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Legal Ethics Advisors and the Interests of Justice: Is an Ethics Advisor a Conscience or a Co-Conspirator?

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LEGAL ETHICS ADVISORS AND THE INTERESTS OF JUSTICE: IS AN ETHICS ADVISOR A CONSCIENCE OR A CO-CONSPIRATOR?

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INTRODUCTION

In her alluring and alliterative new book,[1] Deborah Rhode makes the point several times that many lawyers are far too quick to follow the instructions of their clients or to facilitate their clients' objectives without reflecting on whether those instructions or objectives serve the interests of justice. Professor Rhode acknowledges a client's right to control a lawyer in *some* situations, but she sharply challenges a client's right to control a lawyer in *all* situations. "[T]he choices that clients make are not always ones that attorneys should assist," she says. "Lawyers also have a right and a responsibility to determine whether their support is ethically justifiable."[2] Professor Rhode also criticizes lawyers for their passivity—one might even say complicity—in the face of client decisions and goals that are amoral, immoral, or even destructive. For example, at various points in her book, she says:

> Defenders of neutral partisanship typically respond that protection of client rights is ethically justifiable . . . because individual liberty and autonomy are of paramount value in a free society.[3]
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> Lawyers can, and should, act on the basis of their own principled convictions, even when they recognize that others could in good faith hold different views.[4]
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> [A]ttorneys often claim that they lack the formal structure of accountability that would justify passing judgment. For lawyers to impose their moral views on clients threatens the legitimacy of a system committed at least in principle to equal access to justice. The

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1. Deborah L. Rhode, In the Interests of Justice (2000). I hope Professor Rhode will not mind if, out of genuine admiration for her semantic skills, I occasionally try my own hand at some alliteration in this essay.

2. *Id.* at 72.

3. *Id.* at 57.

4. *Id.* at 58.

> merits of a client's cause should be determined by judges or juries with due process safeguards, not by individual attorneys with no procedural protections. Yet as a practical matter, the vast majority of legal representation lacks such safeguards. Little of lawyers' transactional, counseling, or even litigation-related work, ever reaches a judge or jury. In many legal contexts, if lawyers decline to pass judgment, no one else will be available to do so. When mechanisms of formal institutional accountability are absent, the need for informal, internalized standards of moral accountability becomes particularly compelling.[5]

In this short paper, I cannot explore the full range of lawyer-client interactions. Nor can I develop a comprehensive theory, or a comprehensive set of rules, to tell lawyers when to follow, and when to resist, client instructions. I can, however, examine some aspects of attorney-client relations in my small corner of the world, where I often function as an ethics advisor to lawyers and law firms. My premise, which I believe Deborah Rhode would endorse, is that ethics advisors have an obligation, both to their clients and to the legal profession, to provide honest, straightforward answers to inquiries concerning ethical conduct. Anything less would be unethical. "Dishonest ethics advice" is a pure oxymoron, and has no place in the legal profession.

I. LEGAL ETHICS ADVISORS HAVE GREAT INFLUENCE ON THEIR CLIENTS

The first observation I want to make is that legal ethics advisors have enormous influence on their clients. When a lawyer asks an ethics advisor whether a proposed course of professional conduct is legally permissible, the lawyer will usually follow the ethics advisor's answer. Attorneys realize that if they ignore ethics advice and engage in conduct that is later determined to be unethical, they would have much to lose in terms of money, reputation, and psychological comfort. Unethical conduct can result in professional discipline, court-ordered sanctions, disqualification, negative publicity, loss of clients, disgorgement of fees, anxiety, self-doubt, malpractice suits, suits for breach of fiduciary duty, and other awful consequences.

Even when a client would incur some economic cost (at least in the short run) by following an ethics advisor's recommendation—for example, if the ethics advisor tells the law firm to turn down a case, pass up a potentially profitable business transaction with its client, or modify a proposed lucrative (but unethical) fee agreement—the client is still likely to follow the advice (though perhaps not without an argument). Most lawyers who take the initiative to call another lawyer for ethics advice take the Code of Professional Responsibility

5. *Id.* at 68-69.

or the Rules of Professional Conduct very seriously. (Of course, I cannot speak for attorneys who do not call anyone for ethics advice.) Money is important to attorneys, but a good reputation (and avoiding a disciplinary hassle, a disqualification motion, a legal malpractice suit, and other nightmares) is usually even more important to them.

Even if money were the most important goal (something few attorneys will admit), attorneys are still likely to listen to ethics advice, if only to preserve their financial health. The ultimate sanction—disbarment—can cost an attorney literally millions of dollars that could have been earned over the course of a career. A one-year (or longer) suspension may cost hundreds of thousands of dollars in lost income during the attorney's absence from practice, and even a short suspension may significantly lower the attorney's ability to attract clients or to command high fees when the attorney is reinstated. And, prevailing before the disciplinary authorities (or persuading them to impose only a minor sanction, such as a reprimand) may cost thousands of dollars in defense costs—not to mention mental distraction, lost time at the office, and diminished credibility with clients and colleagues. (If I ever needed to call on my own legal malpractice policy, my insurer would pay only a modest, limited sum for defense costs in disciplinary matters.)

II. CLIENTS WANT HONEST ADVICE

A second observation I want to make is that lawyers who ask for ethics advice usually want honest advice. When a lawyer calls an ethics consultant to ask a question like "Can we take this case?," "Can we enter into this business transaction with a client?," or "Can we use this fee agreement?," the lawyer generally wants an honest, objective answer, not just a knee-jerk "yes." (I wish I could say that lawyers always want honest advice, but that would be overstating the case. Human nature sometimes prefers affirmation over accuracy.[6])

Lawyers generally want honest ethics advice, because following honest ethics advice is the best way to avoid trouble. Ethics advice is, in part, an assessment of the risks that the lawyer and the firm would be taking by engaging in a certain course of conduct. (Here, I say, "and the firm," because, in New York, where I live, the Disciplinary Rules provide for professional discipline of law firms, and not just individual lawyers.[7] Even apart from formal rules imposing law firm

6. Similar sentiments are reflected in the comments to Rule 1.6 of the ABA Model Rules of Professional Conduct, which state: "Based upon experience, lawyers know that *almost* all clients follow the advice given, and the law is upheld." Model Rules of Prof'l Conduct R. 1.6 cmt. ¶ 3 (2000) (emphasis added).

7. *See, e.g.*, N.Y. Code of Prof'l Responsibility DR 1-102(A) (2001) (codified at N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.3(a) (2001)) ("A lawyer or law firm shall not . . . ."); DR 1-104(A) (codified at § 1200.5(a)) ("A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules."); DR

discipline, however, the entire law firm is also at risk of suffering damage to its reputation when one of its lawyers commits an unethical act. When an individual lawyer is disqualified or disciplined, the name of the lawyer's firm usually gets into the newspaper as well, and certainly works its way into the "rumor mill.") Specifically, lawyers who act unethically risk disqualification, damages, discipline, and disgrace. If ethics advice ignores or underestimates these risks, the incorrect advice is eventually likely to lead to an accident (and, as I tell my students, one ethics accident, like one car accident, can ruin your whole life). Lawyers who take the time and trouble to call for ethics advice don't want to have an accident. (Lawyers who don't call for ethics advice don't want to have accidents, either, but those lawyers sometimes remind me of bad drivers. They say they don't want to have an accident, but then they don't follow the rules of the road that are designed to prevent accidents.)

These observations ring even truer when the person seeking ethics advice from an outside legal ethics advisor is the law firm's own in-house ethics partner—the lawyer who serves, formally or informally, as the conscience of the firm. An ethics partner's primary goal is to protect and advance the interests of the law firm as a whole. The ethics partner expects the outside ethics advisor to share that goal. That goal can be achieved only if the outside ethics advisor gives honest, objective advice. The in-house ethics partner may have reached a tentative conclusion as to whether the conduct in question is ethical or unethical, but the ethics partner nevertheless wants the ethics advisor's advice, not just his or her blind agreement to the partner's conclusion. If the in-house ethics partner is taking an overly cautious approach in a particular situation (i.e., he has tentatively decided to say "no" to a given course of conduct suggested by his or her partners), the partner will be glad to hear from the outside legal ethics advisor that the correct answer is "yes." (Of course, a "yes" answer often comes with conditions, such as obtaining the client's informed consent, or building an ethics wall around certain lawyers in the firm.) If the in-house ethics partner is being too aggressive in a particular situation (tentatively approving conduct that may be forbidden, or conduct that poses serious risks, without fully analyzing the situation), the partner will usually be glad to hear that the correct answer is "no."

III. INITIALLY, IT'S BETTER NOT TO KNOW WHAT THE CLIENT THINKS

That brings me to my next point. An outside ethics advisor will give better advice if, at the outset of the conversation with a client, the

5-105(E) (codified at § 1200.24(e)) ("[T]he firm, as well as the individual lawyer, shall also be responsible for the violation . . . .").

ethics advisor does not know what that client thinks the answer is. One of the most profound statements in Deborah Rhode's book is: "As social science research indicates, assigning individuals to defend a position greatly increases the likelihood that they will come to believe in it."[8] As a corollary, I would expect social science research to indicate that when a client starts out by telling an ethics advisor what he or she thinks the correct answer is, it greatly increases the likelihood that the ethics advisor will come to believe the same thing. Ethics advisors should try to avoid this psychological pressure. After a client states a problem, therefore, a good approach for an ethics advisor is to interrupt the client to say: "Before you tell me what you think the answer is, I want to think this through myself, so let me ask some questions." The ethics advisor can then develop the entire background and reach at least a tentative answer, without being unduly influenced by the client's own thinking.

Naturally, the ethics advisor will eventually need the client's full input to gain a complete understanding of the proposed course of conduct and to render accurate advice. The client's views on the issue presented will form part of the entire background on which the ethics advisor will depend in giving advice on the situation. But, a client who tries to "tilt" the ethics advisor's advice in one direction or another takes on a significant risk of getting advice that is not truly independent of the client's interests. An ethics advisor should therefore resist a client's efforts to steer the advisor toward a particular conclusion. For example, the ethics advisor should say:

> If you want my best advice, tell me the whole situation before you tell me what you think, and I'll give you my best independent judgment. Then we can discuss whether you think I am right or wrong. But don't tell me your tentative conclusion until I tell you mine. If my tentative conclusion agrees with yours, then we're probably both right. If we disagree, we'll try to figure out why.

IV. ETHICS ADVISORS MUST PUT ASIDE THEIR OWN ECONOMIC AND PSYCHOLOGICAL INTERESTS

My next point, which is simply an elaboration on the general rule governing lawyers' personal conflicts, is that ethics advisors must put aside their own economic and psychological interests that might otherwise distort their advice. On the psychological side, ethics advisors must resist the temptation to replace honesty with harmony. Agreeing with a client is always tempting, because it makes conversations about ethics a lot easier. When Rodney King said, "Can't we all just get along?," he was expressing not only a yearning for utopia, but also the pain and discomfort of conflict. (As I write

8. Rhode, *supra* note 1, at 70.

this, America is at war in Afghanistan, and the tension of that conflict is constantly unsettling, even though I am not directly involved. It is hard to achieve inner peace when there is outer war.) Ethics advisors inevitably have to live with a certain amount of conflict, because no client is always right, and no client is always going to agree.

On the economic side, ethics advisors must be especially on guard against the distorting influence of their own financial interests. When a client asks, "Can we do this?," an ethics advisor can usually make a lot more money by saying "yes" than by saying "no." This is true not only because lawyers tend to like an ethics advisor who approves their plans rather than condemning them (and will therefore call for advice more often), but also because a "yes" answer is far more likely to result in follow-up work, including a request for an opinion letter. (When an ethics advisor concludes that a proposed course of conduct is unethical, the client seldom wants an opinion letter memorializing the negative advice. A client who abandons conduct that the advisor deems unethical doesn't need a letter, and a client who decides to go forward with unethical conduct against an ethics advisor's recommendation doesn't want a letter.) Opinion letters, even relatively simple ones, take time, and time is money. Moreover, if a law firm goes forward with conduct that has already raised some ethical issues (e.g., representing multiple clients in the same matter, entering into a novel fee arrangement, or forming a strategic alliance with a non-lawyer), additional ethical issues are likely to crop up down the road as the engagement unfolds. This will translate into more work for the ethics advisor. Killing a project, on the other hand, also kills the prospects that the client will call on the ethics advisor to deal with future ethical issues arising out of the same project.

An ethics advisor therefore has to be doubly careful not to say "yes" too readily to a client's proposed course of conduct. The ethics advisor's own financial and psychological interest is to say "yes" so that the ethics advisor can get along well with the client and generate lots of follow-up work on projects that will require not only an initial opinion letter explaining why they are ethical, but also a lot of follow-up calls as the projects or representations take shape. In short, an ethics advisor has to fight the financial and psychological temptation to become a "yes man." Becoming a "yes man" is bad for the client, bad for the ethics advisor, and bad for the legal profession.

V. ETHICS ADVISORS MUST SEPARATE LEGAL FROM NON-LEGAL ADVICE

At the same time, an ethics advisor also has to resist the temptation to say "no" too readily to a client's proposed course of conduct. Most of the ethics advisors I know have a high regard—I might even say reverence—for the legal profession, and the profession's vital role in a society based on the rule of law. Sometimes lawyers want to do things

that ethics advisors, for non-legal reasons, would not want to do themselves. An ethics advisor may think that something is a bad idea, won't work, or will move the legal profession in the wrong direction. But, I think it's wrong for an ethics advisor to say "no" to a lawyer's proposal without distinguishing between business reasons, moral reasons, personal reasons, and legal reasons. When a law firm calls an ethics advisor to find out if it can ethically enter into a particular fee arrangement, accept a certain matter, or print a certain advertisement, the law firm's first and main question is: "Is this ethical; will this proposed conduct violate any disciplinary rules or rules of professional conduct?"

Most law firms will also want to know, at some point, if an ethics advisor thinks that a proposed course of conduct is a bad idea based on business, social, or moral concerns, and an ethics advisor ought to convey those concerns whether the client asks about them or not.[9] But the first thing clients will want to know is whether a suggested course of conduct is legally acceptable—that is, whether the course of conduct will comply with all the ethics rules. If the proposed conduct is ethical, then the ultimate judgment about whether to carry out the proposal is for the client.[10] An ethics advisor's primary job is to

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9. My formulation is consistent with EC 7-8 of the New York Code of Professional Responsibility, which says, in part:

> A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer *ought* to initiate this decision-making process if the client does not do so. Advice of a lawyer to the client need not be confined to purely legal considerations.... A lawyer *should* bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer's objective viewpoint. In assisting the client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.

EC 7-8 (emphasis added).

EC 7-8 takes a somewhat stronger stance than Rule 2.1 of the ABA Model Rules of Professional Conduct, which says, in part: "In rendering advice, a lawyer *may* refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." R. 2.1 (emphasis added). However, when a client pays for ethics advice by the hour, an ethics advisor should clearly identify non-legal concerns for what they are. Although I agree with EC 7-8 that an ethics advisor not only may, but ought to, raise those non-legal concerns with the client, clients are not obligated to listen to non-legal advice if they don't want to hear it. On the other hand, if a client does not want to hear about non-legal concerns, but the ethics advisor feels strongly that the client ought to hear them, then the ethics advisor should offer to give the non-legal advice without charging for it, or should consider resigning from the role of advisor.

10. This is echoed in EC 7-8 of the New York Code of Professional Responsibility, which provides, in part: "In the final analysis... the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for the lawyer." EC 7-8. It is also consistent with Rule 1.2(a) of the ABA Model Rules of Professional Conduct, which says, in part: "A lawyer shall abide by a client's decisions concerning the objectives of representation...." R 1.2(a). Finally, it is consistent with EC 7-7 of the New York Code of Professional Responsibility, which provides:

analyze the ethical aspects of a situation based on the law. Ethics advisors have no right to veto ideas of their clients based on business or moral grounds, while pretending that the advice is based strictly on the law. Ethics advisors have no right to say, "You aren't allowed to do it," based solely on their own sense of "true North," their own sense of the public interest, or their own moral values, while passing off that judgment as pure and authentic legal advice. Ethics advisors not only must give honest and candid advice, but also must be honest and candid about the basis for that advice. If the real answer is, "Legally you can probably do it, but I think it's bad for the legal profession," an ethics advisor must make that clear. An ethics advisor can't just say, "It's unethical," when he or she really means, "It will damage public confidence in the legal profession," or "Personally, I think it stinks."

On the other hand, even if a proposed course of conduct is ethical under the law, an ethics advisor is always free to say, "I will not help you carry out this project," or "I will not write a letter saying that your proposed course of conduct is ethical, unless I can also write why I think you should not do it for other reasons." The last sentence of EC 7-8 of the New York Code of Professional Responsibility eloquently expresses this idea as follows: "In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment."[11] Giving honest advice, however, means honestly stating the basis for the advice as well as the bottom-line conclusion. Sometimes it is difficult to determine the precise basis for ethics advice, especially when a strong "gut instinct" about a given transaction precedes careful analysis. Nevertheless, an ethics advisor owes it to the client to sort out the legal concerns from the non-legal concerns, and to make it clear whether the proposed course of conduct is illegal (i.e., it violates the ethics rules) or is just ill-advised (i.e., it is morally or socially repugnant).

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer.

EC 7-7.

11. EC 7-8. The quoted language from EC 7-8 is very close to the language of DR 2-110(C)(1)(e), and is generally in harmony with Rule 1.16(b)(3) of the ABA Model Rules of Professional Conduct, which provides that "a lawyer may withdraw from representing a client," if the client "insists upon pursuing an objective that the lawyer considers repugnant or imprudent." R. 1.16(b)(3).

VI. SOME SUGGESTIONS FOR ETHICS ADVISORS ON RENDERING QUALITY ADVICE

Of course, the law governing lawyers is often less than crystal clear on the ethical nature of a certain transaction. As Professor Anthony Amsterdam reportedly once said, "The Code of Professional Responsibility gives as much guidance to a lawyer as a valentine gives to a heart surgeon." On many questions, no definitive answer is available from the case law or from ethics opinions, and the most an ethics advisor can do is assess the risks that may accompany a given course of conduct. In those situations, the ethics advisor cannot say, "This is definitely ethical," or "This is definitely unethical." Instead, the ethics advisor can, at best, say something like the following: "The authorities go both ways on this. The odds strike me as three-to-one that a court would rule in your favor if the opposing lawyer brought a motion challenging your conduct"; or, "A few ethics opinions from other states are on point, but none from our jurisdiction. My best guess is that disciplinary authorities would respect the out-of-state opinions, so I think you can do what you propose."[12]

At this point, the client's own desires take center stage. I said earlier that an ethics advisor should not solicit the client's own answer to the question of whether the suggested course of conduct is ethical until the ethics advisor has worked through his or her own answer. Once an ethics advisor has expressed his or her own candid opinion on the issue, the client's wishes and views should become the focus of discussion. If the ethics advisor has tentatively concluded that the proposed conduct is unethical or highly risky, the client is entitled to present his or her own analysis. For example, if the client believes that the proposed conduct is ethical or not very risky, the client is entitled to state that view, and to seek to persuade the ethics advisor to agree with that view. Clients should not blindly accept an ethics advisor's "gut instinct" or "first draft" oral opinion on whether a proposed course of conduct seems ethical any more than ethics advisors should blindly accept the conclusions of their clients.

As the ubiquitous airport advertisements for Accenture say, "[n]ow it gets interesting." But, now it also gets difficult. The essential question is: how do ethics advisors "stick to their guns" when they still think they are right despite a client's challenge? (Ethics advisors

12. One type of advice I don't think ethics advisors should give is: "Your proposal is plainly unethical, but I don't think you'll get caught." This type of advice is, in my view, clearly unethical. Thus, if a client asks, "But, will I get caught?," I don't think an ethics advisor may ethically answer that question. To say, "It's unethical, but you won't get caught," is tantamount to violating DR 7-102(A)(7), which provides that a lawyer shall not "[c]ounsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent." DR 7-102(A)(7); *accord* R. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent....").

should not, of course, stubbornly stick to their guns if they realize, after hearing the client's views, that the original ethics advice was wrong.) There is no set formula in response to this question, but I will mention three personal ideas that might help others who give ethics advice.

First, an ethics advisor's most valuable asset is his or her reputation. We are fortunate to be in a profession that allows us to remain active and useful as long as we remain healthy. We are not like injury-prone professional football or basketball players, who are generally "over the hill" by their late thirties.[13] We are not like physical laborers who may not have the strength to work after they pass middle age. We have long careers ahead of us, and no amount of short-term financial gain or pleasant escape from acrimonious conflict can make up for a lost or diminished reputation. Giving in to the pressure when we think we are right is not a way to gain respect, maintain a reputation, or serve the interests of justice.

Second, an ethics advisor is a special breed of lawyer, with special responsibilities. If an ethics advisor—a purported "ethics expert"—cannot be honest and ethical in every aspect of his or her law practice, who can? Every conversation between an ethics advisor and client should therefore be a model of ethical lawyering. An ethical lawyer does not give in to pressure or persuasion for political, social, business, or financial reasons. Our focus must constantly be on what we truly believe. Those of us who are scholars in the field have an especially strong obligation to listen to our inner voices, and to be as candid and honest with our clients as we can possibly be, even if our honesty and candor sometimes cost us a client. Our clients may consider us valuable in the short run if we give answers to ethical questions that are merely convenient, but we are truly valuable to our clients and to the legal profession in the long run only if we give answers that are correct.

Third, when I am talking with clients or working on their questions, I find it helpful to think about my own greatest professional hero, Abraham Lincoln—"Honest Abe." Of course, nearly every American holds Lincoln in the highest esteem, but I feel especially close to Lincoln because I was born and raised in Illinois, where the license plates say, "Land of Lincoln," I went to Lincoln School (as did my father), where I walked past pictures of Lincoln everyday, and my best friend lived around the corner on Lincoln Avenue. I have made several pilgrimages to Springfield, Illinois to visit Lincoln's home, his law office, his grave, the store where he worked, and other Lincoln sites. I keep a statue of Lincoln near my desk in the office. When I am formulating my advice about a client's ethical issue, I try to

13. But see Michael Jordan (making a comeback at age thirty-eight) and Jerry Rice (still going strong at age thirty-nine).

imagine Lincoln eavesdropping on my thoughts and on my conversations with the client. I ask myself: "Would Lincoln approve of my work and my approach?"; "Would he agree with my conclusions and my advice?"; "Would Lincoln be proud of me as a lawyer?" These are my goals. If I am meeting them, I am succeeding in my endeavors as an ethics advisor and simultaneously serving the interests of justice.

CONCLUSION

I said at the outset of this paper that I could not develop comprehensive rules to tell lawyers when to follow, and when to resist, client instructions. But, in looking over what I have written about ethics advisors, I think much of it isn't confined to ethics advisors, but extends to all lawyers. Lawyers do, in most cases, have great influence on their clients. Most clients want honest advice. Initially, it's often better not to know what the client thinks so that the client's views do not skew the lawyer's own analysis. (There will be time enough to find out what the client wants or thinks after the advisor's own initial analysis.) Lawyers must put aside their own economic and psychological interests. And, lawyers must clearly separate legal from non-legal advice. Those rules are not easy to follow, but lawyers who follow them, whether in the field of ethics advice or in other areas, will respond, I think, to many of Deborah Rhode's concerns about our profession's excessive deference to clients, and our insufficient regard for the interests of the legal profession and the public. In the interests of justice, we should do no less.