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A REFLECTION ON THE ETHICS OF MOVEMENT LAWYERING

Abstract

This essay takes a new look at legal ethics issues salient to "movement lawyers" who maintain a sustained commitment to social movement goals and collaborate with social movement organizations over time to achieve them. The essay provides a historical overview of movement lawyering, tracing its development to current practice in which movement lawyers work in collaboration with mobilized social movement groups, though not always in traditional lawyer-client relationships. As this analysis reveals, contemporary movements employ a sophisticated array of strategies, which may pull lawyers away from traditional representation paradigms. We argue that the legal ethics literature on movement lawyering must adapt to these new developments. To advance this project, we highlight two under-explored ethical dimensions of movement lawyering practice, which we term intra-movement dissent and temporality.

The concept of intra-movement dissent spotlights the contested nature of social movements and the need for lawyers to take sides in disputes over goals and strategies. Conventional applications of legal ethics rules do not provide sufficient guidance to movement lawyers in such scenarios. Even lawyers who are trying their best to be movement-centered will inevitably confront situations in which they must exercise discretion without clear direction, such as in choosing which groups to represent within movements and how to resolve internal disagreements. The concept of temporality focuses attention on movement lawyers' commitment to a long-term vision of social change. We suggest that movement lawyers should be able to identify long-term movement goals as their primary loyalty and negotiate non-traditional relationships with specific clients and other movement stakeholders to advance those goals. Our primary aim is to highlight the need for more context-specific attention from scholars and practitioners to address legal ethics principles of key importance in guiding movement lawyers.

Table of Contents

*448 Introduction

In the lawyering and legal ethics literatures, scholars over the past decade have begun to focus more attention on "movement lawyering."[1] This focus has tracked activity on the ground as lawyers and activists motivated by social movement goals have played prominent roles in the United States political and legal system--symbolized by the legal mobilization against President Trump's Muslim Travel Ban. There, lawyers responded to social media calls to action by showing up at airports to help detained immigrants while filing lawsuits to block implementation of Trump's executive order.[2] As this suggests, lawyers associated

with contemporary social movements are responding to immediate political challenges, such as the upsurge in racial bigotry and religious intolerance, while also learning how to interact with new movement organizations that use sophisticated digital strategies as well as more traditional forms of grassroots mobilization.[3]

Within this environment, movement lawyering has generated scholarly and practice-based interest as a potential model of legal activism that promotes struggle by marginalized groups while avoiding problems of political overreach and overinvestment in court-based reform.[4] Much of the current scholarly interest in movement lawyering focuses on its relation to progressive activism.[5] Yet ***449** movement lawyers today work to further ideological visions spanning the far left to the far right, addressing a wide scope of specific issue areas.[6] While fully aware of this, we focus on lawyering in connection with progressive social movements, which has drawn the most intense scholarly scrutiny.

Overall, progressive scholars and practitioners have reacted hopefully to the emergence of what we argue is a distinctive model of movement lawyering. They see this model as a means of deploying legal expertise to contribute to movement success while minimizing risks to client autonomy and movement power that previous generations of scholars identified as sources of concern.[7] Indeed, one of the promises of the movement lawyering model lies in its potential resolution of long-standing ethical concerns about lawyers whose pursuit of ideological commitments over specific client interests creates tension with professional duties of client loyalty. Despite this promise, however, little work has been done to explore the professional choices movement lawyers confront in practice and how legal ethics principles apply.

As movement lawyering aspires to collaborative client relationships in the pursuit of long-term reform, it plays out within a professional framework defined by standard legal ethics principles. These principles are expressed in the American Bar Association's *Model Rules of Professional Conduct* (*Model Rules*), which ***450** serve as the template for nearly all states' professional codes. The *Model Rules* draw a clear line between lawyer and client objectives, and between lawyer and client values. Rule 1.2 makes clear that "a lawyer shall abide by a client's decisions concerning the objectives of the representation," and that such representation "does not constitute an endorsement of the client's political, economic, social or moral views or activities."[8] The rules further stress the importance of single-minded attention to a client's immediate interests, prohibiting lawyers from representing a client when such representation would be "materially limited by the lawyer's responsibilities to ... a third person or by a personal interest of the lawyer,"[9] and prohibiting current representation that poses a substantial risk to the confidences of former clients without their consent.[10] Although the rules exhort lawyers to engage in pro bono service and encourage participation in legal services and law reform organizations,[11] they give no guidance on how to choose clients from within a social movement constituency with competing interests. Nor do the rules address lawyers' duties in relation to the development of legal principles and promotion of interests that may be realized only far in the future.

Consider the following example. A lawyer commits herself to representing the Movement for Black Lives (MBL), which is a specific organization that grew out of the Black Lives Matter movement and has its own issue platform, emphasis, and priorities.[12] On referral from MBL, the lawyer agrees to handle an individual client's police brutality case. As the litigation proceeds, the client begins to prefer a large damages award whereas MBL would prefer prospective injunctive relief to prevent such incidents in the future. MBL, for example, would prefer to obtain an injunction that defines new police department policies on the use of force and prohibits striking persons who are in restraints. The lawyer accordingly faces a classic conflict of interest she must resolve. The movement lawyer's reason for being in the case is to further the MBL's vision, even though her attention at the time is devoted to a particular client's individual interests. Or, as is more likely, she may have dual motivations: She wants both to help her client achieve his objective of compensation for his injury *and* to further the interests and objectives of MBL in preventing police violence in the future. What distinguishes her as a movement lawyer is her commitment to MBL's vision of a better world achieved ***451** through strategies for social change. Her orientation to practice involves more than simply representing clients subject to police abuse. In this instance, the lawyer, owing responsibilities both to the movement and to a particular client, finds herself pulled toward two inconsistent objectives simultaneously.[13] She faces a choice between fighting for a higher damages award for her particular client and for the stronger prospective injunctive relief the movement

desires, but finds herself unable to successfully obtain both given limits the defendants have imposed. This conflict is one of the hardest ethical issues movement lawyers confront yet its appropriate resolution remains contested, underscoring the need for more sustained inquiry on the ethics of movement lawyering.

Our essay offers a new perspective by focusing attention on the contemporary practice of movement lawyering in order to highlight the particular ethical challenges it raises. We also provide some preliminary ideas about how these challenges might be resolved. In this sense, we seek to both deepen theoretical understanding of movement lawyering and provide guidance to those who practice it. Toward this end, our essay advances three central aims.

First, we provide an overview of movement lawyering, offer a definition, and assess its relation to familiar concepts of lawyering for social change that have defined the so-called "post"-civil rights era. We argue that, although there is much conceptual and practical overlap, the idea of movement lawyering as multifaceted legal advocacy in the service of mobilized social movement constituencies presents a distinctive vision of legal practice that carries with it specific ethical challenges.

Second, we introduce two concepts that fundamentally shape movement lawyers' ethical choices and responsibilities: *intra-movement dissent* and *temporality*. Intra-movement dissent draws attention to the inherent conflicts over goals and strategies that define social movement struggle, which require that lawyers have a principled mechanism for making representational choices in the first instance and resolving internal disputes. Temporality is the idea that movements work toward social impact over the long term, which requires that lawyers have a process for planning and a commitment to implementation over time, even in the face of short-term disagreement or setback. Both concepts, at bottom, raise the specter of conflicts of interests--either between different interests within a social movement or between short-term client interests and long-term movement objectives. Neither concept is adequately addressed by standard legal ethics principles and both have been overlooked in treatments of movement lawyering.

Third, in light of the value of long-term social movements and the impossibility of neatly resolving conflicts within them, we suggest that lawyers have crucial leadership roles to play in social movement campaigns beyond client-centered counseling, and that standard ethics principles require revision to better facilitate ***452** the positive contributions of lawyers who take sides on issues of social import and dedicate themselves to the pursuit of long-term solutions. We conclude by highlighting the need for more systematic scholarly inquiry on the ethics of movement lawyering.

I. Movement Lawyering: Continuity and Difference

Understanding the emergence of "movement lawyering" as a professional category, and assessing its distinctiveness, requires situating it in relation to alternative models of lawyering for social change, which have been much debated since the advent of "public interest lawyering" in the 1970s.[14] At a basic level, the project of naming a distinctive approach to practice, like movement lawyering, requires identifying something to define it *against*-- an alternative mirror held up to reflect what is different and unique about the new model. This definitional project always raises questions about whether the new model is really new or rather repackages old concepts and practices. In this part, we suggest that both perspectives are true. Contemporary movement lawyering builds upon concepts and practices of the past and also strives for new ways of thinking about and navigating the relationship between law and social change.

We define movement lawyering as the use of integrated advocacy strategies, inside and outside of formal lawmaking spaces, by lawyers who are accountable to mobilized social movement groups to build the power of those groups to produce or oppose social change goals that they define.[15] This definition draws upon recent developments in legal practice and scholarship. Activist lawyering, on both the political left and right, has been influenced by the rise of new social movements and the resurgence of old ones in the new millennium. On the left, prominent examples include the successful legal and political campaign to achieve marriage equality, culminating in the Supreme Court's sweeping decision in *Obergefell v. Hodges*;[16] the legal challenge to the detention of terrorism suspects at Guántanamo as part of the so-called War on Terror;[17] the contentious campaign

to win protected legal status for undocumented youth, called Dreamers, during the Obama presidency against the backdrop of failed efforts to secure comprehensive immigration reform;[18] and the nationwide mobilization against police violence, sparked by the killings of unarmed black men in Ferguson, Missouri, Baltimore, Maryland, and elsewhere, fueling a broader Black Lives Matter movement to challenge racial subordination through ***453** criminalization and related debt collection practices.[19] These efforts have been matched, and in some cases surpassed, by conservative constituencies, some backed by powerful corporate patrons, which have adopted the strategies and tactics of their progressive counterparts to press for goals that oppose progressive values.[20] These conservative campaigns advance the causes of reducing taxes,[21] opposing gun control,[22] overturning Obamacare, undoing campaign finance regulation,[23] and promoting the free speech rights of white supremacists and Christian extremists.[24]

Social science and legal scholars have documented and analyzed these social movement developments, while seeking to draw normative lessons from them. Sociologists have examined how law affects the opportunity structure for movement action and how activists can use law as a tool to reshape social norms and strengthen movement bargaining power.[25] In the legal academy, scholars have plunged deep into the theoretical and empirical literature on social movements to explore how movement mobilization shapes lawyering activity and lays the groundwork for legal transformation. In this "social movement turn,"[26] legal scholars have presented a decentered view of democratic reform, turning away from earlier emphases on lawyers and courts in the vanguard of civil rights-era change, and focusing instead on how social movements take the lead in changing "hearts and minds"--forging a path along which lawyers and courts then follow.[27]

This scholarly focus on social movements generally and movement lawyering in particular can be understood as a response to criticisms of the role of law and ***454** lawyers in progressive social change.[28] The concept of "public interest" lawyering, as it came to be defined during the 1970s, was associated with the practice of representing clients, primarily in litigation, whose interests were underrepresented in the legal and political system by virtue of their marginalized status.[29] Public interest lawyering during this period was understood and undertaken as a progressive project on behalf of racial justice, women's rights, environmental justice, and other causes. However, as success in the 1970s gave way to retrenchment and reversal beginning in the 1980s--with lawyers confronted by more hostile courts and the rise of a conservative public interest law counter-movement--scholars articulated two central critiques that have cast a long shadow over progressive practice ever since.

One critique highlights how the asymmetrical power between public interest lawyer and client--whether a vulnerable individual or diffuse class--enables lawyers to pursue their own political vision over client interests, undermining the core professional tenet of client accountability. Derrick Bell articulated this critique in a ground-breaking article in which he charged civil rights lawyers with "serving two masters."[30] Specifically, Bell argued that the lawyers for the NAACP Legal Defense and Educational Fund (LDF), who handled the remedial phases of school desegregation in the aftermath of *Brown v. Board of Education*,[31] skated close to violating their ethical duties to their clients. They did so, in Bell's view, by pushing for the movement ideal of complete school integration over the desires of clients[32]--African American school children and parents speaking on their behalf. These clients, Bell explained, preferred winning more resources to improve their own local, still largely segregated, schools over being transported to white schools in other parts of town. Agreeing with Justice Harlan's position against the NAACP in an earlier case, Bell claimed that the "divided allegiance" of lawyers employed by social movement organizations "has developed in a far more idealistic and dangerous form,"[33] and that lawyers working for idealistic motives, rather than pecuniary ones, needed the most ethical policing. In Bell's words: "[i]dealism, though perhaps rarer than greed, is harder to control."[34]

***455** In the scholarly dialogue *Serving Two Masters* spawned, some commentators critiqued 1970s-style public interest lawyering as insufficiently self-reflective.[35] Critics faulted lawyers (who were usually socially privileged, white, and male) for dominating clients and client groups, substituting their own perspectives for those of affected communities, and, in general, using their privilege in ways that were in tension with the community empowerment goals of the movements they purportedly

served.[36] Public interest lawyers lost sight of the appropriate line between lawyer and leader, neglecting to ensure that they served as agents rather than principals. In this regard, Bell and others portrayed public interest lawyers as untethered from the interests of the vulnerable communities they claimed to represent-- contending that lawyering had become yet another way of dominating vulnerable communities through patronizing, know-it-all interventions.[37] It was in response to these concerns about accountability that scholars advocated a client-centered approach, in which lawyers deferred to their clients' stated aims, articulated after active dialogue and counseling.[38]

The second critique of public interest lawyering questioned the effectiveness of litigation and adjudication in fundamentally altering entrenched structures of social power. In this vein, critics suggested that the pursuit of law reform through courts at best wasted resources and at worst harmed social movements by coopting their message and energy, and often producing backlash. Political scientist Stuart Scheingold offered one of the most potent versions of what he termed the "myth" of rights-based litigation strategies: "Without support of the real power holders ... litigation is ineffectual and at times counterproductive. With that support, litigation is unnecessary."[39]

Beginning in the 1990s, law and social science scholars developed two important alternative concepts of activist lawyering that responded to these foundational critiques. One response was to move away from the model of top-down litigation associated with public interest lawyering toward a model of "community" or "collaborative" lawyering,[40] in which lawyers engaged in "formal or informal collaborations with client communities and community groups to identify and address client community issues."[41] Responding to concerns about lawyer accountability, community lawyering embraced central principles of client-centeredness: ***456** "enlisting the client in active problem solving, empowering the client to make decisions, and taking account of legal and non-legal impacts of problems."[42] Famous examples of this approach included Gerald López's concept of rebellious lawyering, which sought to mesh client and community autonomy with bottom-up reform so that community members could become the agents of their own change,[43] and Lucie White's account of community-based legal mobilization in South Africa challenging what she called the "third dimension" of power.[44] Critics of community lawyering responded that by limiting its scope to the community level, the model gave up on broad social change goals for a "micropolitics" of client empowerment.[45] William Simon's critique of the clinic-based, client-centered model provided another, far more biting, call for redirection.[46] Simon's argument was that lawyers necessarily exercise power over clients, because legal representation involves numerous opportunities for exercising discretion and professional judgment.[47] Simon proposed that lawyers, recognizing this, should focus on cultivating their professional judgment and sense of justice in exercising discretion in this manner.[48]

The second alternative to public interest lawyering sought to avoid thorny debates over the meaning of the "public interest" in order to spotlight what motivated lawyers to engage in social change. The concept of "cause lawyering," introduced by Austin Sarat and Stuart Scheingold, focused on the rejection of professional neutrality in the pursuit of "something to believe in."[49] In this model, the lawyers' social change objectives moved "from the margins to the center of their professional lives,"[50] as cause lawyers expressed "a determination to take sides in political and moral struggle."[51] The cause lawyer, in this view, was a "moral activist" who shared "with her client responsibility for the ends" of the representation.[52] This framing divorced the model from any particular conception ***457** of the public good. At the same time, it recognized the inevitability of conflict between the lawyer's commitment to cause and client. In this sense, cause lawyering-premised on the lawyer's "thick identification" with social change goals[53]--accepted departures from client-centeredness in the pursuit of broad-based reform.

The contemporary movement lawyering concept builds upon, but is ultimately distinct from, these concepts. As a matter of legal practice, activist lawyers have long aligned themselves with social movement causes and sought to collaborate with movements rather than run them. Lawyers have further sought to advance social movement objectives through a wide variety of law-related strategies, many of them not focused on litigation in high profile courts. In this sense, contemporary movement

lawyering represents less a dramatic break with the past than a reconceptualization of practice that emphasizes different features of advocacy and distinctive aspects of lawyer relationships with clients and constituencies.

Movement lawyers in contemporary practice follow the leadership of grassroots actors in designing social movement campaigns, often using multiple legal strategies consciously crafted to complement and advance political goals.[54] The new focus on social movements thus points toward an affirmative vision of lawyering that seeks to promote popular mobilizations to change law and society through "contentious politics,"[55] which alter the distribution of resources and the balance of power within democracy. Recent accounts of movement lawyering emphasize lawyer accountability to *mobilized social movement organizations that have the resources and political power* to advance campaigns.[56] In this context, there is less concern about lawyers dominating vulnerable clients because social movement groups are organized and sophisticated--able to assert power in collaborations with lawyers.

Movement lawyers represent or collaborate with social movement organizations through collective processes of power mapping and campaign design in which movement stakeholders identify targets, tactics, and goals. Movement campaigns typically have multiple, interconnected purposes: achieving discrete policy wins, building public support, strengthening grassroots participation, reinforcing the organizational capacity of the movement itself, and striving for lasting, long-term results.[57]

***458** In supporting movement campaigns, lawyers use an integrated advocacy approach, in which litigation plays an important (though not central) role. For example, litigation may be deployed for its indirect effects on political mobilization and public opinion rather than as a tool to make change directly.[58] Movement lawyers also use a range of other skills: educating community members about their rights, advising and defending protestors, researching and drafting policy language, writing legal opinions to support policy positions, counseling movement organizations on legal levers that may be pulled to exert pressure on policy makers or private actors in negotiating contexts, and devising mechanisms for monitoring the enforcement of policy. Historically, lawyers have always done all of this, but the new movement lawyering vision brings this work to the fore. By expanding the meaning of legal problem solving, movement lawyering recognizes the risks of narrowly framed litigation to the overall effectiveness and durability of complex social change efforts.

As an example of integrated advocacy, Nan Hunter's analysis of the drive for marriage equality shows how LGBT rights lawyers deployed new "technologies of advocacy," shifting away from a litigation-first model toward what she terms a "campaign" model built around messaging through sophisticated media strategies toward the goal of state-by-state same-sex marriage victories.[59] The existence of strong movement institutions--lobbying groups, think tanks, and communications firms--was key to the success of this approach.

Movement lawyers think of themselves as broadly accountable to social movements, which are themselves represented by specific organizations and their leaders. In this sense, movement lawyers maintain accountability to democratically led organizations that claim to stand in for broader movement interests. At times, these organizations are movement lawyer clients, while at others such organizations are simply part of the larger movement infrastructure that develops collective goals and strategies. The point is that there is engagement, formal and informal, between movement lawyers and organizational leadership that shapes what movement lawyers do.

Movement lawyering responds to critiques of the past by positing a more accountable and effective model of mobilizing law for transformative social change. Movement lawyers participate in the formulation and strategize about the achievement of the causes they pursue, but their role is anchored in relationships with extant social movement organizations that have ultimate decision-making authority and legitimate claims to represent the interests of movement ***459** constituencies.[60] Although movement lawyers use the legal tools at hand to advance movement causes, they do so in the context of a "participatory, power-sharing process within the lawyer/client relationship," in which lawyers lend their support to produce the "cultural shifts that make durable change possible."[61] Lawyers do not simply defer to what non-lawyers think about social movement goals and

tactics--part of being a movement lawyer is having a stake and a view, and providing leadership to advance the cause.[62] Yet, in doing so, movement lawyers engage with movement leadership in a collaborative fashion.[63]

This collaborative role, however, raises its own ethical challenges, which the movement lawyering literature has not addressed. The rest of this essay focuses on two important and under-explored ethical issues. First, social movements are inevitably complex and conflictual.[64] Movement lawyers are therefore constantly confronted with the need to make representational choices in a context of *intra-movement dissent*, in which social movement organizations divided on a host of issues clash over goals and strategies. How movement lawyers choose to align themselves within a contested social movement field focuses ethical attention on the issue of accountability at the point of client selection and throughout cycles of social movement contention. Second, because social movements are focused on achieving a future state of affairs, with their scope of vision often extending very far ahead of the present day, there is a crucial *temporal* dimension to movement lawyering. How movement lawyers pursue goals over the long-term, navigate trade-offs with short-term client interests, adapt in the face of setback, and confront counter-mobilization are core ethical challenges.

II. Intra-Movement Dissent: Taking Sides in Contested Causes

The first ethical challenge focuses on conflicts within the social movement constituency lawyers seek to represent. Whom should lawyers represent within "the movement"? Because social movements are internally contested, lawyers who align themselves with social movements are necessarily forced to make decisions to represent the interests of particular factions over others. Social movements in American politics express very different ideas about how social change could produce a better world, so there are many conflicting movement lawyering ***460** visions.[65] However, the point we highlight here is that even within a particular social movement, there are conflicts over how to frame the ultimate movement goals and which strategies to pursue. As Sameer Ashar describes in his analysis of movement lawyering in the fight for immigrant rights, there was significant conflict between mainstream and radical immigration groups over whether to prioritize a stand-alone bill for Dreamers or pursue comprehensive immigration reform during the Obama administration.[66] As this example suggests, intra-movement conflict is the norm, with mainstream movement actors more inclined toward incremental reform within existing democratic processes, while radicals push for more fundamental restructuring outside of normal political channels, and a host of other players take positions along multiple other axes.[67] Movement lawyers have to make representational choices in the context of these disagreements and thus inevitably take sides in intra-movement debates over what ends to pursue and the appropriate means for doing so.

The movement lawyering model seeks to address this problem by situating lawyers in contexts in which other stakeholders influence their decisions about whom to represent and how to do so, and then emphasizing advocacy for mobilized clients that have the power and authority to hold lawyers to account. In this way, movement lawyers seek to address conflicts in the social movement context by representing clients that, in turn, legitimately represent the movement's constituency. Lawyers do so by representing a movement organization directly, representing an individual at the direction of a movement organization (or coalition) to advance the movement's goals, or initiating a class action as part of a strategy designed in conjunction with movement organizations. In each case, lawyers are accountable to "a movement, not a class."[68]

Yet this framing of movement representation raises substantial questions at the core of legal ethics, to which movement scholars have paid insufficient attention. What does it mean to represent a movement? Who has organizational or individual standing to speak legitimately on a movement's behalf? How do lawyers select among conflicting movement viewpoints about goals and strategies? And what happens when there is only a weak or even non-existent movement infrastructure?[69] Taking these questions as a point of departure, the remainder of this ***461** part offers preliminary observations about the deeper accountability challenges of movement lawyering and how scholars and practitioners might think about them going forward.

One observation relates to the exercise of ethical judgment by lawyers in their representational choices--or the criteria by which movement lawyers make decisions about client selection. Movement lawyers seek to advance movement goals by representing

clients that share or express those goals. Ideally, there would be a collective process to determine and revise goals or, at least, an ongoing set of conversations between movement lawyers and organizational representatives that would guide lawyer choices about which clients to represent and how.[70] However, that is not always the case and the movement lawyering literature often equates the lawyer's representation of particular movement organizations with representation of the movement writ large. But this obscures important ethical issues.

For one, the representation of organizational clients raises concerns about lawyers preferring some group interests over others. Standard conflicts of interest principles tend to treat organizational clients as a "black box."[71] Commentators, however, have shown how this standard conception may gloss over internal disagreements in which more powerful organizational actors silence important dissenting views.[72]

In addition, no existing legal ethics principle holds movement lawyers accountable for the choice of whom to represent in the first instance. Generally, a lawyer's ethical discretion at the point of client selection is considered to be at its apex. A lawyer can select a client for most any reason at all, subject to prohibitions against discrimination.[73] Although Model Rule 1.2 affirms that representation of a client does not mean that the lawyer necessarily espouses that client's worldview or values,[74] it of course does not prohibit a lawyer from choosing a client precisely because that lawyer *does* in fact espouse the client's values or political orientation. The question is whether that specific choice is made in a principled fashion that adequately accounts for competing positions within movements.

***462** Movement lawyers intervene in complex environments, in which decision-making is diffuse and contested.[75] Sometimes work on behalf of coalitions may give lawyers more claim to "represent the movement," yet coalitions comprised of multiple organizations with different levels of power and resources can submerge internal schisms and sometimes may even give an air of legitimacy to groups that do not genuinely reflect the range of constituent interests. Lawyers who work within coalitions, serving on leadership committees without representing the coalition as a whole, may find themselves called on to influence decision-making, yet have for guidance only their own values or those of movement organizations with which the lawyers are most closely aligned. Lawyers may be called upon to exercise their best judgment about what a still-amorphous movement would regard as in its best interests. In these scenarios, the "client" who should give the lawyer direction within client-centering lawyering theory may be mute or non-existent.

The key point is, given the organizational diversity and conflict that defines social movement environments, *lawyers must make choices about which groups to represent or which interests within complex organizations to support, and such choices ultimately require taking sides*. This picture of organizational and ethical complexity challenges the common framing of movement lawyering, which depicts social movements as having coherent interests they can communicate to lawyers in determinate ways. Specific movement organizations may approach lawyers with coherent interests, but this begs the question of which interests such organizations advance and how representative the organizations are. Are there, for example, marginalized constituencies within the social movement, as Tomiko Brown-Nagin explores in depth in her study of civil rights lawyering in post-*Brown* Atlanta?[76] If so, what are the movement lawyers' responsibilities to notice and rebalance inequities of organizational power? If marginalized constituencies leave one social movement organization to form a rival group, what are the movement lawyer's obligations to follow, challenge, ignore, or otherwise respond to this development?[77] What are movement lawyers' obligations to seek to keep peace within social movement factions or, alternatively, to encourage debate about and resolution of important points of contention?[78]

***463** Because lawyers in social movements have to exercise judgment in choosing sides in contentious intra-movement debates, it can be tempting to identify the "movement lawyer" as the lawyer associated with movement interests with which one feels most politically sympathetic. In this sense, labeling someone a "movement lawyer," and casting others outside that category, may be more a political judgment than a professional one. When scholars criticize lawyers for lacking accountability

to movements, they may actually be suggesting that those lawyers *have chosen to represent the wrong side in intra-movement disputes*.

One assumption of the movement lawyering model is the existence of mobilized groups to hold lawyers to account. But what happens when a movement lacks strong organizational capacity? In this context, one of the important exercises of lawyer discretion is to support the formation of client groups in the first instance--so that the lawyer has an entity toward which to be accountable. Such client construction involves activities akin to community organizing, where lawyers enter communities or approach members of constituencies the lawyers believe should have a cause or claim to pursue in the interests of social justice. This client construction can involve building organizations, recruiting members for lawsuits, or some combination of both. Often individual cases and organization-building synergistically interact. As history shows, there are many times when, due to a lack of favorable conditions for political mobilization, legal advocacy may precede--and help spark--social movement activism. While the NAACP's Charles Hamilton Houston and Thurgood Marshall, for example, were courageous movement lawyers by all accounts,[79] their legal challenges to *Plessy* did more to galvanize organizational development in the racial justice movement than respond to the instructions of a well-organized group.[80] They saw themselves as part of the leadership responsible for charting the movement rather than as external agents responding to direction from it, and they were nothing if not highly opinionated about how the movement should develop.[81]

***464** More recently, lawyers used test case techniques in the campaign against anti-sodomy laws, at times with little correlation to the situation of the real plaintiffs involved.[82] But in these cases, at least, lawyers found willing clients.[83] Similar questions are presented in situations researchers have documented in which movement lawyers work in communities to create organizations that will then advance legal and political claims. Professor Tony Alfieri's reflection on his work with African American churches in Miami, Florida is a case in point.[84] His article on *Inner-City Antipoverty Campaigns* focuses on how a lawyer is supposed to decide when and how to become engaged in community struggle in the first instance.[85] How should movement lawyers go about deciding which communities to enter, cast the pitch for building movement organizations, and select campaign priorities? As Alfieri points out, deciding to intervene requires having criteria governing when outsider legal-political interventions should be mounted by lawyers who are not from affected communities and on what terms lawyers should structure engagement and collaboration with local residents and representatives.[86] He reviews a set of rules or judgments that lawyers have developed over time about case selection and argues in favor of lawyers making long-term commitments to specific neighborhood groups and staying faithful to those groups even when their views conflict with other neighborhood representatives.[87]

In all of these contexts, lawyers following a movement-centered model will work hard to stay in sync with the desires and articulated interests of the constituencies they work with, just as community organizers do. Their success in doing so comes not from standard ethical rules but from training in self-reflection and prudence.[88] Such training involves cultivating skills, which may be first taught in law schools, in areas such as close listening, consultation, collaboration, mindfulness, fair-mindedness, and sensitivity to context and nuance. All of these qualities are part of the ethical apparatus that movement lawyers should bring to bear on their work.

III. Temporality: Pursuing Long-Term Impact

A second critical feature of movement lawyering practice is the relationship of lawyers' work to time, or what we call *temporality*. In the standard legal ethics ***465** framework, lawyers conceive of the fundamental point of their work as achieving the discrete objectives of a specific client (whether individual or group), after which time they terminate their representation of the client. To be sure, many lawyers, both in the private and nonprofit sectors, represent repeat player clients over time, helping them--in Marc Galanter's famous phrase--to “play for rules” by strategically litigating some cases to judgment while settling others in order to shape legal doctrine in favor of repeat player interests.[89] However, standard legal ethics analysis tends to treat these representations just like any other, in which lawyers should defer to clients about the resolution of each discrete representation. This atemporal approach ignores the fact that such lawyers' work can profoundly affect the future of law and society more

broadly--often in completely unanticipated ways.[90] Although the *Model Rules* invite lawyers to consider the impact of client work on others, including the court, third parties, and society as a whole,[91] they do not call on lawyers to consider what impact their work will have on the world *after* their particular client representation ends, even though the impact may often extend far longer than the defined endpoint of a matter. Indeed, the one area in which the rules address long-term obligations of lawyers is confidentiality--a duty to clients, rather than the public interest, that lasts forever.[92] Other duties, such as client loyalty, terminate when the client representation ends.[93]

Movement lawyering, in contrast, is fundamentally about mobilizing law to change the direction of society far into the future--to achieve some vision of an improved state of affairs in relation to which a particular client's legal matter represents a stepping stone. Movement lawyers typically see themselves as belonging to the movement,[94] contributing legal skills just as others provide non-legal support.[95] Put simply, the movement lawyer's central aim is to mobilize law to cause future social change (or to stop it). Although the movement lawyer's efforts may not bear fruit until a far distant point, the pursuit of *future impact* is the motive force behind the movement lawyers' work--even if the precise vision of that impact is blurry or contested.

***466** In this pursuit of long-term impact, the movement lawyer chooses clients with interests and goals that overlap with, but may not always be identical to, the interests and goals of the movement with which the lawyer is affiliated. The movement lawyer's focus on future impact may motivate her to make short-term decisions that are inconsistent with specific client interests in order to achieve the long-term goal. For example, as highlighted in the Movement for Black Lives example in the introduction, a lawyer may prefer injunctive relief favored by the movement organization over her individual client's desire for a large damages award.

Standard legal ethics analysis has treated this tension as a conflict between a lawyer's commitment to cause and her obligations to a client's case.[96] Even in the classic test-case strategy, in which lawyers seek to carefully select cases to build precedent over time, it is standard to view lawyers' ethical obligations as running to the particular clients in the discrete precedent-building cases. This conception of the lawyer's duty to short-term client interests in particular matters, as opposed to long-term movement interests, is precisely what gives rise to the conflicts concern captured by Bell's "serving two masters" critique discussed earlier.

We would suggest, however, that legal ethics should permit movement lawyers to count the long-term movement's interest as a legitimate goal to pursue. In this regard, we suggest that long-term movement goals be treated akin to a consentable client conflict. Lawyers routinely address potential conflicts of interest between two clients in initial retainer agreements. This is often done by specifying a withdrawal procedure through which a "secondary" client gives informed consent that, in the case of an unresolvable conflict with the lawyer's "primary" client, the lawyer will withdraw from representing the secondary client. In the context of movement lawyering, a movement lawyer should similarly be able to agree to represent a specific client only to the extent that the client's interests remain consistent with those of the broader movement constituency--which is effectively the lawyer's "primary" client.

Surfacing this temporal dimension of movement lawyers' work provides a counterweight to Bell's serving two masters critique. In the school desegregation context, Bell argued that LDF lawyers should have taken seriously the wishes of parents who advocated against integration and in favor of enhancing school quality in segregated communities--pursuing those parents' local objectives rather than the NAACP's national objective of complete school integration.

But there is another way to look at this scenario. The lawyers involved were also representing the wing of the civil rights movement, embodied in LDF, which had fought for across-the-board school desegregation for at least a generation. Lawyers whose primary loyalty was to the principles espoused by LDF would have different obligations than those Bell assumed paramount: Their obligations ***467** were to follow the ideals of the movement they represented. Through a long and complex historical process involving generations of activism and accompanying sacrifice, that movement had won hard-fought victories. As a result of this historical process, the organization with which the lawyers were affiliated stood for the principle that equal citizenship on the basis of race could only be achieved through complete student integration. From this perspective, accepting

anything less would have constituted a retreat to the discredited "separate but equal" doctrine and undermined the strength of other ongoing efforts to promote racial equality in schools and other institutions. Why were the LDF lawyers who handled the post-*Brown* remedial litigation not entitled to give voice to the collective effort that produced this view of what the post-*Brown* remedial plan should be?

Many objections can be (and have been) raised about whether "the movement"-or at least a particular leadership segment of it--made the right judgment in choosing school integration over other approaches to improving the education of African American students.[97] However, our point here is not to weigh in on that debate. Instead, we are suggesting that Bell was wrong to assume that LDF lawyers were not ethically permitted to view school desegregation as the proper goal they used as their ultimate guidance. To the contrary, we believe that lawyers representing the long-term goals of a complex, multi-decade movement would be justified in regarding those goals as primary. Such lawyers should not be required to abandon those goals based on the different wishes of particular individual clients, especially when doing so would undercut the lawyers' long-term efforts to build and defend legal precedent in favor of a reform vision such as the challenge to the "separate but equal" doctrine. The lawyers Bell wrote about were members of an intergenerational line of activists who had carried out the full school integration battle.[98] Instead of abandoning their school integration goal, the LDF lawyers' appropriate recourse was to have withdrawn from representations where a parent group wanted to pursue a course other than integration, using a standard conflicts analysis after having secured advance informed consent to this course of action at the outset.[99]

From this perspective, one need not conclude that movement lawyers are ethically required to place clients' interests ahead of long-term movement interests. Lawyers who represent both an individual *and* a movement effectively have dual clients, just as lawyers in standard lawyering arrangements often do. Movement lawyers should be entitled to handle that situation the same ***468** way that lawyers in standard arrangements would, by explaining to their client that dual representation carries the risk that diverging interests may arise even when interests seem convergent at the start of a representation. The lawyer should lay out her planned course of action if irreconcilable conflicts of interest arise between a client and a movement organization in the course of the representation, such as between parent desires for local school resources versus LDF's integration goal. This may require the lawyer to withdraw from the client representation in the case. In Bell's scenario, for example, the LDF lawyers could have explained to the parents in the remedial litigation cases that the lawyers' goal was to work for school integration consistent with LDF's instructions, and that parents should sign up for representation only if that was the remedy they wanted too. If a divergence of goals arose as the litigation proceeded, the LDF lawyers should have discussed this divergence with the parents and figured out how to proceed. If they could not resolve the conflict in goals, the LDF lawyers should have sought to withdraw from representing the parents, in order to maintain their commitment to LDF's long-term goal of school integration. These lawyers should have sought alternative counsel for the parents. If they could not find alternative counsel, their ethical dilemma would become greater, as is always the case in "last lawyer in town" scenarios. This situation illustrates the importance of obtaining informed consent from clients at the outset, so that a foreseeable conflict between client and movement goals does not arise as a surprise well into the litigation.

In summary, when lawyers formulate long-term social change goals in conjunction with other social movement actors, legal ethics analysis should give more deference to lawyer decisions to prioritize long-term movement ends over the short-term goals of an individual or group client, even though those movement ends may be abstract or contested. Movement lawyers can do this by using retainer agreements with future conflict procedure explanations similar to those commonly used in business practice and securing fully informed consent at the outset from all of the clients in the case. As a matter of best practice, movement lawyers should include a statement in their retainer agreements with individual or group clients that explains the procedures they will use if an unresolvable conflict arises, including the possibility that the lawyer will be required to withdraw from representing the clients or, when there is a non-consentable conflict, from the case altogether. What the lawyer cannot do, we agree in keeping with standard ethics analysis, is to continue to represent a client in a conflict of interest situation but steer that representation toward the movement's goals when the client objects. The proper course of action in this situation is to withdraw from the client representation or perhaps the entire case when appropriate.

Movement lawyering raises additional questions that future scholarship should address. One set arises from the fact that some of the work that contemporary movement lawyers do may not count as the practice of law. The blurring of the ***469** line between "practicing law" and other work that lawyers do has become an important topic in business law ethics analysis,[100] but has not gained sufficient attention in the movement lawyering context. In one example that raises this issue, movement collaborations may involve the use of contracts other than retainer agreements, such as memoranda of understanding (MOUs) between a lawyer (or group of lawyers) and leaders of movement organizations. The goal of an MOU is to clarify that the parties do *not* intend to enter a lawyer-client relationship, but rather to structure a different kind of relationship.

Where the MOU is designed to structure relationships among movement stakeholders in strategic decision-making contexts that do not involve the traditional practice of law, they are permissible devices to promote collaboration. Movement organizational leaders and lawyers may choose to work together but not enter a client-lawyer relationship for a host of legitimate reasons. For example, movement leaders may choose to involve lawyers in a relationship that does not involve giving legal advice. The judgment the movement may be seeking from affiliated lawyers may be political and strategic or relate to public relations, media, policy, or legislative strategies. Generally, parties should be entitled to give life to their informed choice to structure relationships with each other in these contexts without invoking lawyer-client duties.

The topic of whether movement leaders and lawyers can imagine and give life to relationships other than the traditional client-lawyer representation on which the *Model Rules* focus brings to mind a chapter from David Luban's classic book, *Lawyers and Justice*.[101] In this chapter, Luban takes on the problem of movement lawyers "manipulat[ing] their clients and put[ting] the interest of the cause above those of the client" by handling cases to serve "the political theories of the lawyers themselves."[102]

Accepting for the sake of argument that movement lawyers do, in fact, engage in manipulation, Luban proceeds to defend such action as justified by the context of the relationship.[103] Key to Luban's defense is the idea that movement lawyers are not acting as traditional lawyers when collaborating with other movement actors in advancing a political cause. They are instead, in Luban's terms, acting in "political comradeship."[104] Just as actors in political contexts sometimes engage in manipulating or deceiving their political comrades with respect to tactical matters--while remaining true to the deeper, shared political goals--Luban ***470** argues so too may movement lawyers acting as political actors engage in acts of client manipulation.[105] This is because, in political contexts, all the actors are comrades rather than holding sharply divided roles of client versus lawyer. We do not believe movement lawyers should ever "manipulate" clients (nor do we believe Luban thinks this; rather, he is imagining an extreme scenario in order to drive home his point). But the development of new forms of collaboration between movement constituencies and movement lawyers, as we discussed above, may now be giving reality on the ground to Luban's idea of "political comradeship." Although he was interested in a different issue--whether the movement ends justified the means lawyers used to pursue them--he highlights the important point that movement lawyers operate in a political context that requires rethinking ethical concepts that apply in standard legal representation. We believe that idea usefully reframes movement lawyers' obligations in ways that lend support to more flexible understandings of permissible relationships between lawyers and other movement actors, such as agreements to collaborate that do not involve traditional legal representation.

We have argued that focusing on the long-term scope of movement lawyers' goals highlights the fact that movement lawyers' loyalty runs to a set of ideas or a vision rather than to particular clients. But what happens when that vision is challenged or no longer appears politically viable? In this regard, part of Bell's critique was that lawyers had set an agenda that was no longer consistent with the views of a significant segment of the constituency the lawyers claimed to represent. Were LDF lawyers acting within their ethical rights in following an agenda that had been set through the work of prior generations of activists? Note that here temporality reaches back in history as well as forward into the future: Do movement lawyers have the ethical discretion to listen to the historical echo of the voices of figures who set a movement on its path but are no longer around?

In this context, temporality is double-edged. It can, on the one hand, give credence to the ongoing implementation of long-term movement goals (*i.e.*, integration in the classic post-*Brown* LDF example) or it can serve as an argument for changing course in the face of changing conditions (*i.e.*, resistance to busing, violence against school children, and judicial disinclination

to remedy segregation across district lines, in the same example). It is here that movement lawyers are caught in the changing tide of internal movement politics, in which dissenting views come to the fore and sometimes take hold in ways that change a movement's course. We thus return to a key question: What should lawyers do when that happens?

When possible, movement lawyers should be guided by the decision-making processes movements adopt to develop--and also change--end goals. But these ***471** processes may sometimes be underdeveloped or unsteady.[106] In these situations, movement lawyers should do their best to take direction from a movement's chosen leaders. Yet movement lawyers should also be attentive to issues or problems in movement leadership structures that may duplicate patterns of domination in the larger society, and should attend as well to the voices of those who may be shut out of movement leadership. Rather than pretending to exercise no influence, they should seek to use it prudently, as all lawyers aim to do when they serve clients in the role of "trusted counselor."[107] Movement lawyers must strive to exercise excellent judgment, one of the highest forms of specialized skill the best lawyers develop through experience and training. From this perspective, there is nothing inherently wrong with movement lawyers having a seat at the decision-making table in relation to a social movement, provided that their perspectives are added to, rather than considered to be superior to, those of others taking part in a collaborative process (or "political comradeship," in Luban's terms).

In the same vein, movement lawyers should recognize the power and discretion they exercise in a vast array of professional decisions, including how they frame the issues in case representations or other matters in which they take part, and which movement values, or interpretation of those values, they propound and follow. In these respects, movement lawyers inevitably may be making ethical decisions unconstrained by particular clients, because a movement lawyer's overall career involves the exercise of ethical decision-making toward long-term goals. In this pursuit, movement lawyers ally with some organizations representing sub-movements or branches of movements but not others. They may create organizations or bring movement activities to communities that did not have them before.[108] They may choose to represent some clients and pass over others. They may become close to and have the ear of some leaders more than others. They may translate movement goals into legal demands and in doing so inevitably alter them to some extent.[109]

Focusing on long-term impact also spotlights the issue of what constitutes the appropriate time frame for judging success. Because political struggles do not have firm start or endpoints, and because each move within such struggles tends to elicit responses by counter-movements, the temporal frame of impact assessment is never obvious. How do movement lawyers decide when to start and stop measuring social change in relation to a pre-defined goal? There is no obvious answer in many cases. The choice of endpoints, which may be artificial, can affect one's ultimate assessment. Legal mobilization does not occur in a neat and linear fashion, and the time frame of analysis has important evaluative implications. ***472** Consider the movement for same-sex marriage. If one were to study the movement before the mid-2000s, it would look much worse than it does now with the success in *Obergefell v. Hodges*.[110] And apparent victories at one point in time can slide backwards as well. Take the Voting Rights Act of 1965 and the retrenchment in *Shelby County, Alabama v. Holder*.[111] Or consider *Roe v. Wade*,[112] which had a positive short-term effect on access to abortion, though the longer-term picture has been decidedly more mixed.[113] Moreover, as time passes, the number of other intervening variables that may have explanatory power for why social change occurs increases--and thus evaluating a social movement's impact becomes more difficult.

In staying committed to long-term social movement goals in a changing world, movement lawyers must strive to be highly reflective about their work in representing a vision with which they identify and to which they have decided to devote their efforts. In thinking about their role over the long haul, movement lawyers are not violating their ethical duties. To the contrary, they are acknowledging their context in order to guide their work in relation to core values of respect for others, empathy, self-reflection, and "other-regarding" behavior[114]--values at the heart of professionalism.[115]

Conclusion

This essay has sought to initiate a deeper conversation on the ethical issues confronting today's movement lawyers. Toward that end, we have examined the ethical context of movement lawyering--one shaped by long-term, repeat-play dynamics, in which there is both significant intra-movement dissent and mobilized opposition. From this perspective, we have offered a preliminary account of the ethical challenges facing movement lawyers, spotlighting the fundamental conflicts that shape movement lawyering from the point of client selection through the pursuit of long-term causes. The goal of this effort has been to link movement lawyering practice and scholarship with the field of legal ethics. We hope to spark a more robust conversation in which specific ethical issues get deeper analysis. We urge scholars to consider whether traditional ethics analysis is always best suited to the type of legal practice in which movement lawyers engage.

***473** Although our effort has been preliminary, it has produced a set of starting points for future reflection. We have suggested, first, that movement lawyering, while building on old foundations, aspires to a new practice ideal defined by integrated advocacy for mobilized clients. This aspiration, we have argued, carries forward ethical tensions that need fuller exploration. Such exploration implicates the longstanding debate within legal ethics about whether rules of professional conduct should aspire to unify the profession--binding everyone to the same standards of conduct in order to promote uniform behavior and professional cohesion--or whether the application of the rules should be more context-specific, recognizing that specific forms of practice may raise different ethics concerns.[116]

Our view is that movement lawyering should not be shoehorned into standard ethical paradigms. Instead, scholars should help define appropriate legal ethics principles tailored to this practice context. Those principles should not be completely subsumed under the principles that guide standard lawyering arrangements.[117] Standard principles provide a starting point that should apply in important respects, such as on matters involving integrity, honesty, and fairness to third parties. Yet in other respects, standard ethics rules may be illsuited to the important values movement lawyering pursues.

As we have argued, standard ethics gives insufficient guidance to how lawyers should think about selecting social movement clients and engaging with organizational leaders in contexts of intra-movement dissent. Movement lawyers may be required to act without clear client direction when they first begin to mobilize a community or organize a new group, as well as when constituencies they represent do not have strong procedures in place to provide for giving instructions or making decisions. These scenarios call on movement lawyers to engage in ethical considerations that are not well articulated in traditional legal ethics rules.

In addition, we have questioned the standard view that movement lawyers must always prioritize specific clients' short-term interests over a movement's long-term goal--a principle that would leave the long-term goal without effective representation. Instead, movement lawyers should be permitted to assert their primary loyalty to the representation of the movement goal, at the same time that they wish to represent individual or organizational clients. Under this practice arrangement, movement lawyers must ensure informed consent and authentic collaboration by affected clients.

***474** We have suggested that in pursuing authentic collaboration, movement lawyers must strike a fine balance between norms of deference and the exercise of leadership. Movement lawyers should carefully listen to and consider the views of individuals and groups who will be affected by movement lawyering work. And movement lawyers should be humble and sensitive to the dangers of abusing their professional status. Yet at the same time, lawyers have important contributions to add to movement design and execution. Toward that end, lawyers should offer their skills and expertise to movements in such a way as to achieve the most effective results possible. They should, in short, aspire to work in partnership with other movement stakeholders--those in the lead and those on the ground--dedicating themselves to helping advance movements to win democratically accountable change over time.

Footnotes

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1 *See, e.g.*, Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. Rev. 405 (2018) [hereinafter Akbar, *Radical Imagination*]; Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 Calif. L. Rev. 1879, 1879 (2007); Scott L. Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*, 85 Fordham L. Rev. 1987 (2017); Scott L. Cummings, *The Social Movement Turn in Law*, 43 Law & Soc. Inquiry 360 (2018) [hereinafter Cummings, *The Social Movement Turn*]. For an international perspective, see Law and Globalization from Below: Towards a Cosmopolitan Legality (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005); Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty (Lucie E. White & Jeremy Perelman eds., 2011); Balakrishnan Rajagopal, *International Law and Social Movements: Challenges of Theorizing Resistance*, 41 Colum. J. Transnat'l L. 397 (2003).

2 Jonah Engel Bromwich, *Lawyers Mobilize at Nation's Airports After Trump's Order*, N.Y. Times (Jan. 29, 2017), http://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html [http://perma.cc/2Y3C-UPKE].

3 The pivot toward digital strategies can be seen in the proliferation of movement hashtags, such as: #noto-nemore, #occupywallstreet, #metoo.

4 *See* Scott L. Cummings, *Movement Lawyering*, 2017 Ill. L. Rev. 1645 (2017) [hereinafter Cummings, *Movement Lawyering*].

5 *See* Cummings, *The Social Movement Turn, supra* note 1.

6 *See* Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements: An Introduction, in* Cause Lawyers and Social Movements 1 (Austin Sarat & Stuart A. Scheingold eds., 2006) [hereinafter Sarat & Scheingold, *What Cause Lawyers Do*]. *See also Radiolab Presents: More Perfect-- The Imperfect Plaintiffs*, Radiolab (June 28, 2016), http://www.radiolab.org/story/more-perfect-plaintiffs/ [http://perma.cc/6D7V-ZPMC] (describing how Edward Blum, a right-wing non-lawyer activist, engineered two key civil rights cases before the U.S. Supreme Court in the span of several years).

7 *See generally* Tomiko Brown-Nagin, Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement (2011) [hereinafter Brown-Nagin, Courage to Dissent]; Susan D. Carle, Defining the Struggle: National Organizing for Racial Justice 1880-1915 (2013) [hereinafter Carle, Defining the Struggle]; Jennifer Gordon, Suburban Sweatshops: The Fight for Immigrant Rights (2005); Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (2004); Richard L. Abel, *Contesting Legality in the United States after September 11, in* Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism 361 (Terence C. Halliday et al. eds., 2007); Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 Iowa L. Rev. Bull. 61 (2011); Anthony V. Alfieri, *Faith in Community: Representing "Colored Town"*, 95 Calif. L. Rev. 1829 (2007); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. Pa. L. Rev. 927 (2006); William N. Eskridge Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062 (2002); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 Yale L.J. 2740 (2014); Gwendolyn M. Leachman, *From Protest to* Perry*: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. Davis L. Rev. 1667 (2014); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 Yale L.J. 256 (2005); Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States, in* Cause Lawyering: Political Commitments and Professional Responsibilities 261 (Austin Sarat & Stuart Scheingold eds., 1998); Douglas NeJaime, *Winning Through Losing*, 96 Iowa L. Rev. 941 (2011); James Gray Pope, *Labor's Constitution of Freedom*, 106 Yale L.J. 941 (1997); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 Calif. L. Rev. 1323 (2006); Michael Waterstone et al., *Disability Cause Lawyers*, 53Wm. & Mary L. Rev. 1287 (2012).

8 Model Rules of Prof'l Conduct R. 1.2(a) & (b) (2016) [hereinafter Model Rules].

9 Model Rules R. 1.7(a)(1). If a conflict exists, lawyers must decide whether they "will be able to provide competent and diligent representation to each affected client."Model Rules R. 1.7(b)(1). If the lawyer decides she can provide representation, she must then discuss the situation with the affected clients, including the risk of having to withdraw from the representation if an unresolvable conflict arises, and obtain the client's informed consent before proceeding.Model Rules R. 1.7(b)(4).

10 Model Rules R. 1.9.

11 Model Rules R. 6.3 & 6.4.

12 *See* Akbar, *Radical Imagination, supra* note 1. On the Movement for Black Lives, see generally *A Vision for Black Lives: Policy Demands for Black Power, Freedom & Justice*, Movement for Black Lives, http://policy.m4bl.org/ [http://perma.cc/ZJ8T-GKD2] (last visited May 22, 2018).

13 *See* David Luban, Lawyers and Justice: An Ethical Study 319 (1988).

14 *See* Alan K. Chen & Scott L. Cummings, Public Interest Lawyering: A Contemporary Perspective 58-78 (2013).

15 *See* Cummings, *Movement Lawyering, supra* note 4, at 1690.

16 Suzanne B. Goldberg, Obergefell *at the Intersection of Civil Rights and Social Movements*, 6 Calif. L. Rev. Cir. 157, 163 (2017).

17 Jess Bravin, Terror Courts: Rough Justice at Guantanamo (2013).

18 Sameer M. Ashar, *Movement Lawyering in the Fight for Immigrant Rights*, 64 UCLA L. Rev. 4 (2017) [hereinafter Ashar, *Movement Lawyering*].

19 *See* Akbar, *Radical Imagination, supra* note 1; Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Calif. L.Rev. 125 (2017); Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58Wm. & Mary L. Rev. 1171 (2017). *See also* Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, The Guardian (July 19, 2015), http://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement [http://perma.cc/MH9J-MN3W].

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22 *See* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 Harv. L. Rev. 191 (2008).

23 *See* Ann Southworth, *The Support Structure for Campaign Finance Litigation in the Roberts Court: A Research Agenda*, 86 U. Colo. L. Rev. 1221 (2015).

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25 *See* Chris Hilson, *New Social Movements: The Role of Legal Opportunity*, 9 J. Eur. Pub. Pol'y 238, 239-40 (2011); Michael McCann, *Law and Social Movements: Contemporary Perspectives*, Ann. Rev. L. & Soc. Sci. 17, 29-30 (2006).

26 Cummings, *The Social Movement Turn, supra* note 1.

27 *See, e.g.*, Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 Calif. L. Rev. 2133, 2144 (2007); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 Clinical L. Rev. 427, 440 (2000).

28 *See* Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. Rev. 1552, 1559 (2017) [hereinafter Cummings, *Puzzle of Social Movements*].

29 *See generally* Burton A. Weisbrod et. al., Public Interest Law: An Economic and Institutional Analysis 28-29 (1978) (discussing classic definitions of public interest law and noting that at bottom they involve representing under-represented interests).

30 *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470 (1976).

31 347 U.S. 483 (1954).

32 Bell, *supra* note 30, at 512.

33 *Id.* at 505.

34 *Id.* at 504.

35 For a discussion of this critique, see Cummings, *Puzzle of Social Movements, supra* note 28.

36 *See* Gerald P. López, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice (1992).

37 *Id.*

38 *See, e.g.*, Robert B. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 Ariz. L. Rev. 501 (1990).

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47 *Id.*

48 *See generally* William H. Simon, The Practice of Justice: A Theory of Legal Ethics (1998).

49 Stuart A. Scheingold & Austin Sarat, Something to Believe In: Politics, Professionalism, and Cause Lawyering (2004).

50 *Id.* at 2.

51 *Id.* at 5.

52 Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority, in* Cause Lawyering: Political Commitments and Professional Responsibilities 3 (Austin Sarat & Stuart A. Scheingold eds., 1998).

53 Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. Colo. L.Rev. 1 (2003).

54 *See, e.g.*, Anthony V. Alfieri, *Rebellious Pedagogy and Practice*, 23 Clinical L. Rev. 5 (2016); Jim Freeman, *Supporting Social Justice Movements: A Brief Guide for Lawyers and Law Students*, 12 Hastings Race & Poverty L.J. 191, 202 (2015); Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. Pa. J.L. & Soc. Change 25, 53 (2011); Alexi Nunn Freeman & Jim Freeman, *It's About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 Clinical L. Rev. 147 (2016).

55 Charles Tilly & Sidney Tarrow, Contentious Politics 4 (2006).

56 *See, e.g.*, Ashar, *Movement Lawyering, supra* note 18; Cummings, *Movement Lawyering, supra* note 4.

57 Michael W. McCann, *How Does Law Matter for Social Movements?, in* How Does Law Matter? 83-98 (Bryant G. Garth & Austin Sarat eds., 1998).

58 Cummings, *The Social Movement Turn, supra* note 1. Social movements used litigation campaigns for organization building well before the 1970s. *See, e.g.*, Carle, Defining the Struggle, *supra* note 7, at 5 (noting that during the long historical stretches in which

courts were hostile to social movement goals, activists did not naïvely expect success from courts, but saw filing cases as a means of raising public awareness and mobilizing activism).

59 Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. Rev. 1662 (2017).

60 David A. Snow, Sarah A. Soule & Hanspeter Kriesi, *Mapping the Terrain, in* The Blackwell Companion to Social Movements 10 (discussing the key role of organizations in social movements).

61 Guinier & Torres, *supra* note 7, at 2753.

62 For instance, as Hunter reveals in the marriage equality movement, lawyers were essential strategists in developing the public relations campaign that shifted the frame from preventing discrimination to promoting love. *See* Hunter, *supra* note 59.

63 Kathleen M. Erskine & Judy Marblestone, *The Movement Takes the Lead: The Role of Lawyers in the Struggle for a Living Wage in Santa Monica, California, in* Cause Lawyers and Social Movements 277 (Austin Sarat & Stuart A. Scheingold eds., 2006).

64 *See generally* David S. Meyer, The Politics of Protest: Social Movements in America 130-32 (2007) (noting splits within social movement coalitions between more institutionally oriented and more radical groups as movements gain greater access to policy making).

65 *Compare* Ann Southworth, Lawyers of the Right: Professionalizing the Conservative Coalition (2008) (studying conservative movement lawyers) *with* López, *supra* note 36 (presenting the commitments of left-wing lawyers).

66 Ashar, *Movement Lawyering, supra* note 18.

67 *See, e.g.*, Brown-Nagin, Courage to Dissent, *supra* note 7, at 190-91 (discussing conflict between moderate NAACP lawyers and more radical lawyers representing the Student Nonviolent Coordinating Committee).

68 Guinier & Torres, *supra* note 7, at 2782.

69 *See* Martha R. Mahoney, *"Democracy Begins at Home"--Notes from the Grassroots on Inequality, Voters, and Lawyers*, 63 Miami L. Rev. 1 (2008) (detailing the role of lawyers in advancing the right to vote in the absence of political participation and grassroots organization).

70 Cummings, *Movement Lawyering, supra* note 4, at 1658.

71 Model Rules R. 1.13.

72 *See* Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 Va. L. Rev. 1103 (1999); Paul R. Tremblay, *Counseling Community Groups*, 17 Clinical L. Rev. 389 (2010). *See also* Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 Fordham L. Rev. 2449 (1999) (arguing that the *Model Rules* do not adequately address how lawyers should manage the issues of client autonomy and conflicts of interests in representing groups).

73 Model Rules R. 8.4(g).

74 Model Rules R. 1.2(b).

75 *See, e.g.*, Simon, *Dark Secret, supra* note 46, at 1107 ("Poor people are not more likely than non-poor people to have consensus about their interests.").

76 Brown-Nagin, Courage to Dissent, *supra* note 7, at 385-429 (discussing the work of welfare rights mothers' leagues to redeem the promise of *Brown v. Board of Education* to improve educational opportunity for poor children).

77 In one historical case study, the social movement organization's lawyer left the more conservative organization to help found a more radical one. *See* Carle, Defining the Struggle, *supra* note 7, at 186-93 (discussing National Afro-American Council lawyer Frederick McGee's actions in proposing and then helping found a more radical organization called the Niagara Movement).

78 *See* Ellmann, *supra* note 72, at 1151-52. In his important work on ethics issues in representing client groups, Ellmann argues that lawyers should monitor the fairness of group decision-making processes and "intervene on behalf of those becoming victims" if necessary. *Id.* at 1152. This helpful framework does not explain how the lawyer is to decide, other than through resort to her own ethical and political values, which constituencies are victims and which are factions whose positions deserve to lose. Ellmann also discusses the lawyer's potential role as mediator in intra-group disputes, again flagging this problem but not fully resolving how it can be addressed from a client-centered perspective. *Id.* at 1155-56. *See also id.* at 1161-62 (discussing whether lawyers should ask dissenting sub-groups to leave organizations while lawyers stay with the original group); *id.* at 1158 (noting that lawyers must judge the impact of interventions they may make on group autonomy).

79 *See, e.g.*, Gilbert King, Devil in the Grove (2012) (documenting Marshall's bravery in representing criminal defendants in towns in which he barely escaped lynching mobs); Genna Rae McNeil, Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights (1984) (arguing that Houston developed a vision of social movement lawyering he hoped to pass on to future generations of lawyers).

80 *See generally* Mark V. Tushnet, The NAACP's Legal Strategy Against Segregated Education, 1925-1950 (2005).

81 *See id.*

82 *See* Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of* Lawrence v. Texas., New Yorker (Mar. 12, 2012), http://www.newyorker.com/magazine/2012/03/12/extreme-makeover-dahlialithwick [http://perma.cc/FT2R-6XB9]. *See also* Dale Carpenter, Flagrant Conduct: The Story of *Lawrence V. Texas* (2012) (discussing lawyers' creation of a case narrative for the lawsuit that overturned anti-sodomy laws).

83 *See* Lithwick, *supra* note 82.

84 *See, e.g.*, Anthony V. Alfieri, *Community Education and Access to Justice in a Time of Scarcity: Notes from the West Grove Trolley Garage Case*, 2013Wis. L. Rev. 121 (2013).

85 Anthony V. Alfieri, *Inner-City Antipoverty Campaigns*, 64 UCLA L. Rev. 1374 (2017).

86 *Id.*

87 *Id.*

88 *See* W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78Wash. U. L.Q. 113, 124 n.37 (2000).

89 Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y Rev. 95 (1974).

90 *See, e.g.*, Daniel R. Ernst, Lawyers Against Labor (1995) (tracing how advocacy by lawyers for clients opposed to the labor movement ended up ushering in the New Deal and expanding labor rights.)

91 *See, e.g.*, Model Rules R. 2.1.

92 *See* Model Rules R. 1.6.

93 *See* Model Rules 1.9 (discussing former client conflicts rules, which focus on preserving client confidentiality).

94 *See* Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31Harv. C.R.-C.L. L. Rev. 443, 447-49 (1996).

95 For example, non-lawyer members of a movement may be organizing new chapters, leading rallies, lobbying policy makers and legislators, or raising funds through grassroots outreach or by writing foundation grants. Still others may be writing newsletters or magazine articles, contacting press outlets, speaking to the media, appearing at the meetings of organizations, or speaking at other events.

96 *See, e.g.*, Luban, *supra* note 13, at 319.

97 The literature critiquing the lawyering strategies in *Brown v. Board of Education* is profuse. *See, e.g.*, What *BROWN V. BOARD OF EDUCATION* Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision (Jack M. Balkin ed., 2001).

98 Mark Tushnet traces the history of that battle in Tushnet, *supra* note 80.

99 We recognize that in a desegregation suit brought as a class action, other options, like the creation of subclasses with separate representation, might be possible.

100 *See, e.g.*, Dana A. Remus, *Out of Practice: The Twenty-First-Century Legal Profession*, 63 Duke L.J. 1243 (2014) (discussing the ways in which business lawyers increasingly do work that is not the practice of law); Tanina Rostain, *Legal Ethics: The Emergence of "Law Consultants,"* 75 Fordham L. Rev. 1397 (2006) (examining the growing practice of lawyers in the business sector providing law "consultancies" rather than legal representation).

101 Luban, *supra* note 13, at 317.

102 *Id.* at 317.

103 *Id.*

104 *Id.* at 325.

105 *Id.* at 326-29, 337, 340.

106 For a thoughtful analysis of the ethics issues that arise in representing inchoate groups, see Tremblay, *supra* note 72.

107 *See* Model Rules preface (emphasizing the lawyer's importance as client counselor). *See also* Model Rules R. 2.1 (noting the broad scope of the lawyer's role as advisor to the client).

108 *See* Alfieri, *supra* note 84.

109 *See* Akbar, *Radical Imagination, supra* note 1.

110 Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

111 Shelby County, Alabama v. Holder, 133 S. Ct. 2612 (2013).

112 Roe v. Wade, 410 U.S. 113 (1973).

113 *See* Gerald Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991).

114 An "other-regarding" orientation is an orientation that places emphasis on other persons' needs, either in addition to or in lieu of one's own self-interest.

115 Indeed, many of these characteristics turn out to be salient in the developing ethics literature on lawyers and leaders, which may also capture some of what we are striving towards in arguing for conceiving of movement lawyers as engaged in relationships that are somewhat different from the typical client-driven, lawyer-as-agent paradigm. *See generally* Deborah L. Rhode, Lawyers as Leaders (2013).

116 *Cf.* Susan D. Carle, *The Settlement Problem in Public Interest Law*, 18 Stan. L. & Pol'y Rev. 1, 40 (2018) (arguing that ethics problems raised by settlement in public interest cases differ in some regards from those in cases in which clients are paying lawyers for their services); Susan D. Carle, *Power as a Factor in Lawyers' Ethical Deliberation*, 35Hofstra L. Rev. 115, 135-36 (2006) (arguing that ethics concerns for lawyers who represent clients with little power are different from those for lawyers who represent clients with great power).

117 For a classic discussion of the importance of recognizing that practice contexts may alter legal ethics considerations, see David B. Wilkins, *Legal Realism for Lawyers*, 104 Harv. L. Rev. 468, 511 (1990).

31 GEOJLE 447

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MRPC RULE 1.2

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American Bar Association

Client-Lawyer Relationship

SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved.

Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows

are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Definitional Cross-References

“Fraudulent” *See* Rule 1.0(d)

“Informed consent” *See* Rule 1.0(e)

“Knows” *See* Rule 1.0(f)

“Reasonable” *See* Rule 1.0(h)

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MRPC RULE 1.4

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American Bar Association

Client-Lawyer Relationship

COMMUNICATION

(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations--depending on both the importance of the action under consideration and the feasibility of consulting with the client--this duty will require consultation prior to taking action. In other circumstances, such as during

a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Definitional Cross-References

“Informed consent” *See* Rule 1.0(e)

“Knows” *See* Rule 1.0(f)

“Reasonably” *See* Rule 1.0(h)

MRPC RULE 1.7

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American Bar Association

Client-Lawyer Relationship

CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain

their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical

questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a “tribunal” under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and openended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person

in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule

1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Definitional Cross-References

“Confirmed in writing” *See* Rule 1.0(b)

“Informed consent” *See* Rule 1.0(e)

“Reasonably believes” *See* Rule 1.0(i)

“Tribunal” *See* Rule 1.0(m)

MRPC RULE 3.6

Model Rules of Professional Conduct | 2021 Edition

American Bar Association

Advocate

TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:
(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):
(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:
(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Definitional Cross-References

“Firm” *See* Rule 1.0(c)

“Knows” *See* Rule 1.0(f)

“Reasonable” *See* Rule 1.0(h)

“Reasonably should know” *See* Rule 1.0(j)

“Substantial” *See* Rule 1.0(l)

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