at probation revocation proceedings).
27. The Supreme Court has acknowledged the risks. See, e.g., Thigpen v. Roberts, 468 U.S. 27 (1984) (presumption of vindictiveness if a defendant is charged with a more serious crime after exercising his right to a trial de novo). See also United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993) (faulting lack of candor in jury summation of United States Attorney's Office) (Kozinski, J.).
conduct, can the lawyer be faulted too? I answer "no" where the assistance is in connection with a litigation, "yes" where it is not.

As plaintiff, the client has gone to court in order to overcome an otherwise insurmountable obstacle to its goal—government interference. As defendant, the client must go to court in order to avoid an equivalent obstacle—a judicial injunction. In either case, the sole question for the court, and a threshold question for the client, is whether the company may legally ship the drugs. Only courts may adjudicate the client's legal rights and (for practical or legal reasons) a lawyer must shepherd the client through the courts. The lawyer's specific institutional assignment is to secure the client's alleged right to ship the drugs, not to help it ship them. Lawyers are appurtenant to the rights-adjudicating apparatus we've adopted to resolve civil disputes.

When lawyers act within the rights-adjudicating apparatus (and putting aside the discretionary means they employ), its cloak of legitimacy should insulate them against charges of immorality based on a client's ends. As with the criminal system, the civil lawyer enjoys immunity from moral criticism because she works within a structure for determining rights, and not simply because she is a lawyer.

Why should this be so in civil cases? In the criminal context, the adversary system insulates the lawyer from criticism because of the social need for the system and the lawyer's essential position in it. Since there may not be the same pressing need to adjudicate civil entitlements as there is to adjudicate criminal responsibility, one might ask why the rights-adjudicating apparatus should dispense a parallel immunity. Without trying to calibrate comparative social needs, I see a strong, although not as self-evident, public interest in full utilization of the rights-adjudicating apparatus such that lawyers should be protected from moral criticism for taking a particular claim through it regardless of the moral culpability of the client.

Uninhibited utilization of the rights-adjudicating apparatus will shrink uncertainty and clarify options by stimulating fuller elaboration of rights and duties both generally and in particular. Generally, the drug export litigation may develop or amplify legal principles of import to other cases and contexts. Our law grows through controversy. Indifferent to the contestants, it thrives on their contests. Particularly, the litigation will likely have one of three outcomes. The drug company may lose, in which case it may be established that the law does not permit the export of drugs for sale elsewhere in ways prohibited here. Or the drug company may win, in which case we will be told why, and may choose to alter one or more of the legal principles in the court's sequence of rea-
soning. Or the drug company may have a partial victory, entitling it to make the shipment, perhaps, but under conditions that avert the moral quandary. If the company then proceeds, we will have encouraged commerce and made a presumably beneficial drug available to others without ethical compromise.

Civil litigation affords three other benefits that strengthen the argument for granting lawyers immunity from moral criticism for their clients' goals. First, litigation is a form of public education, an information window. Though this benefit is incidental, it will occasionally prove valuable. In the drug export case, for example, discovery and trial may lead to publicity about the international workings of domestic pharmaceutical companies. Second, litigation accompanied by compulsory process may unearth new facts, or new contexts within which to place known facts. These in turn can change our assessment of the moral issues. We may learn, for example, that the domestic prescription and warning requirements were imposed improperly or were based on fallacious experiments, or that experience with the drug since the requirements were imposed render their continuation ill-advised. Third, even if no new fact is discovered or disclosed, new or overlooked moral insights may be revealed in the public debate surrounding the litigation. Further, since law has moral force, the moral context may be altered by the judge's explanation of the applicable legal rules and the reasons for them. Moral lessons from the public debate and the judge's opinion may cause the drug company or its opponents to reexamine their positions.

Some of these arguments in support of the value of civil litigation derive from one antecedent proposition: the moral, factual, legal, and contextual perceptions of a dispute can change as the dispute moves through the courts. Litigation may color these perceptions either by bringing us new information or encouraging us to view known information differently. Of course, it may not do any of these things. It is the capacity of litigation as an inquiring process to reveal factual, moral, legal, and contextual truths, not the certainty that it will, that provides its value.


29. James Boyd White writes that:
in the law, our language of facts and law is constantly being tested against the real world, against common sentiment, against cases and argument, and remade in light of what is discovered. This means that the law is a way in which the community defines itself, not once and for all, but over and over, and in the process it educates itself about its own
In Hypothetical IV(b)(iii), the lawyer, by preparing the legal documents necessary to effect export of the client’s drug, helps the client implement its rights, not define them. His work is done outside the rights-adjudicating apparatus. Though no longer part of an immunizing structure, can he claim equivalent protection by virtue of his calling? I think not. On his own, the lawyer is as morally vulnerable as any agent who provides a skill or product essential to the client’s purpose. There is no longer a strong social benefit that presses us to afford the lawyer an immunity denied others. If the drug company can be criticized for its contemplated shipment, so can its agents, including the lawyer. This means that clients may find their lawful purposes impeded for lack of legal help, or that a lawyer who helps a client lawfully attain a legal objective may nevertheless be charged with the immorality of the objective.

But should we recognize a difference between legal agents and others, like suppliers and shippers, such that even in Hypothetical IV(b)(iii) the lawyer ought to be immune to criticism. A lawyer helps a client meet an obstacle that our political and legal institutions have imposed (e.g. obtaining export documents), the argument might run, while other agents merely help the client overcome practical obstacles. The manufacturer of military hardware whose customers are brutal dictators needs suppliers of raw materials. It also needs a shipping company. Where we have created a legal obstacle to achieving a goal, the argument might run, we are obliged as a society to promote means to remove it, while we have no obligation with regard to practical impediments. Lawyers, therefore, should be encouraged to accept clients with repugnant goals, though we do not similarly encourage other agents to do so. And if in order to honor our social obligation we want lawyers to accept these clients, then we cannot criticize them for doing so.

This argument would give all legal representation the same immunity-granting power afforded by the criminal adversary system and civil litigation. A lawyer is insulated from criticism for goals he pursues through civil and criminal contests because these contests yield significant social benefits. Lawyers are not immune simply because they are lawyers. But should they be?

character and the nature of the world. The limits of our minds and imaginations are reached and tested, and a new step taken. This is what the law is about.


30. Professor Fried seems to make this argument in Fried, supra note 1, at 1072-73.
I think not. The effort to extend the immunity should fail for two reasons. First, a distinction between lawyers and other agents, based on the kinds of obstacles each helps a client overcome, is weak. While lawyers sometimes remove legally imposed obstacles, sometimes they do not. Negotiating and drafting a contract, for example, or conducting a title search, may be services a client desires or needs in order to achieve a goal—and so obstacles to it—but like the shipper’s and the supplier’s services, they are obstacles usually inherent in the nature of the client’s purpose. They are not legally imposed preconditions to the client’s objective. Conversely, some legally imposed preconditions can be performed only by nonlegal agents—for example, a requirement that an accountant certify financial statements in connection with a stock offering. The legal and nonlegal categories are thus more fluid than might first appear.

Second, and more important, it does not follow that because society has chosen to create a legal obstacle to the accomplishment of a goal, it is obliged to encourage lawyers to be available to help remove the obstacle. The requirement of a prospectus containing designated information is a legal obstacle to the goal of issuing stock. Its office is to inform investors. If a company proposed to issue stock for a morally repulsive business—e.g., the sale of magazines with nonobscene photographs of people in sexually degrading positions—and lawyers declined to assist it for that reason, the company might fail, but it would fail because of moral objection to its business and not because of moral objection to the required legal service. The reason for requiring the legal service and the reason to decline legal assistance are unrelated. Unlike a lawsuit that establishes the same magazine’s right to publish, preparation of a prospectus does not advance the social values that are incident to litigation and so society need not bestow it with immunity-granting status.

We would have a different situation if lawyers refused to perform a legally essential service because the service itself was morally problematic. Examples might be cross-examination of a truthful rape victim intended to convey the impression that she invented, imagined, or consented, or the forceful defense of a serial murderer, in each instance assuming that there is factual warrant to challenge the witness’ credibility or the proof of the defendant’s guilt. When society creates a legal need for a morally questionable service, it should be required to immunize lawyers so they are not hesitant to provide it. But in the magazine hypothetical, the lawyer does not decline to aid the client because preparation of a prospectus is a service that presents moral issues. He declines because of the client’s goal. As such, the lawyer is in a position no differ-
ent from the retailer who will not sell the magazine, or the writer who will not accept its assignment. Each declines otherwise neutral assistance because of the company's immoral end and not because of the nature of its need.\textsuperscript{31}

CONCLUSION

"Moral reasoning," writes Robert Condlin, "aims at a certain universality; it attempts to discover and appeal to norms that are binding on all agents, in all situations."\textsuperscript{32} He quotes Hannah Arendt's wise counsel that in order to reach this goal we must be able to "think . . . from the standpoint of somebody else."\textsuperscript{33} Lawyers, by contrast, are constrained to regard a single "standpoint"—their clients'. In the much-quoted declaration of Lord Brougham: "[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."\textsuperscript{34} In case there should remain any doubt, Lord Brougham immediately added that the "hazards and costs to other persons" are no concern of the lawyer, who "must not regard the alarm, the tortments, the destruction which he may bring upon others. . . . [H]e must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion."\textsuperscript{35}

Here then is the dilemma. If moral value in the behavior of others, including clients, and lawyers when they are not acting for clients, requires willingness to "think . . . from the standpoint of somebody else," do lawyers as agents act morally when by design, not accident, they are blind to those standpoints? I have offered one, not definitive, answer: sometimes. Certainly not always. And not automatically.

\textsuperscript{31} I do not pretend that my hypotheticals describe all cases. A hard case is presented by a lawyer who is asked to enforce a claim for a money judgment where a knowledgeable plaintiff, say a door-to-door computer salesman, took apparent oppressive advantage of unworldly defendants, say a poor working couple with children. The law may not at the moment recognize the salesman's conduct as a defense. I have argued that the lawyer cannot be criticized for bringing the case, which may educate the public and spur appellate courts or the legislature to change the law. Also, the facts or context may turn out differently than they first appeared. But even if the lawyer is not morally accountable for bringing the case, does she also escape responsibility if the plaintiff wins and the lawyer enforces the judgment? Enforcing the judgment may be seen as akin to assistance with the paperwork in Hypothetical IV(b)(iii). Alone, it carries no special social benefit that should cause us to afford moral immunity. But it may enjoy a spillover immunity from the litigation. If the reasons to encourage litigation are valid, then the judgment must be enforced or the plaintiff will have no motive to bring the case in the first place.

\textsuperscript{32} See The Good Lawyer,\textit{ supra} note *, at 326.

\textsuperscript{33} Hannah Arendt, Eichmann in Jerusalem 49 (1963).

\textsuperscript{34} 2 Trial of Queen Caroline 8 (J. Nightingale ed. 1821).

\textsuperscript{35} Id.