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To a Young Lawyer: Thoughts On Disobedience

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TO A YOUNG LAWYER: THOUGHTS ON DISOBEDIENCE

L. HAROLD LEVINSON*

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I. INTRODUCTION

Most young lawyers spend at least the first few years of their professional careers working under the supervision of senior lawyers.¹ Familiar examples

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1. A nationwide survey of 23,223 graduates of the class of 1982 reports the following categories of employment after graduation:

include the associate in a law firm; the assistant in a governmental law department, such as that of the attorney general, district attorney, public defender, legal services office, or administrative agency; the assistant to the general counsel in a corporate in-house legal department; and the judicial clerk. According to the language adopted in 1983 in the ABA Model Rules of Professional Conduct, the supervised lawyer is the "subordinate" of the supervisor.²

The Model Rules address, to a limited extent, the relationship between the subordinate and the supervisor. I propose to explore that relationship further, with particular emphasis on the situations in which a subordinate lawyer may consider engaging in insubordination, and with due regard to the price that the subordinate and others may have to pay for the act of insubordination, even if the act was legally or morally justified.³ The examples in this article occur within the setting of a law firm, in which the subordinate lawyer is an associate and the supervisor is a partner. With minor adaptations, the same examples apply to other settings in which a subordinate lawyer works under supervision.

Self-employed in private practice	4.1%
Private practice in law firm	53.3
Public Defender, legal services and other public sector	2.9
Business concerns—legal	5.8
Business concerns—non-legal or unidentified	4.7
Government—legal	9.2
Government—non-legal or unidentified	1.3
Judicial clerkships	10.6
Military	1.6
Academic	3.0
Employment category unidentified	3.5
Total	<u>100.0%</u>

The percentage of those who went into private practice in law firms is further analyzed by size of firm, as follows:

Very small firm	(2-10)	22.0%
Small firm	(11-25)	8.1
Medium firm	(26-50)	6.1
Large firm	(51-100)	5.8
Very large firm	(over 100)	8.5
Firm size unidentified		2.8
Total		<u>53.3%</u>

NATIONAL ASSOCIATION FOR LAW PLACEMENT, CLASS OF 1982 EMPLOYMENT REPORT AND SALARY SURVEY 60-63 (11th ed. 1984).

2. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 5.2 [hereinafter cited as MODEL RULES].

3. The article deals only with acts of insubordination for which the subordinate can claim, in good faith, either legal or moral justification. A subordinate who engages in disobedience without a good-faith claim of legal or moral justification deserves to be dismissed or otherwise disciplined by the law firm. In addition, the subordinate may be subject to professional discipline for unfitness to practice law, under the MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102(A)(6) (1982) [hereinafter cited as CPR] and under the MODEL RULES, *supra* note 2, Rule 8.4(b).

Although the article focuses on the problems of the subordinate who is a lawyer, it also devotes some attention to the problems of non-lawyer employees of law firms. The purpose of these apparent digressions is to explore the extent to which the problems of the subordinate lawyer are the same as those of any other subordinate, and the extent to which the subordinate lawyer, by reason of being a lawyer, faces unique problems.

After surveying the law applicable to the subordinate lawyer, including but by no means limited to the Model Rules, this article will discuss, in turn, two types of justification for disobedience. The first type is legal justification, arising when the supervisor asks you to do something unlawful and you refuse in reliance on the law. The second type is moral justification, arising when the supervisor asks you to do something which is lawful but which unacceptably offends your moral position. After discussing legal and moral justifications for disobedience, the article offers some proposed principles of law office management which may prevent the conflicts that underlie the very thought of disobedience.

I do not presume to tell you what values to believe in, nor when you should take your beliefs so seriously that you rely on them as the basis for an act of insubordination. Rather, my purpose is to encourage you to preserve, develop, and remain in touch with your own values, whatever they may be, and to consider the option of insubordination if you receive an instruction that you find troublesome on either legal or moral grounds. I take the liberty of adding that if you would never, under any conceivable circumstances, say "no" to your supervisor on either legal or moral grounds, I would seriously question your fitness to be a lawyer—or to be a secretary, automobile mechanic, cook, soldier, or effective citizen in a democratic society.

II. APPLICABLE LAW

Subordinate lawyers are subject to the general law applicable to the entire community (with narrow exceptions), to the special law applicable to lawyers, and to a special subdivision of that law dealing with the relationship between subordinate and supervising lawyers.

A. *General Law*

In almost all respects, lawyers are governed by the same general law that applies to the entire community. The most notable exception is the lawyer-client privilege, which allows and indeed requires the lawyer to refuse to disclose privileged information, even in circumstances in which a non-lawyer could be legally compelled to testify or else be held in contempt of court.⁴ The

4. See, e.g., *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984). The Court sustained the authority of the Internal Revenue Service to require a firm of independent auditors to produce the tax accrual workpapers it had prepared during the audit of the taxpayer. The Court noted that auditors are not entitled to assert the

lawyer-client privilege can even override a criminal statute, as illustrated by a bizarre and troublesome case.⁵ A client told his lawyers of the location of the bodies of two persons whom the client had murdered. The lawyers found and photographed the bodies but did not reveal the existence or location of the bodies to the public authorities. When the facts became known the lawyers were prosecuted for the misdemeanor of failing to report unburied corpses. The New York court held that the lawyers had justifiably disobeyed this statute, because obedience would have violated their higher duty to maintain the confidentiality of their client's privileged information.

Despite exceptions such as that illustrated above,⁶ the general laws constitute a vital part of the law applicable to lawyers. Such basics as the law of torts, contracts, property, agency, and partnership form an essential substructure for the activities of the lawyer. Professor Gross has pointed out that the lawyer/client relationship requires the lawyer to act in a fiduciary capacity with regard to the client, under the law of agency.⁷ If the principal lawyer employs a subordinate lawyer to assist in serving the client, the subordinate lawyer is a sub-agent, owing fiduciary duties both to the supervising lawyer and to the client. These duties, arising under the general law of agency, exist in addition to any other duties that may be found under the special law applicable to lawyers.

B. *Special Law Applicable to Lawyers*

To some extent, the special law applicable to lawyers overlaps with the general law that applies to the community as a whole. In some of the overlapping areas, the two sets of laws conflict, as illustrated by the above discussion of the lawyer-client privilege. In other overlapping areas, the two sets of laws

attorney's traditional privilege against disclosing a work product resulting from a professional engagement.

5. *People v. Belge*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1975), *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).

6. The following examples illustrate some additional areas in which the general law does not apply to lawyers: (1) lawyers may be exempted from serving as jurors, *State v. Brown*, 169 Conn. 692, 364 A.2d 186 (1975); *Commonwealth v. Geschwendt*, 271 Pa. Super. 102, 412 A.2d 595 (1979), *aff'd*, 500 Pa. 120, 454 A.2d 991 (1982); (2) lawyers are not at liberty to solicit business, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *cf. In re Primus*, 436 U.S. 412 (1978); *In re Greene*, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981), *cert. denied*, 455 U.S. 1035 (1982); *In re Oxman*, 496 Pa. 534, 437 A.2d 1169 (1981), *cert. denied*, 456 U.S. 975 (1982); (3) lawyers are not allowed to charge, as a fee for their services, whatever the traffic will bear, *In re Kutner*, 78 Ill. 2d 157, 399 N.E.2d 963 (1979); (4) a lawyer may not engage in sexual contact while visiting a client in a penitentiary, *Committee on Professional Ethics & Conduct v. Durham*, 279 N.W.2d 280 (Iowa 1979); (5) a lawyer may not make public defamatory remarks against a judge, *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165 (Ky. 1980), *cert. denied*, 449 U.S. 1101 (1981). *But see infra* notes 22-23 and accompanying text.

7. Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259 (1985).

are consistent; for example, both the general law and the special law of lawyering prohibit a lawyer from knowingly filing a false document with a court.⁸ Further, the special law of lawyering expressly incorporates portions of the general law.⁹

A substantial part of the special law applicable to lawyers does not overlap at all with the general law, but rather adds to it by addressing topics not covered by the general law. Examples include the special provisions regarding disqualification of lawyers and their withdrawal from employment because of conflicts of interests.¹⁰

The special law applicable to lawyers is found in a number of sources, each requiring a brief identification here.

1. Codifications

The dominant sources are the codifications of standards, referred to variously as codes of ethics, professional responsibility, or professional conduct. The American Bar Association has provided highly influential models, first in its 1908 Canons of Professional Ethics,¹¹ then in its Code of Professional Responsibility of 1969-70,¹² and most recently in the 1983 Model Rules of Professional Conduct.¹³ Each jurisdiction has adopted its own codification, either as a statute or as a rule of the state's highest court or as an overlapping combination of both, depending on which of the two organs has authority under the state constitution to regulate the practice of law.¹⁴ The ABA Code of Professional Responsibility remains the source from which the codifications of most states are derived, although the 1983 ABA Model Rules have recently started to exert their influence. Many states have made their own distinctive

8. The special law of lawyering prohibits the use of false evidence, MODEL RULES, *supra* note 2, Rule 3.4(b); CPR, *supra* note 3, DR 7-102(A)(6).

9. *See infra*, notes 18-20 and accompanying text.

10. MODEL RULES, *supra* note 2, Rules 1.7 to 1.12; CPR, *supra* note 3, DR 5-101 to 5-106.

11. CANONS OF PROFESSIONAL ETHICS (1908). Professor L. Ray Patterson traces rules of ethics in the United States as far back as D. Hoffman's A COURSE OF LEGAL STUDY (2d ed. 1836), then to Judge G. Sharswood's AN ESSAY ON PROFESSIONAL ETHICS (1854). In turn, Sharswood's essay influenced Judge T. G. Jones in his drafting of the ALABAMA CODE OF LEGAL ETHICS, adopted by the Alabama State Bar Association in 1887 and regarded as the first formal code of legal ethics in this country. The Alabama Code served as the Model for the ABA's Canons, adopted in 1908. L. PATTERSON, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY § 1.02 (1982). Footnotes to the CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 3, include references to related provisions of the 1908 CANONS.

12. *See supra*, note 3.

13. *See supra*, note 2.

14. On the overlapping jurisdiction of legislatures and courts, *see, e.g.*, Pace v. State 368 So. 2d 340 (Fla. 1979); Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978); Petition of the Tennessee Bar Ass'n, 532 S.W.2d 224 (Tenn. 1975); *In re Cannon*, 206 Wis. 374, 240 N.W. 441 (1932).

adaptations of the ABA Code, and these variations must of course be taken into account within any particular state.¹⁵ For purposes of a nationwide survey, however, discussion can most usefully focus on the ABA models themselves.

Federal courts are not bound by a state's adoption of any codification of standards regulating the conduct of lawyers, but many federal courts have promulgated rules adopting the ABA Code of Professional Responsibility, and other federal courts treat the ABA Code as a persuasive authority.¹⁶ A federal court recently placed significant reliance on the 1983 ABA Model Rules although the court had not adopted those rules.¹⁷

Each of the ABA models contains a summary of the types of conduct that are prohibited, and in each model that summary includes a prohibition against violating certain provisions of the general law. The Model Rules define misconduct as follows:¹⁸

Rule 8.4 Misconduct. It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

The major difference between this provision of the Model Rules and the corresponding language in the Code of Professional Responsibility is in subsection (b). The corresponding provision in the Code prohibits "illegal conduct involving moral turpitude."¹⁹ The comments to the Model Rules point out the difference, observing that the policy of the Model Rules is to reach only those offenses that "indicate lack of those characteristics relevant to law practice."²⁰

15. For compilations of the ABA CPR, *supra* note 3, with the corresponding provisions adopted by the states, see ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (1984) and ABA Nat'l Center for Professional Responsibility CODE OF PROFESSIONAL RESPONSIBILITY BY STATE (1980). The provisions adopted by a particular state are generally available in that state's compilation of statutes or court rules.

16. *See, e.g.,* Paul E. Iacono Structural Engineer, Inc. v. Humphrey, 722 F.2d 435 (9th Cir. 1983), *cert. denied*, 464 U.S. 851 (1983); *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 658 F.2d 1355 (9th Cir. 1981).

17. Securities Investor Protection Corp. v. Vigman, 587 F. Supp. 1358 (C.D. Cal. 1984), *rev'd on other grounds*, 764 F.2d 1309 (9th Cir. 1985).

18. MODEL RULES, *supra* note 2, Rule 8.4.

19. CPR, *supra* note 3, DR 1-102 (A)(3).

20. MODEL RULES, *supra* note 2, Rule 8.4 comment; *see also infra*, notes 90-91 and accompanying text.

2. Inherent Power of Each Court

The modern codifications of lawyer's conduct are, to a considerable extent, restatements of decisions made by courts in the exercise of their inherent power to assure decorum and fair play by advocates at the bar. The courts enforced their decisions by the contempt power, or by the power to exclude the offending lawyer from practice before the offended tribunal.²¹

Once the detailed codifications went into effect, the practical impact of the inherent power of the courts was reduced, since disciplinary proceedings tended to focus on specific language in the codification rather than on the common law precedents of the courts. A residue of the traditional inherent power remains in each court, however. For example, courts have invoked their inherent power to discipline lawyers who make offensive statements in or regarding the court.²² The circumstances in which discipline can be imposed for offensive statements have been curtailed by decisions of the United States Supreme Court interpreting the first amendment.²³

21. See, e.g., *Goodhart v. State*, 84 Conn. 60, 78 A. 853 (1911); *In re Clifton*, 115 Fla. 168, 155 So. 324 (1934); *West v. Field*, 181 Ga. 152, 181 S.E. 661 (1935); *Commonwealth v. Roe*, 129 Ky. 650, 112 S.W. 683 (1908); *Bar Ass'n of Boston v. Casey*, 211 Mass. 187, 97 N.E. 751 (1912); *In re Fox*, 296 So. 2d 701 (Miss. 1974); *In re Mindes*, 88 N.J.L. 117, 95 A. 743 (1915).

22. Before adoption of the CPR, *supra* note 3, or other enforceable rules of professional conduct, courts relied on their inherent power to impose discipline on lawyers who made offensive statements. See, e.g., *Cobb v. United States*, 172 F. 641 (9th Cir. 1909); *In re Hanson*, 99 Kan. 23, 160 P. 1141 (1916); Annot., 12 A.L.R. 3d 1408.

After adoption of the CPR, the courts continued to rely on their inherent powers, but these powers were reinforced by the CPR, and particularly EC 8-6. Courts imposed discipline in, for example, *Baker v. Monroe County Bar Ass'n*, 34 A.D.2d 229, 311 N.Y.S.2d 70 (1970), *aff'd*, 28 N.Y.2d 977, 272 N.E.2d 337, 323 N.Y.S.2d 837 (1971), *cert. denied*, 404 U.S. 915 (1971); *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165 (Ky. 1980), *cert. denied*, 449 U.S. 1101 (1981); *State v. Eisenberg*, 48 Wis. 2d 364, 180 N.W.2d 529 (1970), *cert. denied*, 402 U.S. 987 (1971).

23. See, e.g., *Holt v. Virginia*, 381 U.S. 131 (1965); *In re Sawyer*, 360 U.S. 622 (1959). Recent state cases that have imposed no discipline include *Justices of Appellate Division, First Dep't v. Erdmann*, 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973); *State Bar v. Semaan*, 508 S.W.2d 429 (Tex. Civ. App. 1974). See Note, *In re Erdmann: What Lawyers Can Say About Judges*, 38 ALB. L. REV. 600 (1974). The most recent development is *In re Snyder*, 105 S. Ct. 2874 (1985). A lawyer applied for compensation under the Criminal Justice Act, for serving as court-appointed counsel for a defendant in a federal district court. The chief judge of the Eighth Circuit Court of Appeals, after conducting the required review of the application, twice rejected it because it contained inadequate information. The lawyer then sent a letter to the secretary of the district judge, stating, in part: "I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you are instructed to remove my name from the list of attorneys who will accept criminal indigent work. I have simply had it." *Id.* at 2877. When the lawyer refused to apologize for the harsh tone of the letter, the Eighth Circuit suspended him from practice for six months.

The Supreme Court reversed, basing its decision on Rule 46(b) of the Federal Rules of Appellate Practice, and therefore finding no need to address any constitutional issues. Rule 46(b) provides for the suspension or disbarment of an attorney for "con-

Another area in which courts have exercised their inherent power is in the matter of dress codes. By a vote of 4 to 3, the Florida Supreme Court upheld the authority of a trial court to hold a lawyer in contempt of court because the lawyer refused, after warning, to wear a necktie of conventional fabric and dimensions, rather than the string tie with metal medallion which he wore in the courtroom.²⁴ A related example is found in a standard book on practice before the Supreme Court of the United States, which warns vestless gentlemen to wear their jackets buttoned.²⁵

Of greater practical significance, perhaps, is the power exercised by courts in promulgating rules of practice and procedure, including details such as the size of paper on which pleadings should be typed, and the number of copies to be filed.²⁶ Courts may refuse to accept non-conforming documents, and the offending lawyers may face the embarrassment of having to ask forgiveness from their clients as well as from the courts. In some jurisdictions, the power to promulgate rules of procedure is regarded as the province of the legislature as well as the courts. The approval of both the judiciary and the legislature may be necessary in order to immunize the rules against challenge.²⁷

3. Oath

Perhaps the most ancient source of law applicable to lawyers is the oath

duct unbecoming a member of the bar." *Id.* at 2880; FED. R. APP. P. 46(b). Interpreting Rule 46(b) in light of the "lore of the profession," the Court stated:

All persons involved in the judicial process—judges, litigants, witnesses, and court officers—owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone. However, even assuming that the letter exhibited an unlawyer-like rudeness, a single incident of rudeness or lack of professional courtesy—in this context—does not support a finding of contemptuous or contumacious conduct, or a finding that a lawyer is not "presently fit to practice law in the federal courts." Nor does it rise to the level of "conduct unbecoming a member of the bar" warranting suspension from practice.

Id. at 2882.

24. *Sandstrom v. State*, 336 So. 2d 572 (Fla. 1976).

25. R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 740 (5th ed. 1978).

26. *See, e.g.*, SUP. CT. R. 33; FED. R. APP. P. 32.

27. At the federal level, Congress has delegated rulemaking power to the Supreme Court. 18 U.S.C. § 3771 (1982); 28 U.S.C. §§ 2071 *et seq.* (1982); 19 C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4509 (1982).

In Florida, the state constitution empowers the Supreme Court to adopt rules for practice and procedure in all courts, but these rules may be repealed by statute passed by a two-thirds majority of the membership of each house of the legislature. FLA. CONST. art. 5, § 2(a) (amended 1972). This constitutional provision laid to rest a long-standing controversy between the court and the legislature; *see, e.g.*, *Petition of Florida State Bar Ass'n*, 155 Fla. 710, 21 So. 2d 605 (1945); *see also Cohn v. Borchard Affiliations*, 25 N.Y.2d 237, 250 N.E.2d 690, 303 N.Y.S.2d 633 (1969).

of office taken, pursuant to legal requirement, at the time of admission to the practice of law. In the history of the English common law, the lawyer's oath of office is traced back to before the year 1300.²⁸ It continued to be a statutory requirement, for at least some portions of the English legal profession, until 1932.²⁹ The American colonies picked up the requirement of the oath from the English statutes then in effect.³⁰ After independence the states preserved some form of the oath requirement, and the institution continues to the present time.

The English oaths were brief promises of faithful performance of the practice of law.³¹ American adaptations add a pledge to support the constitu-

28. Andrew Horne, a successful London fishmonger, wrote *THE MIRROR OF JUSTICES* in or near 1300 as a compilation of traditional English law, including traditions that had originated before the Norman Conquest (1066) and still survived in Horne's days. Referring to the serjeants-at-law (predecessors of today's litigators), Horne writes: "Every countor [serjeant] is chargeable by the oath that he shall do no wrong nor falsity contrary to his knowledge, but shall plead for his client, the best he can according to his understanding." A. HORNE, *THE MIRROR OF JUSTICES* 80 (W.H. transl. 1903).

Horne's work is cited as highly reliable authority in *In re Serjeants at Law*, 133 Eng. Rep. 93, 94, 6 Bing. (N.C.) 235, 238 (C.P. 1840). That court observes that the serjeants' oath of office "has existed from the earliest times" and that the oath includes the promise "to give due attendance for the service of the King's people in their causes." *Id.* This oath of "due attendance" was apparently in addition to the oath of "the best he can" reported by Horne. The "due attendance" oath seems to have obliged the serjeants to make their services available to clients who needed them, an important obligation since the serjeants enjoyed a monopoly as the only practitioners who were allowed to appear in the Court of Common Pleas. *Id.*

The serjeants' oath of "the best he can" was adapted in a statute in 1402, 4 Hen. 4 ch. 18, as follows:

That all the attornies shall be examined by the justices and by their discretions their names put into the roll, and they that be good and virtuous, and of good fame, shall be received and sworn well and truly to serve in their offices, and especially that they make no suit in a foreign country. . . .

29. Barristers were traditionally subject to regulation by the Inns of Court and were therefore not covered by the statutes requiring the taking of oaths. Barristers are not regarded as officers of the court, although solicitors are. 3 HALSBURY'S LAWS OF ENGLAND § 1132 (4th ed. Hailsham 1973). Solicitors were covered by the oath statutes until the Solicitors Act, 1932, 22 & 23 Geo. 5 ch. 37, § 82 sched. 4, which repealed the statutory requirement of an oath.

30. The version of the English oath that most affected the Colonies appears to have been that contained in the Attornies and Solicitors Act of 1729, 2 Geo. 2 ch. 23, worded as follows: "I do swear that I will truly and honestly demean myself in the practice of [an Attorney] [a Solicitor] according to the best of my knowledge and ability, So help me God." Note that this does not differ significantly from the ancient oath of the serjeants, *supra* note 28.

The reception of the English oath into the Colonies is traced in C. WARREN, *A HISTORY OF THE AMERICAN BAR* 26 (the English oath), 43 (Virginia), 53 (Maryland), 72, 77 (Massachusetts), 113 (New Jersey), 121 (South Carolina), 123 (North Carolina), 126 (Georgia), 130 (Connecticut), 139 (New Hampshire), 141 (Rhode Island) (1911).

31. See *supra* notes 28, 30.

tions of the United States and of the relevant state.³² Some adaptations add further details, turning the oath into a cameo restatement of the duties of the lawyer.³³ In the days before any other codification, these longer forms may have served a useful purpose. Today, however, disciplinary proceedings almost always rely on specific language found in the Code of Professional Responsibility or other equivalent codification, and not on the oath. Similarly, scholarly and professional attention is directed almost exclusively to the Code or other equivalent codification, and not to the oath.³⁴

The oath does, however, have a bearing on this article, since we are examining issues of conscience as well as issues of law. A lawyer who is willing to violate a statute or a provision of the Code of Professional Responsibility, in

32. For example, the New York oath, required by N.Y. CONST. art. 13, § 1 (1969) and N.Y. JUDICIARY LAW § 466 (McKinney 1983) states: "I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of _____ according to the best of my ability." The requirement that all applicants for admission to the bar take this oath was upheld in *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971).

33. A longer oath is required by Alabama, as follows:

I do solemnly swear (or affirm) that I will demean myself as an attorney, according to the best of my learning and ability, and with all good fidelity, as well to the court as to the client; that I will use no falsehood or delay any person's cause for lucre or malice and that I will support the Constitution of the state of Alabama and of the United States, so long as I continue a citizen thereof, so help me God.

ALA. CODE § 34-3-15 (1975). In *Nicholson v. Board of Comm'rs*, 338 F. Supp. 48 (M.D. Ala. 1972), an almost identical version of the above Alabama oath was upheld, but the court held that an applicant must be excused from including the words "so help me God" if the applicant conscientiously objects to using these words. *Id.* at 58-59. The reference to citizenship in the Alabama oath is questionable in view of *In re Griffiths*, 413 U.S. 717, 729 (1973), holding that resident aliens may not be excluded from the practice of law.

California requires a short oath, "to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of [the applicant's] knowledge and ability," CAL. BUS. & PROF. CODE § 6067 (West 1974), but the next section of the statute lists the duties of the attorney in considerable detail, which is thus incorporated into the meaning of the oath. *Id.* § 6068.

34. In the books published for use by law students in the ABA-required course in Professional Responsibility, I have found the oath discussed only in M. SCHWARTZ & R. WYDICK, *PROBLEMS IN LEGAL ETHICS* 48 (1983). Brief mention is found in 1 E. THORNTON, *ATTORNEYS AT LAW* 79 (1914). Helen Silving, in an anthropological study, describes the oath as a "self-curse." Silving, *The Oath*, 68 YALE L.J. 1329, 1337, 1527 (1959). A few recent court decisions regarding the disciplining of lawyers have mentioned the violation of the oath of office, together with other grounds for discipline. *E.g.*, *In re Cohen*, 11 Cal. 3d 416, 521 P.2d 477, 113 Cal. Rptr. 485 (1974); *In re Dineen*, 380 A.2d 603 (Me. 1977); *State v. Eisenberg*, 48 Wis. 2d 364, 180 N.W.2d 529 (1970), *cert. denied*, 402 U.S. 987 (1971). *See also In re Cannon*, 206 Wis. 374, 240 N.W. 441 (1932), which traces the history of the regulation of the practice of law, including the requirement of the oath of office.

the belief that higher values predominate, may yet hesitate before violating the oath of office that the lawyer took upon entering upon the practice of law. The oath was, after all, a voluntary act, in a solemn setting purporting to bind the new lawyer in conscience.³⁵

4. Other Sources of Law

Finally, the special law applicable to lawyers includes an assortment of statutes, court rules, and rules of administrative agencies on a wide range of relatively specialized topics. Especially worthy of mention is Circular 230 of the Internal Revenue Service, setting forth the standards of professional conduct required of lawyers and others who practice before the IRS.³⁶ Circular 230 prohibits "disreputable conduct," and defines this term in a manner that imposes tight regulation upon IRS practitioners. For example, a practitioner may not remain in partnership with a person who has been debarred from IRS practice.³⁷ As another example, the IRS prohibits a practitioner from rendering a favorable opinion on a tax shelter investment, unless it is based on a conclusion that substantially more than half of the tax benefits are more likely than not to withstand IRS scrutiny.³⁸

Non-binding sources of recommended practice are also part of the body of persuasive authority on the law applicable to lawyers. For example, the ABA Standards of Criminal Justice include a recommendation on how a defense lawyer should proceed when the client unexpectedly commits perjury on the witness stand.³⁹ A number of courts have relied on this recommendation as the basis for their decisions.⁴⁰

C. *Law on Relationship Between Subordinate and Supervising Lawyer*

The Model Rules break new ground by dealing, systematically, with the relationship between subordinate and supervising lawyers. Rule 5.1 establishes the principle that the supervisor is vicariously responsible, for disciplinary purposes, for acts done by a subordinate under the supervisor's control. Rule 5.2 speaks directly to the status of the subordinate, in the following language:

35. See *infra*, notes 87-93 and accompanying text.

36. 31 C.F.R. § 10 (1984).

37. 31 C.F.R. § 10.51(h) (1984).

38. 31 C.F.R. § 10.33(a)(5)(ii) (1984).

39. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: THE DEFENSE FUNCTION § 4-7.7 (2d ed. 1980).

40. See, e.g., *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978); *Butler v. United States*, 414 A.2d 844 (D.C. App. 1980) (en banc); *Thornton v. United States*, 357 A.2d 429 (D.C. App. 1976), cert. denied, 429 U.S. 1024 (1976). Standard 4-7.7 was rejected in *State v. Robinson*, 290 N.C. 56, 224 S.E.2d 174 (1976). The MODEL RULES, *supra* note 2, address the problem without clearly solving it. Rule 3.3(a)(4). The comment to that rule suggests a solution that would not coincide with Standard 4-7.7.

Rule 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.⁴¹

Rule 5.1 is similar, in some respects, to Rule 8.4(a) and its counterpart in the Code of Professional Responsibility, which prohibit a lawyer from committing a violation "through the acts of another."⁴² Rule 5.2 has no counterpart in the Code of Professional Responsibility.⁴³ Since that Code contains no special provisions regarding subordinate lawyers, the implication is that subordinates are as fully responsible for their actions as are any other members of the bar. As a practical matter, under the Code, a disciplinary tribunal may give a subordinate lawyer the benefit of the doubt if the subordinate committed a borderline violation while acting in good-faith reliance on a supervisor's interpretation of the Code, but this leniency is not spelled out in the Code, and a tribunal may see fit to be harsh rather than lenient. By contrast, the Model Rules expressly immunize the subordinate in that type of situation. As a result, the Model Rules enable the supervisor to insist on obedience from the subordinate in the borderline situations described in Rule 5.2(b). The supervisor can insist because that rule assures the subordinate of freedom from disciplinary responsibility.

III. LEGAL JUSTIFICATION FOR DISOBEDIENCE

The discussion of legal justification for an act of disobedience starts with an example. In this example, as well as in others later in the article, the cast of characters includes (a) Client; (b) Supervising lawyer, the only person in the law firm who has dealt directly with Client; (c) Subordinate lawyer, a member of the bar of the relevant jurisdiction; (d) Clerk, a person with law training who is not a member of the bar but expects to become a member; and (e) Secretary, who is not and does not expect to become a member of the bar.

Example No. 1: The Forged Document

Facts

At the request of Client, Supervising lawyer decides to prepare a forged document, to be submitted to a court as genuine, in support of Client's claim in civil litigation. Supervising lawyer instructs Subordinate lawyer, Clerk, and Secretary to participate in preparing the forgery and explains to all of them its purpose.

Comment

41. MODEL RULES, *supra* note 2, Rule 5.2.

42. MODEL RULES, *supra* note 2, Rule 8.4(a); CPR, *supra* note 3, DR 1-102(A)(2).

43. MODEL RULES, *supra* note 2, comment to Rule 5.2.

The instruction is clearly illegal under the general law. Any person who carries it out commits a criminal act and also is subject to civil liability for any loss caused by forgery.⁴⁴ In addition, if the forgery is carried out, Supervising lawyer and Subordinate lawyer are subject to professional discipline,⁴⁵ and Clerk may be disqualified from becoming a member of the bar.⁴⁶ Accordingly, Subordinate lawyer, Clerk, and Secretary are legally obliged to refuse to carry out the instruction.

Value Choice

Their legal obligation to refuse does not necessarily mean that these individuals will refuse. Each individual is faced with a personal value choice in deciding whether or not to carry out the illegal instruction. Arguments in

44. The basis for criminal liability is the general law of crimes and of torts. An alternative basis for civil liability could be asserted in tort actions against Supervisor and Subordinate, under a theory that a lawyer who violates the standards of professional conduct thereby commits a tort against the victim of that violation. This notion, that violation of a professional standard is a tort per se, has not been generally accepted by the courts. *See, e.g.,* Woodruff v. Tomlin, 616 F.2d 924 (6th Cir.) (en banc), cert. denied, 449 U.S. 888 (1980). *See* MODEL RULES, *supra* note 2, "Scope," stating that violation of the model rules "should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules . . . are not designed to be a basis for civil liability." Of course this statement in the introduction to the Model Rules would not bind a court in a tort case, even in a jurisdiction that had adopted the Model Rules.

45. MODEL RULES, *supra* note 2, Rule 1.2(d); Rule 3.3(a)(4); Rule 5.1(c); Rule 5.3(c); Rule 8.4(a), (b), (c), and (d); CPR, *supra* note 3, DR 1-102 (A)(1), (4), (5), and (6); DR 7-102(A)(2), (4), and (6).

46. The Model Rules and the Code of Professional Responsibility are addressed to persons who have already been admitted to practice law. Accordingly, these compilations do not directly address the question of the qualifications that a candidate must possess in order to be eligible for admission to the bar. The Code of Professional Responsibility prohibits a lawyer from furthering the application for admission to the bar of "another person known by him to be unqualified in respect to character, education, or other relevant attribute." CPR, *supra* note 3, DR 1-101(B). The Model Rules do not repeat this provision, but merely prohibit a lawyer (or an applicant) from submitting false or incomplete information in connection with an application for admission to the bar. MODEL RULES, *supra* note 2, Rule 8.1.

It seems reasonable to assume that an applicant for admission to the bar may be disqualified if that person has engaged in conduct which would result in the disbarment of a member of the bar. This principle seems consistent with the requirement of *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), that an applicant may be denied admission only on grounds that are reasonably related to the practice of law. *Schware* was cited, by the California court, for the proposition that the grounds for denial of admission and for disbarment are essentially the same. *Hallinan v. Committee of Bar Examiners*, 65 Cal.2d 447, 55 Cal Rptr. 228, 421 P.2d 76 (1966); *see also* Special Project, *Admission to the Bar: A Constitutional Analysis*, 34 VAND. L. REV. 655 (1981); Annot., 64 A.L.R.2d 301 (1959). Professor Deborah Rhode, in a recent study, concludes that a double standard exists, in which "both substantive and procedural requirements are more solicitous of practitioners [facing threatened disbarment] than applicants [facing threatened denial of application]." Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 547 (1985).

favor of refusing to carry it out include the moral obligation to obey the law because it is the law; the moral obligation to obey the particular laws at issue here because those laws are appropriate, since they assure fair play and integrity in the judicial process; and the fear of punishment if the forgery is committed and later detected.

Arguments in favor of carrying out the illegal instruction include the fear of adverse consequences from the employer if the instruction is not carried out, and various arguments calling into question the moral appropriateness of obeying the laws in the particular circumstances. These questions could address such issues as (1) whether Client's opponent is probably engaging in equally foul play, in which case the illegal instruction may result in a fair balancing of the scales; (2) whether Client deserves to win at all costs, because of the justness of Client's cause, and whether the judicial system can be relied upon to produce a just result without "a little help" from illegal tricks such as forgery; or (3) whether the laws prohibiting forgery are the product of oppressive and discriminatory legislation which should be undermined for the general good of society, in which case we are morally obliged to undermine these unjust laws whenever possible.

The above questions, on the moral appropriateness of obeying the laws in the particular circumstances, offer a preview of the issues we will explore later in this article, under the general heading of moral justifications for disobeying the legal instruction of a supervisor.⁴⁷ I will put off further discussion of these issues until then, but please note how these issues fit into the present discussion of legal justifications for disobedience. In deciding whether or not to carry out an illegal instruction, a subordinate must make a value choice, and that value choice is not radically different from the choice made by a person who has to decide whether or not to carry out a legal but morally troublesome instruction.

Leaving aside, for the time being, the question of the moral appropriateness of disobeying the illegal instruction, let us focus on the risk of adverse consequences from the employer if the employees disobey the illegal instruction.

Risk of adverse action by employer

Although the law prohibits employees from carrying out the illegal instruction to commit a forgery, the law does not provide a fully satisfactory set of remedies for those who refuse to carry out the illegal order and who suffer adverse consequences from their employer as a result. Let us first consider the general law, applicable to all employees in the example, and then consider whether the special law of lawyering offers any additional protection to Subordinate lawyer or to Clerk.

To clarify the example, assume that all employees refuse to carry out Supervising lawyer's instruction, and that all are discharged from employment

47. See *infra*, notes 81-93 and accompanying text.

with the law firm. The relevant legal theory is found in the law of unjust dismissal.

Unjust dismissal

Under the common-law doctrine of employment at will, the employer has the right to discharge an employee at any time, for a good reason, a bad reason, or no reason at all.⁴⁸ This doctrine provides absolutely no legal remedy for the employee who was discharged because the employee refused to carry out an illegal instruction.⁴⁹

More recently, some courts have inserted an implied obligation of good faith into the employment relationship. Those courts are willing to provide relief to an employee who was discharged in bad faith.⁵⁰ In a jurisdiction following the "good faith" approach, the employees in our example would likely be able to convince a court that the employer acted in bad faith by discharging them for their refusal to engage in the criminal conduct requested by the employer.⁵¹

Even in a court that does not generally follow the "good faith" approach, some relief may be available to Subordinate lawyer and Clerk in our example, if they are discharged for refusing to obey an illegal order. A court may decide that a law firm, by employing an associate lawyer and a law clerk, has incurred some obligation to provide them with an appropriate environment in which they can develop their professionalism. This argument may be supported by the historical analogy of the apprenticeship system in which law clerks depended upon their employers for the training and recommendation needed for admission to the legal profession.⁵² Additional support is found in

48. L. LARSON, UNJUST DISMISSAL § 1.01 (1985) [hereinafter cited as LARSON].

49. *Id.*

50. A pioneering case is *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); *see also Cancellier v. Federated Dep't Stores*, 672 F.2d 1312 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917, *modified*, 117 Cal. App. 3d 520 (1981); LARSON, *supra* note 48, § 3.05 [2]. Other grounds for relief include tort theory, LARSON ch. 4; wrongful termination statutes, *id.* ch. 5; public policy based on statute or constitution, *id.* ch. 6; public policy based on general public standards or morals, *id.* ch. 7; and personnel manuals, employee handbooks and other written policies, *id.* ch. 8.

51. Professor Gross observes: "There is a split of authority on whether the discharge of an 'at-will' employee as a reprisal for opposition to the employer's unethical or illegal conduct is actionable." Gross cites *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983), as an example of a judicial view that denied recovery to a wrongfully discharged employee—in that case, an accountant. The contrary view was taken in *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980), and in *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). Gross, *supra* note 7, at 297-98 n.167 (1985).

52. On the historical importance of the apprenticeship system, *see, e.g.*, 2 A. CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 173-76 (1965); M. RADIN, ANGLO-AMERICAN LEGAL HISTORY 258-60 (1936); 1 E. THORNTON, ATTORNEYS AT LAW 60-64 (1914).

Model Rules 5.1 to 5.3 which, for disciplinary purposes, require all law firms to provide an appropriate environment for their personnel.⁵³ The employees could argue that the disciplinary provisions of Model Rules 5.1 to 5.3 should be matched by corresponding remedies in civil litigation regarding the employment relationship. Although not all breaches of disciplinary rules result in civil liability,⁵⁴ a court may be persuaded that a law firm should be held civilly liable to employees who were discharged for their refusal to commit criminal acts or other disciplinary violations that the employer requested.

Lesser sanctions

The principles regarding unjust dismissal apply as well to situations where lesser sanctions are imposed, but proof of the existence of sanctions or the measurement of the remedy may be more difficult.⁵⁵ Suppose that, in our example, Subordinate lawyer refused to participate in the forgery, the law firm did not discharge him, but did not make him a partner as soon as he thought he was entitled. Subordinate lawyer would find it difficult to prove that the firm's decision not to make him a partner was in retaliation for his refusal to participate in the forgery; indeed, the members of the firm who made the negative decision on his promotion to partnership may not be sure what their own motives were. Even if Subordinate lawyer can prove that retaliation was at least part of the firm's motivation, he will find it very difficult to convince a court to decree his admission to partnership.⁵⁶

Undesirability of litigation

The above discussion indicates that if the employees were discharged or

53. Subordinate could invoke MODEL RULES, *supra* note 2, Rule 5.1 and 5.2, applicable to lawyers. Clerk and Secretary could invoke Rule 5.3, Responsibilities Regarding Nonlawyer Assistants. See MODEL RULES, *supra* note 2, Rule 5.3 comment.

54. See *supra*, note 44.

55. See D. EWING, DO IT MY WAY OR YOU'RE FIRED 135-42 (1983) ("A fiend's manual of perfidious punishment," ranging from moving an employee's desk to the immediate proximity of a notorious cigar smoker to promoting the employee to a useless job). The law firm's most potent type of "perfidious punishment," short of outright dismissal from employment, is to exclude an associate from the group that it invites to become partners. See *infra*, note 56 and accompanying text.

56. Specific performance has been ordered for the reinstatement of employees discharged in violation of anti-discrimination statutes or collective bargaining agreements, although courts generally are reluctant to specifically enforce employment contracts. A. FARNSWORTH, CONTRACTS § 12.7 n.20 (1982) (citing *Staklinski v. Pyramid Elec. Co.*, 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959)). These situations, arising in industrial settings, are distinguishable from the situation where a law firm has wrongfully refused to invite an associate to become a partner, in view of the close relationship that exists between one partner and another. See *Hishon v. King & Spalding*, 104 S. Ct. 2229 (1984), holding that the petitioner stated a claim for relief under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e et seq. (1982), by alleging that the respondent law partnership discriminated against her, on the basis of gender, when it failed to invite her to become a partner. The Court noted that the petitioner sought declaratory and injunctive relief, back pay, and compensatory damages in lieu of reinstatement and promotion to partnership. Thus, the Court was not required to decide whether reinstatement and promotion would be proper remedies.

otherwise sanctioned for their refusal to participate in the forgery, their chances of obtaining relief against the law firm in civil litigation would be questionable. The outcome would depend on whether the courts of the relevant jurisdiction follow the "good faith" approach, or at least could be persuaded to use this approach with regard to complaints by lawyers or law candidates. If sanctions less serious than discharge were imposed, the outcome would further depend on the ability of the employees to prove the existence of sanctions and to establish a practical type of relief.

While we need to discuss the possibility of litigation, as a means of appraising the rights and duties of the parties, it is clear that litigation is not a desirable method for resolving disputes between a law firm and its employees, if some other and more appropriate means of resolution can be found.⁵⁷

Completion of Example No. 1

This example has served as an introduction to the discussion of legal justifications for acts of disobedience. The discussion now proceeds along more structured lines.

A. Ascertaining Illegality of Order

In Example No. 1, the illegality of the Supervising lawyer's order to commit forgery was gross and obvious. Subordinate lawyers in practice are not likely to confront similar examples of gross illegality unless, perhaps, they are asked to alter or pad their time reports that will be used for preparing bills for clients,⁵⁸ and even these requests may be phrased with some degree of sub-

57. See *infra*, notes 99-108 and accompanying text, setting forth some proposed principles of law office management. These principles would not be legally binding. They are offered as "aspirational" in the spirit of Ethical Considerations of the Code of Professional Responsibility. See CPR, *supra* note 3, Preliminary Statement.

58. If a law firm, having established an hourly basis for its fee, deliberately falsifies its time reports and bills the client for a greater number of hours than were actually spent, the law firm commits a fraud against its own client. The individuals responsible for this fraud may be vulnerable to criminal and civil sanctions. In addition, disciplinary action could be maintained under the MODEL RULES, *supra* note 2, Rule 8.4(c), prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation." Other applicable provisions of the Model Rules include Rule 1.1 (competence), 1.3 (diligence), 1.5 (reasonable fees), and 2.1 (independent professional judgment based on candid advice—this rule is involved because a lawyer who swindles his own client may be ultra-timid in resisting if the client asks the lawyer to engage in unethical conduct to help the client carry out illegal actions). Relevant provisions of the CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 3, include DR 1-102(A)(4) (conduct involving dishonesty, etc.), DR 6-101 (competence), DR 7-101(A) (zealous representation), DR 2-106 (no excessive fees), and DR 5-101(A) (independent professional judgment).

See Los Angeles County Bar Ass'n., Formal Op. 391 (1981), cited in Gross, *supra* note 7, at 308 n. 204, and in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 801:1704 (1984). This opinion holds: (1) a law firm that bills out secretarial and paralegal time at the rate normally charged for an attorney acts fraudulently and charges an unreasonable fee; and (2) a law firm may not discharge an associate because of that associate's refusal to approve a fraudulent billing, because such discharge

tlety, such as a kindly observation that “our associates who are considered for partnership generally record over 3,500 billable hours per year.”⁵⁹

In the more usual situation, the supervisor’s order appears at first to be quite valid. Its invalidity becomes apparent only when the subordinate examines the underlying facts and law, and then applies a lawyer’s judgment to the facts and law.

Example No. 2: The Frivolous Lawsuit

Facts

Supervising lawyer hands a file to Subordinate lawyer and says: “Please prepare a complaint for filing in the [appropriate] court on behalf of Client. This file contains all the details you need.” After studying the facts disclosed in the file and the law of the relevant jurisdiction, Subordinate lawyer concludes that the filing of a complaint in this case would be frivolous.

Comment

The disciplinary rules clearly prohibit lawyers from filing frivolous lawsuits.⁶⁰ If Subordinate files the suit knowing it is frivolous, he commits a violation. If Supervisor knew, at the time he handed the file to Subordinate, that the suit was frivolous, Supervisor committed a violation by instructing Subordinate to file a suit that Supervisor knew to be frivolous.⁶¹ If Supervisor did not know enough about the case, at the time he handed the file to Subordinate, to make a determination whether it was frivolous or not, Supervisor’s action in handing the file to Subordinate is subject to either of two interpretations: first, that Supervisor expected Subordinate to make an evaluation of the file and to report back to Supervisor before filing the suit; or second,

would make participation in fraudulent conduct a condition of the associate’s continued employment.

59. This anecdote was reported by a respected friend, who stated further that the associate resigned from the law firm, realizing that the firm was engaged in the continuing unethical practice of defrauding its own clients. The associate obtained congenial employment elsewhere.

Professor Gross reports that law firms typically expect associates to bill from 1600 to 2000 hours per year. Gross, *supra* note 7, at 307; see also Harper, *Life in a Small Firm/Big Firm*, 71 A.B.A.J. 52, 57 (May 1985), reporting that a “typical” associate in a New York law firm “guesses that he bills 200 hours a month.” For discussion of the economics of the mix between partners and associates, including a reference to a 40-hour workweek (or, possibly, billing-week), see *LawScope: Getting Leverage*, 71 A.B.A.J. 17 (May 1985); see also J. STEWART, *THE PARTNERS* 70 (1984) (“When [associate S.] scored another triumph by billing 24 hours in a single day, [associate R.]—in a move that became the subject of legend in the firm—flew to California [from New York], worked on the plane and, by virtue of the change in time zones, managed to bill 27 hours in one day.”). I doubt seriously whether any lawyer can deliver 27 or even 24 hours’ worth of billable professional services in one day.

60. MODEL RULES, *supra* note 2, Rule 3.1; CPR, *supra* note 3, DR 7-102(A)(1), (2).

61. MODEL RULES, *supra* note 2, Rules 5.1(c) (responsibility for violation committed by subordinate lawyer) and 8.4(a) (responsibility for “the acts of another”); CPR, *supra* note 3, DR 1-102(A)(2) (“actions of another”).

that Supervisor wanted the suit filed, with reckless disregard as to whether it was frivolous or not.⁶²

Confer

The obvious reaction is to advise Subordinate to confer with Supervisor and point out the results of Subordinate's research and the basis for his conclusion that filing the suit would be frivolous. This conference may convince Subordinate that the suit is meritorious, in which event Subordinate can proceed in good conscience to file the complaint. Or the conference may convince Supervisor that the suit is frivolous, and Supervisor may agree that the complaint should not be filed. Or the conference may have an inconclusive result. Subordinate may continue to believe the suit is frivolous, Supervisor may believe—or at least may pretend to believe—that the suit is meritorious and may insist that Subordinate file the complaint. By this time, Supervisor may admire the conscientious manner in which Subordinate addresses his work or, on the other hand, Supervisor may be irritated by the novice who questions the judgment and integrity of his senior.

The risk of irritating the supervisor is a real one, especially if the same subordinate has questioned the same supervisor in similar circumstances before, and with similar results. Subordinates may become intimidated by a history of rebuffs, and may learn that the best way to get along is to do what the supervisor says without asking any irritating questions.

The fear of irritating the supervisor does not, of course, excuse the subordinate from raising a question if the subordinate has reached a good-faith conclusion that the case is apparently frivolous or raises another issue of professional misconduct. If the law firm maintains an atmosphere in which a subordinate feels intimidated in this type situation, the firm has violated its duty to maintain an appropriate environment for its professionals⁶³ and an associate who seeks an appropriate professional environment should recognize

62. The comments to the Model Rules point out a distinction between MODEL RULES, *supra* note 2, and CPR, *supra* note 3, which may be relevant here. The comments observe that the test of frivolous litigation is an objective test under Model Rule 3.1—"A lawyer shall not bring or defend a proceeding . . . unless there is a basis for doing so that is not frivolous. . . ." By contrast, the comments note that the CPR establishes the following test in DR 7-102(A)(1)—"[A] lawyer shall not: (1) File a suit . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." In my view, the test in DR 7-102(A)(1) includes a subjective element ("he knows") and an objective element ("it is obvious"). Further, the comment to Model Rule 3.1 fails to mention DR 7-102(A)(2), which states that "A lawyer shall not . . . (2) Knowingly advance a claim or defense that is unwarranted under existing law. . . ." This appears to require the simultaneous existence of a subjective element ("knowingly") and an objective element ("that is unwarranted").

In any event, a supervisor who acts in reckless disregard when instructing a subordinate seems to be acting incompetently, and also seems to violate the requirements of Model Rules 5.1 to 5.3, regarding the maintenance of a professional atmosphere within the law firm.

63. See MODEL RULES, *supra* note 2, Rules 5.1-3.

that this firm has failed to provide it.⁶⁴

Refer

In the event of impasse between supervisor and subordinate, the law firm should provide a mechanism for referring the matter to other members of the firm.⁶⁵ If this referral fails to resolve the matter satisfactorily, or if referral within the firm is impossible because of the small size of the firm or the conflicting interests of other firm members, a referral outside the firm should be considered. An external referral, however, raises the question of client confidentiality. In order to be effective, the outside referee may need access to facts which identify the client and which must remain confidential within the law firm unless the client waives the privilege.⁶⁶ In some situations of this type, a violation of the confidentiality rules may be considered as morally though not legally justified, if no other feasible method can be found to resolve the impasse within the law firm.⁶⁷

Continuance of Example No. 2

If the impasse between supervisor and subordinate cannot be resolved by any available conference or reference, the parties must face issues that will be discussed under later headings of this article. After exploring these issues in general terms, we will return to the resolution of Example No. 2.

64. See *infra*, notes 99-108 and accompanying text, on proposed principles of law office management.

Professor Gross advises associates to initiate a discussion with the partner who gave the instruction and to explain why the associates consider the instruction unethical. His survey of associates in Illinois reveals that 72% of the associates, in the event of disagreement with a partner's ethical decision, generally discuss the matter with the partner and reach an agreement. An additional 21% discuss the matter and sometimes disagree with the partner. Gross, *supra* note 7, at 301 n.181.

65. Gross, *supra* note 7, at 301; see also *infra* note 111 and accompanying text. The public accounting profession has adopted a system that merits examination by law firms. When a difference of opinion arises among the personnel of an accounting firm, regarding an accounting or auditing matter in an audit engagement, the firm must "enable an assistant to document his disagreement with the conclusions reached if, after appropriate consultation, he believes it necessary to dissociate himself from the resolution of the matter [by the supervisor]. In this situation, the basis for the final resolution should also be documented." Statement on Auditing Standards No. 22, par. 12 (1978), *codified in* AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, PROFESSIONAL STANDARDS § 311.12.

66. In a somewhat analogous situation, a lawyer who reports to bar disciplinary authorities regarding the misconduct of another lawyer may not include information that is otherwise confidential. See MODEL RULES, *supra* note 2, Rule 8.3(c): "This rule [requiring reporting] does not require disclosure of information otherwise protected by Rule 1.6." Since disclosure of otherwise confidential information is not required, disclosure of that information is prohibited by Rule 1.6. See also CPR, *supra* note 3, DR 1-103(A): "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge." This clearly indicates that the lawyer shall not report such knowledge if it is privileged. See DR 4-101.

67. See *infra*, notes 107-08 and accompanying text.

B. *Resolving Impasse*

Assume that the supervising lawyer's instructions are not grossly or clearly illegal, that the subordinate lawyer has done his best to research the issues and to confer and refer, that the subordinate is still not satisfied that his compliance with the orders would be legal, and that the supervisor still wishes to have the instruction carried out. Assume also that the subordinate is morally satisfied with the applicable law, and therefore would not have a morally acceptable basis for violating the law in order to comply with the supervisor's instructions. How can this impasse be resolved?

One possibility is for the supervisor to say to the subordinate, "Do what I tell you or I'll fire you." The subordinate then must make a decision. He may derive some guidance from Model Rule 5.2(b), which immunizes the subordinate from disciplinary responsibility if he "acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."⁶⁸ This phrase contains three terms that leave room for interpretation: "reasonable resolution," "arguable question," and "professional duty." Even if the subordinate interprets all three terms in a manner that would support his immunity from disciplinary responsibility for carrying out the supervisor's instruction, he cannot be certain that the disciplinary authorities would agree with his interpretation. Further, the Model Rules cannot immunize anyone from criminal sanctions, civil liability, or any consequences other than professional discipline.

In fact, Rule 5.2(b) could hurt the subordinate. If he refuses to carry out the supervisor's instruction and is fired as a result, his opportunity to obtain civil relief in a suit for unjust dismissal may be lost, because the court may find that the employer discharged him in good faith, in a situation that falls within Rule 5.2(b). Finally, if the subordinate wishes to uphold the law because he conscientiously believes that the law should be upheld, he will still find compliance with an illegal order objectionable, even though he may not anticipate suffering any sanctions.

Another solution is for the subordinate to request reassignment to another case, so that he no longer has to handle the troublesome case. Some law firms routinely allow their associate lawyers to request reassignment, without having to make any particular case for doing so.⁶⁹ The firm may, however, run out of patience with an associate who makes a habit of asking for reassignment. If the firm consents to reassignment, is the conscience of the reassigned subordinate clear? He has escaped from his personal dilemma, but knows that someone else will be given the same instruction that he was reluctant to carry

68. MODEL RULES, *supra* note 2, Rule 5.2(b).

69. The accompanying text is based on numerous anecdotes I have heard from lawyers and law clerks. See also the survey by Professor Gross, indicating that 14% of the responding associates answered "Yes" to the question "Have you ever withdrawn from a case because of an ethical disagreement with a partner?" Gross, *supra* note 7, at 314, Question 19 of survey.

out. The next subordinate may carry out the instruction without question, or may be as troubled about it as was the first subordinate. In either situation, what has the first subordinate accomplished, except to distance himself to some extent from the problem?⁷⁰

A third possibility is for the subordinate to recognize that he and the firm are incompatible and that a separation will be inevitable. He may therefore resign before he is discharged for refusing to carry out the supervisor's instruction.

As a fourth possibility, the subordinate may decide that his resignation will be inevitable, but he may not yet be ready to make the move. In order to buy time, he may consider complying with the objectionable instruction, with the rationalization that the illegality of the instruction is only marginal, and that the conscience of the subordinate can survive this relatively minor transgression as a means of providing for an orderly exit from this law firm into a new environment which, the subordinate hopes, will be more congenial.

A fifth possibility is that the associate will report the supervisor to bar authorities. Model Rule 8.3(a) requires a report from a lawyer who knows that another lawyer "has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."⁷¹ A grossly improper order by the supervisor, such as the order to prepare a forged document in Example No. 1, would trigger the reporting requirement of Rule 8.3(a). A close judgment call as to whether a suit is frivolous would not so clearly justify a report under this rule. The associate risks considerable embarrassment and ill-will if he makes a report to bar authorities in a situation not clearly covered by Rule 8.3(a).⁷²

Still a sixth possibility arises if the subordinate feels so strongly about the illegality of the instruction that he cannot perform it himself and cannot tolerate the possibility that someone else may perform it if he simply steps aside. The subordinate lawyer may then find himself with no choice other than to try to prevent anyone else from carrying out the illegal instruction. Depending on the circumstances, this step may involve contacts with other associates in the law firm to urge them not to comply with the instruction, direct contact with the client to urge the client to withdraw its request that was the basis of the supervisor's order, contact with the potential adversary of the client to warn of the threatened improper action, contact with the court for a similar purpose, or disclosure to the press and other media, as well as to affected persons or

70. See *infra*, notes 107-08 and accompanying text; see also Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RESEARCH J. 543.

71. See *supra*, note 66.

72. See *infra*, note 106 and accompanying text, on a proposed principle recognizing the deference owed by a subordinate lawyer to the law firm and to the firm member who is directly serving the client. Professor Gross observes that the associate owes fiduciary obligations to the law firm, including the duties of good care and skill, loyalty, and obedience. Gross, *supra* note 7, at 262.

institutions. These are drastic measures which violate, to one extent or another, the subordinate lawyer's fiduciary duties to his law firm, to the client of his law firm, and possibly to others. The consequences to the subordinate who initiates this type of action can be disastrous. If family or others depend on the subordinate, they too can suffer. Is a subordinate ever justified in resorting to "whistle-blowing" and the other drastic measures listed above, for the purpose of vindicating his belief that his supervisor has issued an illegal instruction?

Completion of Example No. 2

The above discussion illustrates at least some of the options available to the subordinate lawyer in the event of impasse regarding the supervisor's instruction. The legal conclusion is clear—the subordinate should not carry out an instruction which he regards as illegal. On a practical level, the subordinate's response to the apparently illegal instruction is likely to be influenced by a number of non-legal factors, such as the intensity of the subordinate's feelings about the impropriety of the supervisor's instruction; the prospects of subordinate's obtaining a satisfactory position in another law firm; the question whether this is the first dispute or merely the latest in an ongoing series of similar disputes between subordinate and supervisor; and the quality of the professional environment in the law firm and in the legal community.

Example No. 3: False Reports on Toxic Waste Disposal

Facts

Client has been accused by an administrative agency of illegal disposal of toxic waste products. Supervising lawyer has assigned Subordinate lawyer to appear on behalf of Client at a hearing before the agency. Shortly before the hearing, a driver employed by Client approaches Subordinate and tells him, "strictly off the record," that the driver, upon the instructions of senior officers of Client, has personally dumped numerous loads of waste precisely in the manner and at the location alleged by the agency prosecutors. Client has consistently denied these allegations. Subordinate believes the driver.

Subordinate tells Supervisor what the driver said. Supervisor replies: "Forget you ever heard it. Our job is to defend Client. Our witnesses will continue to deny the allegations. Go ahead with the defense, just as we planned it."

Comment

Subordinate has to worry about the possibility that Client's witnesses may present perjured testimony at the hearing; this raises issues comparable to those in Example No. 1, *The Forged Document*. Subordinate must also be concerned with the possibility that if the true facts were known (assuming the driver was telling the truth), Client's defense may be frivolous; see Example No. 2, *The Frivolous Lawsuit*. In addition, Subordinate has two new problems. First, he has little time to make a decision, since the hearing will shortly take place. Second, the outcome of this hearing may affect the welfare of third parties whose property and health could be injured if Client continues to dump the toxic waste without being apprehended.

Shortage of time

The shortage of time deprives Subordinate of some of the opportunities that might otherwise be available for conference and reference of the matter. He must do the best he can by way of consultation, and should perhaps urge Supervisor to seek a continuance of the hearing so as to provide more time to resolve the ethical problem within the law firm or by outside reference. But any available continuance is likely to be a short one, and Subordinate must be prepared to make a relatively quick decision.

Welfare of third parties

Assume that Subordinate continues to believe the driver's story; that serious public danger could result from Client's continued dumping of the toxic waste without being apprehended; that Subordinate has exhausted any available types of conference and reference; and that Supervisor continues to insist that Subordinate handle the hearing on the basis of the original denial of all charges.

Subordinate may conclude that he has incurred an obligation to protect the welfare of the potential victims of the continued dumping of the toxic waste. He is not the only person bearing this obligation. The driver, the managers who sent the driver on his missions, other people employed by Client who know about the dumping, as well as Supervisor himself—all who know the facts bear the burden that accompanies this knowledge. Why should Subordinate be the one and only person from among this group who has to stick his neck out? And suppose the driver had approached someone else—say, Supervisor—with the information, with the result that Subordinate would never have known about it in the first place?

Affirmative acts to protect public

Subordinate may well agonize, because he is in a situation where he may feel obliged to do something affirmative in order to protect the public welfare. Whatever his act may be, it is likely to have serious consequences, not only for Subordinate personally and his dependents, but also for others—including perhaps the talkative driver, company management, Supervisor, and the law firm itself.⁷³ He is allowed and required to report Supervisor to bar authorities, under Rule 8.3(a), if Supervisor “has committed a violation of the rules . . . that raises a substantial question” about Supervisor’s “honesty, trustworthiness or fitness as a lawyer in other respects.”⁷⁴ Any other type of affirmative act by Subordinate is likely to violate some provisions of the special law applicable to lawyers, such as the requirement of confidentiality,⁷⁵ and his justifica-

73. On the liability of the law firm for the associate's tortious acts, see Gross, *supra* note 7, at 262-63.

74. MODEL RULES, *supra* note 2, Rule 8.3(a); CPR, *supra* note 3, DR 1-103(A). These provisions are limited by the requirement that the client's confidences must be preserved; see *supra*, note 66.

75. MODEL RULES, *supra* note 2, Rule 1.6; CPR, *supra* note 3, DR 4-101. For some moral reflections, see, e.g., S. BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT*

tion for that conduct can be found only in the moral arena.

Continuance of Example No. 3

We will revisit Subordinate's moral dilemma later, in context of the general discussion of moral justification for disobedience.

IV. MORAL JUSTIFICATION FOR DISOBEDIENCE

Again we start with an example.

Example No. 4: The Brain Transplant Lab

Facts

Client owns and operates a medical research facility and has done numerous brain transplant experiments on animals. Client is now ready to attempt brain transplants from a human donor to a human donee and has retained our law firm to seek the necessary approvals. Supervising lawyer assigns Subordinate lawyer, Clerk, and Secretary to prepare the applications. The filing of an application is provided for by law, and Supervisor suggests no illegal act. For reasons of deeply held religion, Subordinate, Clerk, and Secretary believe that brain transplantation is wrong. They do not wish to participate in helping Client or anyone else to engage in this type of activity.

Comment

Supervisor's instructions are clearly legal. The question for the employees is whether they should jeopardize their employment rather than assist Client in obtaining approval for doing human brain transplants. The question for Supervisor, if the employees refuse to participate, is whether to threaten them with discharge for insubordination, or to reassign them to other duties. The employees would stand almost no chance of obtaining judicial relief in a civil lawsuit against the law firm for unjust dismissal, even in a jurisdiction that reads a "good faith" provision into all employment contracts, because the supervisor's instructions were legal and the law firm therefore had a good-faith basis for discharging the insubordinate employees. The subordinate lawyer, for the same reasons, stands virtually no chance of using Model Rules 5.1 and 5.2 as the basis for civil relief or disciplinary sanctions against the law firm or the supervising lawyer.

What is accomplished by non-participation?

Assuming that the law firm threatens to discharge the employees rather than reassign them, each employee is faced with a choice between continued employment with the firm on the one hand, and the dictates of conscience on the other. The question will arise whether the employees are accomplishing anything by their disobedience, since presumably the law firm or the client will easily be able to find other people to prepare the application, and therefore the refusal of these employees to participate in the application will not prevent the

AND REVELATION (1982), and S. BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978).

brain transplant activities, but may possibly impose a brief delay. The employees may, however, believe that they must at all costs refrain from participation even though other participants may soon accomplish the objectionable task.

Obligation to make legal services available

As regards the subordinate lawyer, the question arises whether this refusal to service the law firm's client is an abdication of the responsibility of the legal profession to make its services available to all who need them.⁷⁶ One response is that many other lawyers are available, and that chances are extremely high that the law firm or the client will quickly find other counsel to provide the needed service. On the other hand, assume that no other lawyer can be found who is willing to render the service, because all other lawyers find the client's end-purpose to be morally offensive. If a client's end-purpose offends every member of the bar, can one use a market theory to argue that the client whose cause is not "marketable" to any lawyer may properly be left without any legal representation?⁷⁷ This highly speculative question emphasizes the importance of including, within the legal profession, practitioners with the greatest feasible diversity of backgrounds and perspectives, the better to serve our pluralist society.

Affirmative acts

76. One of the two ancient oaths of the serjeants was "to give attendance for the service of the King's people in their causes," *supra* note 28. A more recent recognition of the obligation of the legal profession to make its services available is found in the CPR, *supra* note 3, EC 2-24 to 2-25 (clients unable to pay), EC 2-26 to 2-30 (unpopular or uncongenial clients), and EC 2-33 (participation in legal assistance organizations). The ABA's use of non-enforceable Ethical Considerations rather than enforceable Disciplinary Rules as the medium for expressing the bar's obligation indicates the ambivalence with which the ABA faced this issue when drafting the CPR in the 1960's.

The Model Rules do not have anything equivalent to the Ethical Considerations of the CPR. The Model Rules provisions on the bar's obligation to make its services available show that the ABA was just as equivocal in the 1980's as in the 1960's on this issue. Thus, Rule 6.1 provides that "A lawyer should render public interest legal service," but goes on to give such a broad definition of this responsibility as to allow committee work for the organized bar to count. Further, the comment emphasizes that the term "should" in Rule 6.1 means that the rule "is not intended to be enforced through the disciplinary process." Thus, the rule is, in effect, an Ethical Consideration, in a document that was not supposed to contain any such thing. Rule 6.2 requires a lawyer to accept court appointments, but lists a number of excuses from this obligation, including "unreasonable financial burden."

See infra note 105 and accompanying text for further discussion of this topic.

77. In the recent history of the United States, certain categories of clients were indeed unable to obtain legal services from members of local bar, and had to depend on volunteers from other jurisdictions. Some state courts strictly limited their grant of permission for out-of-state practitioners to appear *pro hac vice*. The federal courts, taking note of the problem, required the state to be liberal in granting motions to appear *pro hac vice* where this seemed to be only practical means by which persons could assert their legal rights. *See, e.g., Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968); *infra* note 105 and accompanying text.

Assume next that the employees decide they must actively try to prevent the client from obtaining the permit to conduct human brain transplants. Accordingly, the employees, using the information obtained within the law firm regarding the client's proposed application, organize public protest groups and attempt to bring political pressure to bear to prevent the appropriate authorities from approving the client's application.

These affirmative acts clearly violate the law applicable to lawyers, first by revealing and using confidential information obtained from the law firm's client,⁷⁸ second by acts of disloyalty to the interests of the law firm's client.⁷⁹ Subordinate lawyer could be subject to professional discipline and Clerk could be subject to disqualification from admission to the bar. All three employees would, in addition, be subject to civil litigation arising from the law of agency and from the duties of good-faith cooperation and loyalty that may be implied from their employment contracts with the law firm.⁸⁰

Lawyer's violation of the law

By carrying out affirmative acts to obstruct the client's application, Subordinate lawyer has violated the law without legal justification, claiming only the moral justification based on his religious opposition to human brain transplants. This raises the question whether a lawyer is ever morally justified in violating the law. We are, after all, officers of the court, sworn by oath to uphold the constitution, dependent for our livelihood upon our expertise in making the law accessible to our clients—are we not morally as well as legally obliged to obey the law at all times?

Continuance of Example No. 4 and consolidation with Example No. 3

We will revisit this question, and the similar question left open in the previous discussion of Example No. 3, after a more general discussion of the moral obligation to obey the law. We first examine the citizen's moral obligation, and then we explore the distinctive moral obligation of the lawyer.

A. *Citizen's Moral Obligation to Obey the Law*

1. Good Faith Test of Validity of Law Distinguished

If a person disobeys a statute in order to test its constitutionality, in the good faith belief that a court may feasibly hold the statute invalid, that person's conduct is, in my view, still within the law as that person perceives it. The law applicable to lawyers clearly recognizes a lawyer's right to assert good faith challenges to the validity of existing laws.⁸¹ On the other hand, if a per-

78. See *supra*, note 75.

79. See *supra*, note 72.

80. *Id.*

81. See MODEL RULES, *supra* note 2, Rule 3.1; CPR, *supra* note 3, DR 7-102(A)(2). See, e.g., *In re Tamblin*, 298 Or. 620, 695 P.2d 902 (1985) (no discipline against lawyer who advised client to disobey a preliminary injunction, since the supreme court held the injunction was legally void). Much of the legal literature on civil

son disobeys a statute—or court rule, administrative regulation, or judicial precedent—without any reasonable belief that a court would hold the violated provision invalid, that person is acting contrary to the law. The present discussion addresses only this latter type of disobedience to the law.

2. Inevitable Conflict Between Law and Personal Morals

It is virtually inevitable that a person's moral values will come into conflict with the law at one time or another. The law, made by legislatures, courts, and administrative agencies, results from a political process in which consensus can be reached only by rejecting the wishes of significant segments of the population. Thus, even if law and personal values could coincide in a homogeneous and theocratic community, that type of coincidence is not possible and seems never to have been intended in our society.

3. Moral Persuasiveness of Positive Law

Although personal values may differ from the law, the citizen is not morally free to disregard the law and always pursue his own values instead. This conclusion follows, I believe, from the notion that citizens are morally obliged to defer their personal preferences to the collective wishes of society, up to a point. Our society has made the basic choice that there should be a legal system, and the existence of such a system is itself a socially endorsed value, indicating a preference for some kind of system rather than the relative instability that might otherwise prevail. Second, having ordained the existence of a system, our society has produced laws in a manner which appears reasonably legitimate as a means of reflecting, at least crudely, the collective wishes of the community.⁸² It appears that each citizen is under some moral obligation to

disobedience focuses on challenges against allegedly unconstitutional laws. See, e.g., Black, *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, 43 TEX. L. REV. 492 (1965); Freeman, *The Right of Protest and Civil Disobedience*, 41 IND. L.J. 228 (1966); Keeton, *The Morality of Civil Disobedience*, 43 TEX. L. REV. 507 (1965).

Violations of the CPR, *supra* note 3, in reliance on constitutional grounds, have become an accepted and apparently respectable means of testing the validity of the challenged provisions. See, e.g., *In re R.M.J.*, 455 U.S. 191 (1982); *Bates v. State Bar*, 433 U.S. 350 (1977). Many moral issues can be posed, in good faith, in constitutional terms. Consequently, the range of moral issues that cannot be tied in good faith to a constitutional provision is relatively narrow. By contrast, the legal systems of many other countries provide fewer opportunities for challenges based on constitutional grounds, either because the constitutions are unenforceable, or because traditional interpretations in those countries have not linked moral issues to constitutional provisions. As a result, in many countries the citizen, lacking an opportunity to argue in constitutional terms, must more often place sole reliance on moral justifications for disobeying the law.

82. See *infra*, note 92 and accompanying text, on the distinction between the moral obligation to obey the laws of a legitimate regime and to disobey those of an illegitimate regime. Lawyers have, in my opinion, a special obligation to society, to

acknowledge the existence of the legal system and to obey the laws it produces. This moral obligation, however, is not absolute. I view the legal system as imposing, on each citizen, a presumptively binding moral obligation of obedience to the laws. Accordingly, the citizen who violates the law acts immorally unless that citizen can produce satisfactory moral justification to rebut the presumptively binding moral obligation of the law. Obviously opinions will vary as to what constitutes satisfactory moral justification. So it must be in our pluralistic society.

B. Lawyers Distinguished from Other Citizens

Are lawyers under any different moral duty than other citizens, as regards obedience to the law? The question requires analysis of two issues: 1) dealing with the lawyer's moral obligation to obey the general laws that apply to the entire community; 2) dealing with the lawyer's moral obligation to obey the special laws that apply only to lawyers.

General laws

I suggest that certain categories of citizens are under an especially strong moral obligation to obey the general laws. Legislators are one of these categories; lawyers are another. This heightened moral obligation applies to lawyers for a number of reasons. First, we earn our living—some of us handsomely—by making the legal system and the laws accessible to the layperson. Second, we should understand, at least as clearly as anyone else understands, the risk of destabilization of society if the general laws are widely disobeyed. Third, we have the title of officers of the court and we have taken an oath to support the constitutional system. Since this last reason relates to the title and oath that are derived from the special law applicable to lawyers, I will discuss it further under that heading, although I offer this reason here in support of the notion that lawyers are under a stronger moral obligation than most citizens to obey the general law.

This theory still leaves the lawyer some room to violate the general law with moral justification, but the justification has to be stronger to overcome the greater presumptive moral force of the general law.

Special law applicable to lawyering

The lawyer's moral obligation to obey the special law of lawyering is, according to one view, weaker than the lawyer's moral obligation to obey the general law, because the special law of lawyering does not reflect the same societal consensus as is found in the general law. Although small segments of the special law of lawyering are enactments of the legislature, most of this

monitor the legitimacy of the regime, to use all available orderly processes to preserve and improve the legitimacy of the regime and, if all else fails, to resort to other measures; see *infra*, notes 92-93 and accompanying text. As indicated in the accompanying text, I perceive the present government of the United States to be legitimate, although by no means perfect.

special law is the product of court rules and decisional law. I have the highest respect for our court system and for numerous individual judges, but the fact remains that court rules and decisions do not reflect societal consensus in the same manner as general statutes. To the contrary, many of the pronouncements of the courts with regard to the law applicable to lawyering reflect the wishes of the legal profession itself, and the welfare of the profession is not always subordinated to the public welfare in these pronouncements.

A contrary view is that the lawyer is under a greater moral duty to obey the special law of lawyering than the general law. The rationale is that the lawyer is an officer of the court, having taken a special oath (discussed below), and owes a fiduciary obligation to society to be meticulous in carrying out the special law of lawyering, so that society's legal system can function fairly and efficiently.⁸³ Under either view, the lawyer is morally obliged to conform to the special law of lawyering, unless a higher value overrides that law.

ABA recommendations distinguished

Two particular aspects of the special law applicable to lawyering require mention. First, this body of special law is sometimes defined to include the recommendations of organizations such as the American Bar Association, even before these recommendations have been given legal effect through incorporation into court rules or decisions. For example, the 1983 ABA Model Rules of Professional Conduct may be considered to be part of the special law applicable to lawyers, although these rules have no legally binding effect until their adoption by a court.⁸⁴ The moral force of these non-binding ABA rules is, in my view, minimal. First, they are not legally binding, and therefore do not carry the presumptive moral force of laws. Second, the ABA has not demonstrated an overriding attachment to the public interest.⁸⁵ Third, in my opinion

83. See MODEL RULES, *supra* note 2, "Preamble: A Lawyer's Responsibilities" and CPR, *supra* note 3, "Preamble."

84. See *supra*, notes 14-17 and accompanying text.

85. The ABA certainly does sometimes act in what its leadership perceives as the public interest, for example by vigorously advocating continued federal support of the Legal Services Corporation, and by creating a Commission on Professionalism. See 71 A.B.A. J. 135-36 (April 1985). Perhaps the ABA does as much as could be expected to assert the public interest. The major emphasis in the ABA, however, seems to be to increase the number of ABA members (now well over 300,000, or roughly one-half of the lawyers in the United States), to increase ABA revenues (projected at \$43 million, based on an increase in annual dues to \$150), to protect the legal profession against external regulation, and to expand the range of business-related services available to ABA members (including high-limit credit cards, discounts on car rentals, hotels, office equipment and other goods and services, and group pension and insurance plans). This emphasis is apparent from the contents of the ABA Journal, e.g. 71 A.B.A. J. 134-35 (April 1985), and from informational letters and brochures sent to members. No doubt this emphasis reflects the wishes of the members or of prospective new members, as perceived by the ABA leadership and its weighty bureaucracy.

I have difficulty finding a commitment to the public interest in the programs sponsored by the ABA and a number of state bar associations, regarding the probation and rehabilitation of attorneys who have become "impaired" by their abuse of alcohol and

the Model Rules themselves lean too much toward the self-interest of the legal profession and too little toward the public interest.⁸⁶ On the other hand, the fair and efficient administration of justice imposes some moral obligation upon a lawyer to conform to generally accepted and prevailing norms of conduct expected by the courts and the bar, even if these standards have not been given legal effect.

Lawyer's oath of office

The second topic requiring special mention is the lawyer's oath of office.⁸⁷ While the requirement of this oath is imposed by the special law applicable to

drugs. *See, e.g.*, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 101:3301, citing ABA Models & Packages Program, Package No. 1: Alcohol and Drug Abuse Programs for Lawyers and Judges (1981), and ABA Center for Professional Responsibility, Survey: Impaired Lawyer Programs (1982) (on file at ABA Center for Professional Responsibility). The problem of the "impaired" attorney has surely become serious and widespread; *see, e.g.*, Evans & Kane, *Young, Smart, Successful and Drunk*, 9 BARRISTER 4 (Fall 1983); King, *Lawyers on the Rocks*, 70 A.B.A.J. 78 (Mar. 1984). The "soft" programs sponsored by the organized bar may well be humane as regards the individual attorney who has become "impaired," but a "harder" approach may better serve the public interest by deterring the marginal abuser of alcohol and drugs, and by maximizing the protection of clients and fellow-attorneys against the risk of relapse by a rehabilitated abuser. The very use of the term "impaired" in the bar's programs appears to be an attempt to conceal or downplay the true nature of the alcoholism or drug addiction that renders these individuals unfit to practice our profession or any other.

I respect the ABA's role as a supporter of the interests of lawyers, but I cannot take very seriously the claim that the Association is truly committed to the public interest. For a sampling of views *see, e.g.*, R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 4-7 (1953), quoted in G. HAZARD & D. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 89-90 (1985), in which Dean Pound observed, in an ABA-sponsored study, that the ABA was not like an association of retail grocers, plumbers or lumber dealers. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981).

86. A few examples must suffice here. First, the introductory material to the MODEL RULES, *supra* note 2, entitled "Scope" emphasizes that a violation of the Model Rules should not be the basis for civil liability of the violator. Second, the Rules do not squarely address the question of whether the legal profession has a duty to make its services available to all who need them and, if so, how each individual lawyer should shoulder an equitable share of the responsibility; *see supra*, note 76. Third, Rule 1.5(e) allows the payment of a referral fee to a lawyer who renders no professional services but merely refers a client and agrees to be jointly responsible, a provision that could convert many practitioners into brokers rather than providers of legal services. Fourth, Rule 1.6 imposes such tight restrictions on the lawyer's authority to disclose clients' information as to force the lawyer to disregard serious public needs. (State adoptions of the Model Rules have expanded the lawyer's right or duty to disclose, beyond the limits drawn by Rule 1.6. *See* ABA/BNA Lawyer's Manual on Professional Conduct 382 (New Jersey) and 445 (Arizona). Bar committees in states where the proposal to adopt the Model Rules is pending indicate widespread sentiment in the same direction; *id.* at 191 (Florida), 534 (Maryland), 237 (Minnesota), 772 (Washington) and 630 (Wisconsin). The Delaware committee, *id.* at 306, supports the Model Rules, although with some misgivings.)

87. *See supra*, notes 28-35 and accompanying text.

lawyers, the content of this oath directly addresses the lawyer's obligation to obey all the laws. Even more significant, perhaps, than the content of the oath is the ceremonial nature of the oath-taking and the status of the lawyer, having taken the oath, as an officer of the court.⁸⁸ The legal effect of the oath is minimal in our times, because of the elaborate codifications that are now used as the major basis for disciplinary action.⁸⁹

The moral impact of the oath is a different matter. Some individuals may believe that the oath adds nothing to the lawyer's moral obligation to obey the law. This view finds some support, by implication, in the comments to the ABA Model Rules.⁹⁰ In explaining the definition of professional misconduct in Rule 8.4, the comments observe that a lawyer who commits adultery does not thereby commit an act of professional misconduct.⁹¹ I point out that adultery generally constitutes a gross violation of the marriage vow. If the ABA tolerates a violation of that oath of fidelity to spouse, evidently the ABA does not take oaths very seriously. If this indeed is the ABA's position, I find it totally unacceptable.

At the other end of the spectrum, some lawyers may feel morally bound by the oath to obey all laws and never to place their own moral values above the law. I do not share that feeling. If the regime is corrupt, if its laws are lacking in legitimacy, if it imposes oppressive burdens on society, my conscience may allow and require me to place my personal values above the laws of the regime,⁹² and even if the regime itself is legitimate, I may find some

88. Whether the oath-taking ceremony is festive, solemn, or trivial depends on the oath-taker's state of mind. I have found the experience of taking the lawyer's oath, in each of the courts where I took it, to be solemn and inspirational. On reflection, the greatest challenge about taking the oath is the realization that my membership in the profession will have at least a minimal impact on many, and perhaps a significant impact on some. *See infra*, text preceding note 102.

89. *See supra*, note 34.

90. MODEL RULES, *supra* note 2, Rule 8.4 comment.

91. *Id.*

92. We may consider, as an extreme and horrendous example, the Hitler regime. At some stages of the regime, the forms of law were used, and the regime was, in a sense, legitimate. Its avowed policies and programs and its principle of loyalty to the person of Hitler were, however, so abhorrent to my view of civilized society that I would have felt morally justified in disobeying and undermining any law of that regime, even if the particular law on its face appeared benign. Further, I would have felt morally justified in concealing my violation so that I could continue to work for the downfall of the regime, realizing that any attempt to use an open, orderly process would be doomed to tragic failure.

As indicated *supra*, note 82 and accompanying text, I regard the present government of the United States as being legitimate and civilized; accordingly I would not feel morally justified in engaging in general disobedience for the purpose of subverting our regime. I do not predict or anticipate that the United States government will ever cease to be legitimate and civilized, but the theoretical possibility must be considered. Lawyers, because of their special skills, have a special obligation to society to prevent and to warn against the descent of governments into illegitimacy.

The MODEL RULES, *supra* note 2, "Preamble: A Lawyer's Responsibilities," as

particular law so offensive that I will be bound in conscience to disobey it.⁹³

well as the CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 3, EC 1-5, call upon lawyers to obey the law. For reasons expressed in this article, I regard a lawyer as being presumptively but not absolutely bound in conscience to obey the law.

93. This type of problem could arise, for me, if a court appointed me to serve as lawyer for a client whose end-purpose I found morally abhorrent. Assume, for example, that a court appoints me to represent a satanic cult in asserting its First Amendment right to perform its rituals. If I undertook the representation and concluded it successfully for the client, I would be a facilitator of the practice of idolatry, one of the three types of conduct that my religion teaches should be avoided at all costs, including martyrdom if necessary. (The other two are murder and incest, the latter term including, for these purposes, adultery and gross unchastity.) See Konvitz, *Conscience, Natural Law and Civil Disobedience in the Jewish Tradition*, in *ON LAW AND MAN: ESSAYS IN HONOR OF HAIM H. COHEN* 159, 167 (S. Shoham ed. 1971). If the court insisted on my appointment, despite my respectful requests to be relieved, I would be conscientiously obliged to decline the appointment, while fully recognizing the legality of the court's order requiring me to accept the appointment.

I might also consider advising a congenial client to commit an illegal act, although in giving this advice I would be violating the rules; MODEL RULES, *supra* note 2, Rule 1.2 (d); CPR, *supra* note 3, DR 7-102(A)(7). Since I assume some moral responsibility for the actions taken by my client on my advice, I would consider advising my client to act illegally only if I felt that (1) the client's act was morally justified in the circumstances, and (2) my violation of the lawyers' rules was morally justified in the circumstances. See, e.g., DiSalvo, *The Fracture of Good Order: An Argument for Allowing Lawyers to Counsel the Civilly Disobedient*, 17 GA. L. REV. 109 (1982); Note, *Liability of the Attorney Who Advises Disobedience*, 6 J. LEGAL PROF. 333 (1981).

I take a very different view of recent violations of the laws of the District of Columbia by numerous prominent citizens, including lawyers and public officials, who deliberately came closer to the South African Embassy than the law allows. See Frank, "Abuse of Law:" *Lawyers Join Apartheid Foes*, 71 A.B.A. J. 19 (March 1985). By violating the D.C. law, these demonstrators invited arrest and, above all, publicity, which in turn gave additional media effectiveness to their protests against the apartheid policy of the government of South Africa. There is no indication that these demonstrators had any moral objection against the D.C. law regarding the size of the demonstration-free zone that should surround foreign embassies in general. While I agree that apartheid warrants strong condemnation, I fail to see the moral justification for violating the D.C. law as a means of getting extra media mileage for an anti-apartheid protest.

We should also consider the concept of duress. In some situations, a person who acts under duress is legally excused, although the conduct would otherwise have been illegal. See, e.g., MODEL PENAL CODE §§ 2.09 (duress) and 3.02 (the closely related "choice of evils"), 10 U.L.A. 474, 477 (1974). In situations where duress is not a legally recognized excuse, a person could argue that duress may constitute a moral justification for illegal conduct.

It is difficult to imagine that a subordinate lawyer could ever plausibly assert duress as a legal or moral justification for carrying out an illegal act upon the order of a supervising lawyer. We can assume that the supervisor's threat is an economic one—to fire the subordinate, or at least to exclude the subordinate from promotion to partner, if the subordinate refuses to carry out the order. I do not believe such a threat would qualify as either legal or moral justification for the subordinate's performance of the requested illegal act, no matter how deeply the subordinate may be in debt for tuition or other loans, nor how many needy dependents the subordinate may have. On a practical level, my conclusion is affected by my assumption that anyone who has enough

The oath that I took as a lawyer and an officer of the court should be interpreted in light of these qualifications, and in a civilized society these qualifications should constitute, for lawyers in general, a well-understood gloss on the language of the oath itself. Whatever may be its basis or rationale, my view is that the oath does increase the lawyer's moral obligation to obey the law, but leaves open the possibility of morally justified disobedience in a narrow range of circumstances.

Completion of Examples No. 3 and 4

We now return to the unanswered questions in Examples No. 3 and 4. As regards Subordinate, the answer depends upon the seriousness with which he takes his moral obligation to obey the law. If he regards this obligation as being paramount, he must not violate the law in either example. Thus, in Example No. 3, he must not engage in illegal disclosure of Client's confidential information, even though his silence may permit serious damage to be suffered by the victims of future pollution. The most he can do is to report Supervisor to bar authorities, since the filing of such a report is legally allowed and even required in the circumstances set forth in Model Rule 8.3(a).⁹⁴

In Example No. 4, a subordinate who gives primacy to his obligation to obey the law will have to refrain from illegal disclosure or use of Client's confidential information about the projected brain transplant lab. In this example, the subordinate does not even appear to have any grounds on which to report the supervisor to bar authorities under Model Rule 8.3(a), since the supervisor is not engaging in any conduct that would subject him to professional discipline.

On the other hand, Subordinate may take the position that his moral obligation to obey the law could be overridden by higher moral obligations. If this is Subordinate's position, he must determine whether, in each situation, his moral obligation to obey the law is outweighed by higher duties. Thus, in Example No. 3, he must determine whether his duty to the potential victims of future pollution outweighs his moral obligation to obey the law. Collateral moral obligations must also be taken into account. For example, if Subordinate engages in whistle-blowing, he may cause injury to innocent associates in the law firm, and if he loses his employment or is subjected to physical abuse by Client's agents, his family may suffer—perhaps a dependent relative who needs expensive medical treatment that will become unavailable if Subordinate is unemployed. That relative may feel very proud of Subordinate's willingness to stand up for a matter of principle, but we may

talent and education to have become a lawyer is capable of earning an honest living, either as a lawyer or in some other capacity. On a more theoretical level, I assert that lawyers are under a special moral obligation to obey the law and, in support of this obligation, to resist duress from those who would have the lawyers violate the law. Of course none of us can predict what level of pressure would bring us to the breaking point. May we never be put to the ultimate test but, if we are, may we respond in a manner that is worthy of our inescapable responsibility as role models.

94. See *supra*, note 74.

wonder whether Subordinate is entitled to force that relative to suffer a deprivation of essential medical treatment as the price paid for Subordinate's support of a principle.

In Example No. 4, Subordinate must determine whether his duty to bear witness against brain transplantation outweighs his moral obligation to obey the law. Again, collateral moral obligations to other persons, such as fellow-associates and family members, become part of the calculation.

The other two employees of the law firm, Clerk and Secretary, also face value choices in Examples No. 3 and 4. The general framework for analysis is the same, namely, whether the individual is under an absolute moral obligation to obey the law, or whether the individual may consider that obligation as being subject to override by higher moral obligations. A distinction can be made, however, among Subordinate, Clerk, and Secretary, when each faces a value choice. Subordinate, having taken the oath as a lawyer, may feel the strongest moral obligation to obey the law.⁹⁵ Secretary, being neither a member nor a candidate for membership in the legal profession, may feel the weakest moral obligation to obey the law, and Clerk, being a candidate but not yet a bar member, may feel an intermediate level of moral obligation to obey the law.

This is not to imply that Subordinate, as a lawyer, has any higher level of morality than Secretary, a non-lawyer. The point is that Subordinate, as a lawyer, may feel that he has undertaken a special duty to obey the law, a duty that may compel him to give extra weight to this duty when confronting other duties that conflict with it.

V. PRINCIPLES OF LAW OFFICE MANAGEMENT

The above examples and discussion indicate that subordinate lawyers may face a dilemma from which no satisfactory escape can be expected. Only the supervisors have the power to prevent these dilemmas from arising in the first place. The law already contains some preventive provisions, by prohibiting a supervisor from issuing an illegal order.⁹⁶ But the subordinate may not have a satisfactory legal remedy if the supervisor issues an illegal order in violation of this provision.⁹⁷ Further, the subordinate has virtually no legal protection if the supervisor issues a legal but morally unacceptable order.⁹⁸

To provide a more adequate set of protections for the subordinate, as well as to encourage a more harmonious environment for the practice of the profession, I have proposed fiduciary principles of law office management.⁹⁹ The fun-

95. See *supra*, notes 87-93 and accompanying text.

96. MODEL RULES, *supra* note 2, Rule 5.1 and Rule 8.4(a) (violation through the acts of another); CPR, *supra* note 3, DR 1-102(A)(2) (actions of another).

97. See *supra*, notes 48-54 and accompanying text.

98. See *supra*, note 80 and accompanying text.

99. An earlier version of these principles appears in Levinson, *Ethics Inside the Law Firm: A Review of D. Ewing, Do It My Way or You're Fired*, 36 VAND. L. REV.,

damental notion is that each lawyer owes a fiduciary duty to each other lawyer, which in turn arises from the fiduciary duty owed by the legal profession to society.

I do not mean to imply that lawyers are the only people who owe a fiduciary duty to society. To the contrary, each identifiable group that offers products or services to society owes a commensurate fiduciary duty to provide those products or services in a manner that serves the public interest while at the same time promoting the justifiable interests of the providers.

If my proposed principles of law office management are in any way useful for the guidance of law firms, similar principles could no doubt be framed for the guidance of other types of enterprises, with variations to take into account the peculiar characteristics of each type of product or service. My proposed principles are, in fact, merely my adaptation of some principles of "good management" formulated by an expert in industrial management.¹⁰⁰

A. *Development of Other Lawyers*

The first proposed principle is that each lawyer is responsible for the development of other lawyers.¹⁰¹ In particular, senior lawyers should maintain an atmosphere in which junior lawyers can function and grow professionally. Junior lawyers should not only feel free but should also feel obliged to express concern if a senior lawyer takes a position that the junior regards as being arguably improper. The junior's obligation in this situation flows from the junior's fiduciary duty to take part in the development of the professionalism of his senior.

This proposed principle, if applied in our examples, would have required the subordinate lawyers to express their concerns to the supervisors, who in turn would have been required to listen carefully. This principle would also require an effective system of conference and reference, followed by the liberal granting of requests for reassignment of the objecting subordinate if the objections did not convince his seniors in the firm.

Beyond the facts in our examples, this proposed principle emphasizes that each lawyer inevitably contributes to the atmosphere of the law firm and of the entire profession. One lawyer's contribution may be more influential than another's but each lawyer makes some contribution. Each has a fiduciary obligation to make that contribution in a manner that the individual believes, in good faith, will be beneficial to society and to the profession. The supervisor cannot avoid the responsibility of serving as a role model for the subordinate, but the converse is also true—the subordinate necessarily serves as a role model for the supervisor. I am convinced that supervising lawyers have been significantly influenced by the professional attitudes of their subordinates. I

847, 853-55 (1983).

100. *Id.* at 847.

101. *Id.* at 853.

am equally convinced that subordinates should be aware of their potential impact and should accept the responsibilities of being role models for their supervisors.

Young lawyers have special responsibilities toward one another. If Associate A asks Associate B to help talk through a difficult question of professional conduct, B is under a strong fiduciary duty to take time to listen and advise in good faith.

The fiduciary obligation of lawyers extends beyond any individual case, and includes the obligation to help improve the general laws and practices of the profession in the public interest, and to participate as active citizens in the general community.¹⁰² Thus, subordinate lawyers as well as their seniors

102. See MODEL RULES, *supra* note 2, "Preamble: A Lawyer's Responsibilities;" CPR, *supra* note 3, "Preamble" and EC 8-1, 8-2 and 8-9.

Debate continues among law professors and others, regarding the proper role of the law schools in stimulating their students to become law reformers. The traditional view, consistent with the Model Rules and Code of Professional Responsibility provisions cited above, is that the law school should encourage its students to engage in orderly processes to improve the law. See, e.g., Bostick, *Commencement Address*, 16 VAND. LAWYER 24 (1985); O'Connor, *Professional Competence and Social Responsibility: Fulfilling the Vanderbilt Vision*, 36 VAND. L. REV. 1 (1983); Wade, *Public Responsibilities of the Learned Professions*, 21 LA. L. REV. 130 (1960).

A more radical approach is suggested by Professor Duncan Kennedy, who advocates "building a left bourgeois intelligentsia that might one day join together with a mass movement for the radical transformation of American society." Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL ED. 591, 610 (1982). In Kennedy's view,

[O]ur society is rotten through and through. . . . [R]eformism is in fact a hopeless endeavor. . . . It is important always to take short-term gains when they are offered, but the only reasons to take them are that it's nice to win something occasionally and that through the coalitions that achieve them one gets access to people who may be converted to more radical commitments.

Id. at 611; see also Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983); *Symposium, Ethics in Academia: Power and Responsibility in Legal Education*, 34 J. LEGAL ED. 155 (1984); *Symposium of Correspondence: "Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL ED. 1 (1985).

My first reaction is to question whether law schools and professors have any effect on the moral development of students. A modest answer is suggested by Willging & Dunn, *Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. LEGAL ED. 306 (1981). For a contrasting view, see Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, 8 U. MICH. J.L. REF. 248 (1975). In the paragraphs preceding this footnote, I have observed that people affect one another, and that associates influence partners as well as vice versa. Consistent with that observation, I conclude that law professors and students influence one another. The professors are the more influential group, not only because they wield authority over grades and graduation, but also—perhaps more importantly—because they are usually much more visible and exposed than the students.

One of the characteristic features of legal education in this country is the emphasis on the professor's intellectual and technical contribution to students, and the demphasis of any questions of values or morals. This approach has a merciful aspect, since it protects the student from having to adhere to a professor's values, but the

should provide input into efforts to reform the special law of lawyering as well as the general laws of the community. The conclusion of this article mentions some areas in which law reform may be required.

B. *Deference to Client*

The second proposed principle requires the law firm to give substantial deference to the values and choices of the client, but to decline or withdraw from employment if the firm and the client cannot resolve significant value conflicts.¹⁰³ In our examples, this would require the law firm to withdraw if the client insisted that the law firm engage in illegal conduct, such as forgery or the presentation of perjured testimony.¹⁰⁴ This principle would also require the law firm to decline or withdraw if the law firm had significant moral difficulties with the client's proposed end-purpose, such as the brain transplant lab.

This principle could conceivably mean that a client with a highly unpopular cause would be unable to obtain legal representation, because each law

approach could also be perceived as implying that value questions are neither important nor even relevant to the student—or to the lawyer.

Professor Kennedy's proposal, cited above, calls for a departure from our prevalent value-free pattern. His approach is based on his diagnosis of our society as being so rotten that reform is not feasible. Since I do not subscribe to his diagnosis, I do not perceive the need for the type of remedy he espouses. *See supra*, note 82.

In my view, the discussion of values does have an important place in the law school, but it should be a shared discussion among professors, students and, if feasible, invited guests, in which the students should be encouraged to formulate and express their own values, without having the content of these values subjected to grading or undue influence by the professor. On the introduction of ethical dialogue into the law school *see, e.g.*, Aultman, *The Professor of Law*, 8 J. LEGAL PROF. 43 (1983); Brooks, *The Future of Ethical Humanism: The Re-Introduction of Ethics into the Legal World: Alan Gewirth's Reason and Morality*, 31 J. LEGAL ED. 287 (1981); Elkins, *Moral Discourse and Legalism in Legal Education*, 32 J. LEGAL ED. 11 (1982); Richards, *Moral Theory, the Developmental Psychology of Ethical Autonomy and Professionalism*, 31 J. LEGAL ED. 359 (1981); Shaffer, *Law Faculties as Prophets*, 5 J. LEGAL PROF. 45 (1980). I support the teaching of law school courses in philosophy, jurisprudence and related topics by experts in these fields, but I also support the pervasive use of ethical dialogue whenever professors feel comfortable enough to engage in it.

One additional component that may be useful is the study of incidents in the lives of lawyers illustrating how the individual faced up to moral challenges. An interesting and useful attempt is W. KUNSTLER, *THE CASE FOR COURAGE* (1962) which is, to some extent, the lawyers' counterpart to J. KENNEDY, *PROFILES IN COURAGE* (1956).

Special considerations apply, of course, if the law school is identified with a particular religious denomination or ethical movement. Students who attend such a school should expect it to emphasize the value system appropriate to the school's avowed mission.

103. *See* Levinson, *supra* note 99, at 854.

104. Forgery is clearly prohibited, *supra* notes 44-46. A lawyer must withdraw if the client insists that the lawyer engage in conduct that would violate professional rules. MODEL RULES, *supra* note 2, rule 1.16(a)(1); CPR *supra* note 3, DR 2-110(B)(2).

firm would have the option of declining employment on the basis of a significant value conflict.¹⁰⁵ This result seems highly unlikely because of the large number of law firms and the increasing diversity of their members. Nevertheless, if a client cannot find a law firm that can represent him without a significant value conflict, I question the wisdom of coercing a law firm to undertake representation of the client. I would prefer to see a change in the laws regarding public defenders, legal services, and other publicly-funded law offices, to allow them to accept clients of all income levels, on a fee-generating basis if appropriate, if the clients have failed, after reasonable efforts, to obtain representation through the general market for legal services. At the same time, the publicly funded law offices would have to explain, in their recruitment of lawyers, the possibility that the office may be called upon to represent unpopular clients. Even then, I would hope that the office would reassign individual lawyers who had personal value conflicts with the proposed client (as proposed in principle No. 1), but that the office would make every feasible effort to furnish one of its lawyers to the client.

This proposed principle of deference to the client, subject to limitations, has little direct impact on the relationship between the subordinate and the supervisor inside the law firm, but it must be stated as a predicate for the next principle, which deals directly with internal relationships inside the law firm.

C. Deference to Law Firm

The third proposed principle requires each partner or associate to give substantial deference to the values and choices of the law firm and of the firm member who is directly serving the client.¹⁰⁶ The firm should not, however, require a lawyer to participate in a case about which he has a significant value conflict with the law firm.

This principle imposes restraint upon the junior lawyer. He should recognize that his request for reassignment may be costly to the firm and perhaps to the client also, and that even if he merely raises questions about the propriety of a supervisor's order, he is subjecting the supervisor and other firm members to commitments of valuable time. Accordingly, the subordinate lawyer should not rely on frivolous grounds in requesting reassignment or in seeking conference or reference to test the propriety of the instructions given by his supervisor. However, in conformity with the liberal reassignment policy of the first proposed principle, the firm should reassign the lawyer who feels uncomfortable about a value choice by the firm.

This principle also cautions the subordinate lawyer against any affirmative act to undermine the law firm's conduct of the client's matter, unless the subordinate is under extreme moral compulsion to engage in an act of conscience, discussed in the fourth proposed principle.

105. See *supra*, note 76 and accompanying text.

106. See Levinson, *supra* note 99, at 854.

D. *Act of Conscience*

The fourth and final proposed principle is that a lawyer—any lawyer—should be ready to serve society through an act of conscience, even in violation of law, but only if the lawyer believes that this act is the only feasible way to fulfill a duty to society that transcends the lawyer's other obligations.¹⁰⁷ A lawyer should be tolerant of the acts of conscience of other lawyers. Law firms or bar disciplinary authorities should consider the circumstances and the options that were available at the time, as well as the conscientious nature of the violation, as a defense or as a mitigating circumstance to reduce the severity of the sanction.

This principle reflects my personal view that neither the lawyer nor any other citizen is under an absolute moral duty to obey all laws. The laws are, however, presumptively binding in the moral arena, and this presumption bears more heavily on lawyers than upon most other citizens.¹⁰⁸ If the lawyer believes that society needs him to violate the law as the only feasible way to fulfill a transcendent moral duty, the lawyer should not escape punishment, but the law firm and other lawyers should make every effort to understand his dilemma and to be lenient in recommending or applying sanctions.

VI. CONCLUSION

My message can be summarized simply. If you subscribe to no higher values, carry out your supervisor's legal instructions, but not his illegal ones.¹⁰⁹ If you subscribe to higher values for other purposes but you consider yourself absolutely bound in conscience to carry out the law, the same result follows.¹¹⁰

On the other hand, if you subscribe to higher values that may in your conscience override your moral obligation to obey the law, you must determine, in each specific situation, whether the law or your other values should control your actions.¹¹¹ This determination should result from a weighing process in which your moral obligation to obey the law has the benefit of a strong

107. See Levinson, *supra* note 99, at 854; *supra*, notes 92-93 and accompanying text.

108. See *supra*, notes 81-93 and accompanying text.

109. *Id.*; see also Gross, *supra* note 7, at 299 n.173. The strongest case cited by Gross is *In re Knight*, 129 Vt. 428, 281 A.2d 46 (1971), holding that an associate cannot escape professional discipline by showing that he acted upon the orders of a supervising lawyer. For perspectives on the defense of superior orders, see T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 42-53 (1970). The above citations generally support the notion that a subordinate lawyer should disobey illegal orders. The converse notion, that the subordinate lawyer should obey legal orders, flows from the contractual relationship between the subordinate lawyer and the law firm, as well as the fiduciary obligation that the subordinate lawyer owes to the law firm and to the client. See *supra* note 7 and accompanying text.

110. See *supra*, notes 81-93 and accompanying text.

111. See *supra*, notes 92-93 and accompanying text.

presumption.¹¹²

I do not suggest what should be the source or content of your higher values, but I point out the possibility that these values may change over the years. One potential source of change is your life within the law firm.¹¹³ I hope this source can be counterbalanced by other sources, detached from the firm and even from the profession, so that your conscience does not become a hostage to your ambition.

In your relationship with other lawyers, regardless of their level of experience or authority, try to claim ample breathing room for your own values and try also to allow breathing room for theirs.¹¹⁴

Beyond your daily role in dealing with the specific matters of clients, you have the opportunity to engage in law reform efforts. This article has suggested a number of agenda topics including, for example, the following: (1) should the doctrine of unjust dismissal be interpreted so as to give relief to a subordinate lawyer who was discharged (or otherwise adversely affected) for refusing to carry out an illegal order?¹¹⁵ (2) should lawyers no longer be required to take the oath upon being admitted to the bar?¹¹⁶ (3) should Model Rule 5.2(b), immunizing a subordinate from discipline when acting under orders in some situations, be repealed by the ABA, or at least rejected by your state in its special law of lawyering?¹¹⁷ (4) should law firms or bar associations be encouraged to adopt principles of law office management and, if so, should these principles be similar to those proposed in this article?¹¹⁸

May I conclude with yet another example, this perhaps the simplest and at the same time the most troublesome of them all.

Example No. 5: The Recurring Emergency

Facts

Supervising lawyer hands a file to Subordinate and asks Subordinate to prepare a brief for filing in the appropriate court within forty-eight hours, the final deadline after Supervisor has obtained as many extensions as could feasibly be obtained. Subordinate has not had previous contact with this case or

112. *Id.*

113. See Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN L. REV. 589 (1985); see also *supra*, note 102.

114. See, e.g., G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* 261-64 (1981) (the cited pages are subtitled "Personal Space and Professional Identity").

115. See *supra*, notes 48-56 and accompanying text; see also Gross, *supra* note 7, at 298, n.167 (citing *Symposium: Commentaries on Professional Tenure*, 59 NEB. L. REV. 1 (1980)); Note, *A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts*, 28 VAND. L. REV. 805 (1975).

116. See *supra*, notes 28-35 and 87-93.

117. See *supra*, notes 41-43 and accompanying text. The House of Delegates of the New York State Bar Association voted to delete Rule 5.2(b) from the Model Rules version for New York State. This vote, at the June 21-22, 1985 meeting, was a preliminary action, subject to final action at the November, 1985 meeting. 27 N.Y.S.B.A., State Bar News, No. 6 (June 1985), pp. 1-2.

118. See *supra*, notes 99-108 and accompanying text.

any other case like it and does not think he can possibly do a competent job within the stated forty-eight hours. This kind of emergency, let us assume, is nothing new. In fact, most of Subordinate's assignments reach him in similar emergency settings. Supervisor knows that he provides insufficient time to allow Subordinate to do a first-class job, but the law firm wins most of its cases anyway, and opponents seldom do a better job.

Comment

In my opinion Supervisor's order is illegal because it requires Subordinate to perform professional duties in an incompetent manner.¹¹⁹ Subordinate is therefore legally obliged to decline to carry out the order.¹²⁰ A common-sense solution would be for Subordinate to point out that he will probably perform incompetently if he attempts to complete the brief within forty-eight hours, and to urge Supervisor to assign additional people to work on the project so as to stand the best possible chance of producing a brief of appropriate professional quality.

If the law firm has adopted principles of law office management along the lines suggested in this article,¹²¹ the climate in the law firm will be conducive to a free expression of Subordinate's views. But without this type of climate, Subordinate may feel reluctant, either to suggest that Supervisor is making unreasonable requests, or to admit that Subordinate may be incapable of satisfying Supervisor's demands. Since this law firm seems to operate habitually in a state of emergencies and imminent deadlines, the firm is unlikely to provide a climate that would be receptive to Subordinate's view that quality must be maintained. After exhausting all available avenues of conferring and referring,¹²² Subordinate may conclude that a career in the firm is neither likely nor desirable, unless Subordinate is willing to orient his career to becoming, in due course, another supervisor who drives his subordinates from one emergency to another, demanding from them the performance of professional services in an incompetent manner. In the meantime, Subordinate must go through the painful process of deciding how to respond to Supervisor's instruction.¹²³

The most troublesome aspect of this example is that recent literature portrays this as the typical and perennial situation in many law firms today.¹²⁴

119. Competence is required by MODEL RULES, *supra* note 2, Rule 1.1 and CPR, *supra* note 3, DR 6-101(A).

120. See *supra*, notes 44-45 and accompanying text.

121. See *supra*, notes 99-108 and accompanying text.

122. See *supra*, notes 63-67 and 101 and accompanying text.

123. See *supra*, notes 68-72 and accompanying text.

124. The sources cited in this footnote indicate that many associates believe they are given insufficient time to complete their assignments. These sources do not address the hypothetical facts in the accompanying text, and do not demonstrate that any unethical conduct has been attempted or committed. See, with the above caveat, Gross, *supra* note 7, at 302, reporting that 83% of the responding associates had at some time felt that they lacked sufficient time to handle a particular assignment; Harper, *Life in a Small Firm/Big Firm*, 71 A.B.A. J. 55 (May 1985), quoting a "typical" associate in a

Whether it continues to be typical may be up to you.

New York law firm as saying:

The hardest thing about my job is that each partner I'm working with thinks his case is the most important, and I've got to please them all, . . . One of the talents you develop, and that makes you a better lawyer, is juggling things and learning to distinguish between purported emergencies and real emergencies. By the very nature of the work, the only things that get done are the real emergencies, the things that have to go out in two hours. Everything else gets backburnered until it becomes an emergency.

