THE MEANING AND ETHICAL SIGNIFICANCE OF PROFESSIONAL IDENTITY FORMATION FOR LAWYERS

CLE Presentation
2022 Christian Legal Society National Conference
Newport Beach, California
October 6-9, 2022

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I. Emphasis on Professional Identity Formation in Legal Education

a. Two foundational reports

i. *Educating Lawyers: Preparation for the Profession of Law* (2007)

ii. *Best Practices for Legal Education* (2007)

iii. Highlighting that curricular focus on pervasively addressing students' professional identity development should be among law schools' primary goals.

b. Rise of professional identity movement in legal education

i. *Building on Best Practices: Transforming Legal Education in a Changing World* (2015)

ii. *The Formation of Professional Identity: The Path from Student to Lawyer* (2020)

iii. Professional identity workshops through the Holloran Center for Ethical Leadership in the Professions at the University of St. Thomas School of Law

c. February 2022 changes to the ABA Standards for Approval of Law Schools

i. Amendment to Standard 303(b) added subsection (3), which requires law schools to foster their students' professional identity formation. The section reads: "(b) A law school shall provide substantial opportunities to students for: (1) law clinics or field placement(s); and (2) student participation in pro bono legal services, including law-related public service activities; and (3) the development of a professional identity."

ii. Addition of Interpretation 303-5: "Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their

clients and society. The development of professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice. Because developing a professional identity requires reflection and growth over time, students should have frequent opportunities for such development during each year of law school and in a variety of courses and co-curricular and professional development activities."

II. Relationship between the Professional Identity Emphasis and the Professionalism Movement in the Legal Profession

a. At least 18 state bars or bar associations have adopted professionalism codes, creeds, or principles; see https://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes/.

b. For one such examples, see *Virginia Principles of Professionalism*, https://www.vsb.org/pro-guidelines/index.php/principles/.

c. "Some jurisdictions, in states including New Jersey, Georgia, Illinois, Florida, Arizona, and North Carolina, have taken the voluntary aspirational codes further and have adopted an intermediary or peer review system to mediate complaints against lawyers or judges who do not abide by the aspirational code." https://www.americanbar.org/groups/business_law/publications/blt/2014/09/02_reardon/.

III. Difference Between Lawyer Professionalism and Professional Identity

"Although lawyer professionalism has been defined in various ways, its focus historically has been on the outward conduct the legal profession desires its members to exhibit. Lawyer professionalism has often referred to adherence to standards or norms of conduct beyond those required by the ethical rules, and the focus of the current discussion of professionalism largely remains on outward conduct like civility and respect for others.

"Civility and respect for others are undeniably important to an emerging lawyer's professional identity, but *professional identity runs deeper, in that it challenges the developing lawyer to internalize principles and values such that the conduct desired will be a natural outgrowth of the individual's moral compass.*"

L.O. Natt Gantt, II & Gloria A. Whittico, "The Role of ASP in Developing Students' Professional Identity" *The Learning Curve*, Winter 2014, at 6 (citations omitted) (emphasis added).

IV. Need for Professional Identify Emphasis in the Legal Profession

a. Many attorneys today lack ethical integration.

Studies underscore that many attorneys either shift or overlook their personal moral judgment when they represent clients. *See, e.g.*, Robert Granfield & Thomas Koenig, *"It's Hard to be a Human Being and a Lawyer": Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, 105 W. Va. L. Rev. 495 (2003).

b. Many lawyers adopt the traditional notion of role differentiation in which they divorce their personal morality from their professional "role" as attorneys.

c. Emphasizing professional identity formation is important to enhancing lawyer well-being.

i. Research on lawyer well-being

1. In 2016, the ABA Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation published their study of nearly 13,000 currently-practicing lawyers. It found that between 21 and 36% qualify as problem drinkers, and that approximately 28%, 19%, and 23% are struggling with some level of depression, anxiety, and stress, respectively. In addition, the study highlighted the extreme reluctance of those suffering to access any sort of assistance or treatment, primarily due to stigma, shame, and fear of being "found out." P. R. Krill, R. Johnson, & L. Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016).

2. In 2017, the National Task Force of Lawyer Well-Being published the comprehensive report, *The Path to Well-Being: Practical Recommendations for Positive Change* ("the Report") outlining 44 recommendations for addressing commonly occurring behavioral health concerns and for providing improved well-being for law students, lawyers, and judges. *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (2017), *available at* https://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf.

3. In 2021, the ABA Practice Forward Initiative published *Practicing Law in the Pandemic and Moving Forward.* This survey of over 4,200 ABA members found that the COVID-19 pandemic has had a significant impact on the lawyers' well-being of lawyers. In particular, it has greatly exacerbated the disproportionate burdens and pressures that women lawyers, particularly those with young children, and lawyers of color were already facing. Respondents therefore stressed how they their employers should provide policies and programs on wellness.

ii. Responses to Lawyer Well-Being Crisis

1. ABA Well-Being Pledge and other national responses

2. State bar reports and task forces (see, for instance, the Report of the Virginia State Bar President's Special Committee on Lawyer Well-Being *The Occupational Risks of the Practice of Law* (May 2019)), available at https://www.vsb.org/docs/VSB_wellness_report.pdf).

3. Formation of the Institute for Well-Being in Law

iii. Developing professional identity relates to the National Task Force's key component to well-being in finding meaning and purpose in one's vocational role.

iv. Focus on professional identity formation promotes lawyer integrity by helping lawyers appreciate the indivisibility of their professional and personal selves and avoid the emotional maladjustment that is correlated with disintegrated living. *See* Larry O. Natt Gantt, II, *Integration as Integrity: Postmodernism, Psychology, and Religion on the Role of Moral Counseling in the Attorney-Client Relationship*, 16 REGENT U.L. REV. 233, 248-51 (2003-04) (discussing how integration across roles is central to personal integrity).

II. Professional Identify Formation as an Instilling of the Institutional Values of the Profession

a. Institutional values proposed by the ABA's MacCrate Report

i. Providing competent representation
ii. Striving to promote justice, fairness, and morality
iii. Striving to improve the profession
iv. Professional self-development

AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 7-10 (1992).

b. Institutional values proposed by *Best Practices*

Best Practices provided greater emphasis than the *MacCrate Report* on personal ethics by encouraging the cultivation of the values of "[a] commitment to justice" and "[r]espect for the rule of law." It also went further in promoting the values of: (1) "[h]onor, integrity, fair play, truthfulness, and candor"; (2) "[s]ensitivity and effectiveness with diverse clients and colleagues"; and (3) "[n]urturing quality of life. *Best Practices* at notes 239, 246, and 253-67.

c. Institutional values proposed by Gantt & Madison

i. Integrity—Being True to Self

Integrity encompasses "five layers":

1. High moral standards (like fairness and honesty)
2. Personal consistency (across situations)
3. Admirable goals (integrity must concern the ends as well as the means)
4. Public accountability (being willing to take responsibility for your transgressions or for those of individuals under you in an organizational structure)
5. Integration ("[I]ntegrity tolerates no split between public and private behavior.")

(*from* Richard Higginson, *"*Integrity and the Art of Compromise," in *Faith in Leadership: How Leaders Live Out Their Faith in Their Work and Why It Matters* 20-23 (Robert Banks & Kimberly Powell, eds. 2000))

ii. Honesty
iii. Diligence/Excellence
iv. Fairness/Seeking Justice & Truth
v. Courage/Honor
vi. Wisdom/Judgment
vii. Compassion/Service/Respect for Others
viii. Balance

Larry O. Natt Gantt, II and Benjamin V. Madison, III, *Teaching Knowledge, Skills, and Values of Professional Identity Formation in* BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD (Lexis 2015) (hereinafter Gantt & Madison).

III. Four Progressive Skills for Professional Identity Formation

a. Self-awareness

i. Self-awareness is a foundational skill to development of a well-formed ethical compass.

"Before we can know our values and identity, we need to know our strengths, weaknesses, and other traits – in short, to know ourselves. Without deliberate effort we are not likely to be aware of our weaknesses because 'all of us believe that we see the world objectively ... and ... we tend to see ourselves as more fair, unbiased, competent, and deserving

than average ....'" Gantt & Madison at 260 (quoting JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS 387 (2012)).

ii. Lawyers are especially good at self-deception.

See generally Kimberly Kirkland, *Self-Deception and the Pursuit of Ethical Practice: Challenges Faced by Large Law Firm General Counsel*, 9 U. ST. THOMAS L.J. 593 (2011).

b. Empathy, ethical sensitivity, and other relational skills

"Empathy lies at the heart of ethical sensitivity. Empathy has been defined as 'the action of understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another ....' The difference between someone who is self-aware and one who has progressed to the stage of having ethical sensitivity shows in the care with which he makes decisions. The ethically sensitive individual knows that her decisions make a difference—that the way she resolves problems affects not only her personally but also other people. When a person's actions conflict with his belief systems, his intuition warns that something is awry…. The primary reason for these feelings is that the actor realizes she has either violated her internalized principles or hurt others. By relying on these internal warning signs, the ethically sensitive lawyer will be more likely to consider the consequences to others as well as the need to act consistently with his principles. The ethically sensitive lawyer may not be able to avoid certain consequences to others resulting from her resolution of an ethical dilemma. In her decision, however, she will have reflected on all options and have chosen the best alternative, one that can still have consequences for others, but which will avoid unnecessary harm.

"Relational skills, in general, promote the values discussed above, such as fairness, compassion, and respect for others. These skills help in understanding another person's view because the law student or lawyer has taken the time to consider the other person's life situation, the pressures her legal problems have created, and the like. They also involve communication skills such as understanding nonverbal communication and empathic listening.66 Relational skills may be viewed as empathy in action."

Gantt & Madison at 261 (citations omitted).

c. Reflective and decision-making skills

"The self-aware, ethically sensitive, and empathic lawyer must also be able to reflect on issues that arise in practice and resolve ethical dilemmas, particularly those that arise in the face of uncertainty. Aristotle sets the standard for the kind of reflection to which anyone, including lawyers, can aspire. Aristotle's famous discussion in the Nicomachean Ethics about virtues explains that a person with

practical wisdom must be able 'to deliberate well.' Such a person has not only knowledge but also "intuitive reason" and "understanding." Law schools, thus, must equip students with practical decision-making tools that enable them to reflect on problems, including "unstructured" problems that have no simple or clear answer, and to resolve them thoughtfully."

Gantt & Madison at 262 (citations omitted).

d. Self-motivation

"The discussion to this point has presumed that developing lawyers and those in practice care about making sound decisions. Nevertheless, a lawyer's capacity for self-awareness and ethical sensitivity translates into ethical decisions only if the lawyer has the motivation to follow through on what he concludes is the right thing to do.71 Accordingly, law schools need to encourage the self-motivation that will empower lawyers to act on the decisions they reach."

Gantt & Madison at 262 (citations omitted).

IV. Practices to Develop the Skills that Promote the Identified Values of the Profession

a. Methods to Develop Self-Awareness

i. Journaling and reflection

ii. Contemplative practices, such mindfulness, meditation, and contemplative Bible reading

b. Methods to Develop Empathy

i. Active listening

ii. Role playing

c. Methods to Develop Ethical Decision-Making

i. Mentor relationships that foster moral dialogue

ii. Drafting ethical decision-making frameworks

d. Methods to Develop Self-Motivation

i. Reflection on moral exemplars

ii. Mentor relationships that promote personal accountability

V. The Role of Counseling Clients on Nonlegal and Moral Issues in Promoting Lawyers' Integration and Professional Identity Formation

a. Religious teachings underscore how moral discourse enhances decision-making.

b. The work environment can promote solidarity and address the relational needs of individuals.

c. Distancing personal morality from professional life leads to moral atrophy; dialogue with others can invigorate moral faculties.

d. Lawyer-to-lawyer discourse cannot completely substitute for direct conversation with clients.

e. Not discussing moral issues may merely drive them "underground." *See* Robert K. Vischer, "Heretics in the Temple of Law: The Promise and Peril of the Religious Lawyering Movement," 19 *Journal of Law and Religion* 427, 477 (2003-04).

VI. The Role of Nonlegal Counseling in Counteracting Client-Lawyer Abuses

a. Early American culture generally viewed the ideal lawyer as a "lawyer-statesman" who exhibited practical wisdom and was an excellent counselor to his clients. *See* Benjamin V. Madison, III & Larry O. Natt Gantt, II, "Morals and Mentors: What the First American Law Schools Can Teach Us About Developing Law Students' Professional Identity," 31 *Regent University Law Review* 161 (2018-2019).

b. After the Enron scandal in 2001, numerous scholars reinforced the argument that good lawyers should be good counselors and should raise nonlegal concerns with their clients.

c. Some have argued for better counseling training in law schools and increased professionalism training by state bar organizations so that lawyers are better equipped to discuss nonlegal concerns with clients.

VII. Nonlegal Counseling as Allowed Under the ABA Model Rules of Professional Conduct

a. ABA Rule 2.1: Advisor—"In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." (The complete text of the rule and comments is attached.)

b. Nearly all the states with ethics rules based on the Model Rules have adopted ABA Rule 2.1 without substantial revision. See the comparison charts on the ABA website for information on how each state has modified the ABA Model Rules: https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/.

c. The ABA Rules explain in the Scope section [14] that "may" rules are "permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion."

VIII. Nonlegal Counseling as Encouraged Under the ABA Rules and Other Provisions

a. Ethical Consideration 7-8 under the ABA Model Code of Professional Responsibility, the predecessor to the Model Rules, provided: "Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. . . . In assisting his client to reach a proper decision, it is *often desirable* for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself." (Emphasis added). Ethical Consideration 7-8 under many state codes of professional responsibility, their predecessors to the rules, is similar.

b. The Comment to ABA Rule 2.1 provides, in pertinent part:

i. "Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. *Purely technical legal advice, therefore, can sometimes be inadequate*. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." (Comment 2) (emphasis added).

ii. "It is proper a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be implied." (Comment 2a).

iii. "A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations. (Comment 3).

c. The Comment to ABA Rule 2.1 is virtually identical to the comments adopted by many states. Some state comments, however, are more expansive. For instance, Virginia includes "moral or ethical" consequences as potentially being required

to be discussed under Rule 1.4: "In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal, *moral or ethical* consequences to the client or to others, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation." (Comment 5 (emphasis added)).

d. ABA Rule 1.4—Communications

   i. This rule, in pertinent part, requires lawyers to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." (Most state rules are similar.)

   ii. Professor John M. Burman at the University of Wyoming College of Law, reasons, "The extent reasonably necessary to permit an 'informed decision' will generally include an explanation and discussion of non-legal factors." John M. Burman, "Advising Clients About Non-Legal Factors," *Wyoming Lawyer,* Feb. 2004, at 40, 41-42.

   iii. The Comment to Rule 2.1 noted above implies that the principles in Rule 2.1 might properly be read into Rule 1.4 such that attorneys, in some cases, can properly communicate with their clients *only if* they explain both the legal and nonlegal considerations at issue.

e. ABA/BNA *Lawyers' Manual on Professional Conduct*

   i. The *Lawyers' Manual* provides: "a lawyer's recommendations arguably *should* go beyond advising the client about that which is merely legally permissible and ought to incorporate moral and ethical considerations as well." *Lawyers' Manual* § 31:701 (emphasis added).

   ii. It also reasons that that ABA Rule 2.1 "likely envisions that the lawyer will bring to the attorney-client relationship moral guidelines from his or her religious background." Regarding advice on economic matters, it adds that clients "probably expect [such advice] as part of the service they are paying for." *Id.* 31:704, 31:709.

f. Restatement (Third) of the Law Governing Lawyers § 94 cmt. h (2000) provides: "A lawyer's advice on significant nonlegal aspects of a matter may be particularly appropriate when the client reasonably appears to be unaware of such considerations or their importance or when it should be apparent that the client expects more than narrow legal counsel. A lawyer *is required* to provide such assistance when necessary in the exercise of care to the extent stated in § 52 [the section on the standard of care for professional negligence and the breach of fiduciary duty]." (Emphasis added).

g. ABA Rule 1.16(b)(4)—Withdrawal for Repugnance

i. Rule 1.16(b)(4) specifically allows an attorney to withdraw if "a client insists upon pursuing an objective that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." (Many state rules are similar.)

ii. Because Rule 1.16(b)(4) allows withdrawal under this provision even when it harms the client, lawyers owe their clients an explanation for their moral repugnance.

h. The Preamble to the Model Rules supports the conclusion that lawyers should, at times, advise clients on nonlegal issues. The second paragraph provides the basic guidance on lawyers' responsibilities when they advise their clients. It reads: "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations *and explains their practical implications*." (Emphasis added.)

IX. Judicial and Ethics Opinions Encouraging Nonlegal Counseling

a. Despite the far-reaching implications of Rule 2.1, "[t]his provision only rarely finds its way into court and ethics opinions." Ellen Bennett et al., *Annotated Model Rules of Professional Conduct* 315 (8th ed. 2015)

b. *Friedman v. Commissioner of Public Safety*, 473 N.W.2d 828, 834-35 (Minn. 1991)): "If the objective of DWI prosecution is to get drunk drivers off the highways, into treatment, and on the way to sobriety, an attorney can play a very important role. A good lawyer is not only interested in protecting the client's legal rights, but also in the well-being and mental and physical health of the client. A lawyer has an affirmative duty to be a counselor to his client. . . . The lawyer may be able to persuade a problem drinker to seek treatment."

c. *In re Marriage of Foran*, 834 P.2d 1081, 1089 & n.14 (Wash. Ct. App. 1992): The court referenced Washington Rule of Professional Conduct 2.1 to stress how attorneys should address the nonlegal consideration of "marital tranquility" when they advise their clients on prenuptial agreements.

d. *Wooten v. Heisler*, 847 A.2d 1040, 1044 (Conn. App. Ct. 2004): "To be sure, an attorney has an *obligation* to act with reasonable diligence; to communicate with the client to the extent reasonably necessary to allow the client to make informed decisions; and to provide advice on such legal *and nonlegal* matters that are relevant to the client's situation" (emphasis added).

e. Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. 97-06 (1997): "the attorney *has an ethical responsibility* to advise the client of the practical consequences, as well as the legal consequences, of his proposed course of action" (emphasis added).

f. N.Y. City Ethics Op. 2011-2 (2011): The opinion referenced New York Rule of Professional Conduct 2.1 to conclude that lawyers whose clients are considering third-party financing for litigation should discuss with their clients the costs and benefits of such financing and consider the clients' financial resources in advising whether such financing is in the clients' best interest.

X. Specialized Codes and Other Commentary

a. American Academy of Matrimonial Lawyers ("AAML") Standard 1.2 under the "Competence and Advice" section of the AAML Bounds of Advocacy provides:

i. "An attorney should advise the client of the emotional and economic impact of divorce and explore the feasibility of reconciliation."

ii. The Commentary to the standard recognizes that few attorneys are qualified to conduct psychological counseling but concludes that discussion of these nonlegal impacts is "appropriate."

b. American Law Institute's Principles of Corporate Governance Section 2.01(b)(2) (1994) states:

i. "Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business: [m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business."

ii. The comment adds, "Corporate officials are not less morally obliged than any other citizens to take ethical considerations into account [in making decisions], and it would be unwise social policy to preclude them from doing so." *Id.* § 2.01 cmt. h.

c. Legal ethicist Monroe Freedman and other scholars underscore how competent attorneys should, when appropriate, provide nonlegal counseling to their clients. *See, e.g.*¸ Monroe H. Freedman & Abbe Smith, *Understanding Lawyers' Ethics* 87 (2d ed. 2002) ("[W]hile representing a client, the lawyer should counsel the client regarding the moral aspects of the representation.")

XI. Factors Influencing Nonlegal Counseling

a. Nature of the client-attorney relationship

In discussions on other matters, has the attorney raised nonlegal considerations?

b. Comfort level between the client and attorney

How influential are the client and lawyer in their respective organizations?

c. Context of the representation

i. *What type of matter is involved?*

ii. *How relevant are nonlegal considerations to the legal matter at hand?*

d. Sophistication of the client

How experienced is the client in handling the type of legal matter at issue? (Note the Comment to Rule 2.1.)

XII. Cases Limiting Nonlegal Counseling

a. *Stanley v. Board of Professional Responsibility*, 640 S.W.2d 210, 213 (1982): "Stanley deceived an immature youth and his naïve parents. He compounded the deception with his lack of understanding of the proper role of a lawyer—which does not include a self-appointed role as a paraclete, comforter, helper, or hand holder, under the guise of legal services and at a lawyer's compensation rate."

b. *Florida Bar v. Buckle*, 771 So.2d. 1131, 1133 n.1 (Fla. 2000): "[W]e agree with the referee that an attorney should carefully exercise his or her professional judgment and discretion with regard to the dissemination of religious materials enclosed with legal correspondence."

c. Board of Prof'l Responsibility of the Supreme Court of Tenn., Formal Op. 96-F-140 (1996): "If the minor is truly mature and well-informed enough to go forward and make the decision on her own, then counsel's hesitation and advice for the client to consult with others could possibly implicate a lack of zealous representation . . . . Counsel also has a duty of undivided loyalty to his client, and should not allow any other persons or entities to regulate, direct, compromise, control or interfere with his professional judgment. To the extent that counsel strongly recommends that his client discuss the potential abortion with her parents or with other individuals or entities which are known to oppose such a choice, compliance with [a lawyer's obligation to exercise independent professional judgment on behalf of a client] is called into question."

XIII. Limitations Placed by Other Model Rules

a. ABA Rule 1.1: Competence

i. Competent representation requires "the *legal* knowledge, skill, thoroughness and preparation reasonably necessary for the representation" (emphasis added); but the term *legal* only modifies the term *knowledge*, and *legal* may be defined expansively. (Many state rules are identical.)

ii. Moreover, the Comment to Rule 2.1 recognizes that "[m]atters that go beyond strictly legal questions may also be in the domain of another

profession" and that "[w]here consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation." The Comment adds, however, "At the same time, a lawyer's advice at its best often consists of recommending a course of action in the fact of conflicting recommendations of experts." (Many state rules are identical.)

iii. This source and others noted above appear to provide that competent attorneys engage in nonlegal counseling in certain situations.

iv. The question therefore arises whether an attorney can be disciplined for incompetent "nonlegal" advice.

b. ABA Rule 1.6: Confidentiality of Information

i. Lawyers must remember their duty under Rule 1.6 not to reveal any information "relating to the representation of a client."

ii. This broad standard includes information exchanged regarding nonlegal counseling if that information "relat[es] to the representation," but it is unclear how far this standard reaches.

iii. Attorney-Client Privilege—Similarly, even though the information protected by the attorney-client privilege is generally narrower than the confidential information protected by the ethics rules, issues arise whether the privilege protects information exchanged when the attorney provides nonlegal counseling. *See* Charlie Dunlap, *Is the attorney-client privilege dead? (No, but it may not be as robust as you thought)*, available at https://sites.duke.edu/lawfire/2019/03/13/is-the-attorney-client-privilege-dead-no-but-it-may-not-be-as-robust-as-you-thought/ (last visited June 24, 2022).

c. ABA Rule 5.7: Law-Related Services (not adopted in a few states, such as Virginia)

i. This rule provides that lawyers are subject to the *Model Rules* when they provide "law-related services" unless certain conditions are satisfied. The Rule defines "law-related services" as "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer."

ii. *Ehrich v. Binghamton City School District*, 210 F.R.D. 17 (N.D.N.Y. 2002), disqualified an attorney who gained confidential information about the opposing party when he performed nonlegal auditing services for that party.

iii. If such moral or other nonlegal advice is considered a "law-related service," Rule 5.7(a) provides that lawyers are subject to the *Model Rules* if the lawyer offers the advice in "circumstances that are not distinct from the lawyer's provision of legal services to clients" or "in other circumstances . . . if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist."

iv. Thus, if the lawyer wants not to be subject to the Rules, the lawyer must provide the nonlegal advice in a distinct setting and provide an appropriate disclaimer.

XIV. Lessons from Rules 1.1, 1.6, and 5.7

a. Attorneys should consider whether traditionally "nonlegal" issues have become so intertwined with the legal ones in their field that they should acquire knowledge of those issues or at least associate with an expert to whom they can refer clients. Attorneys arguably may not be able to provide competent representation under Rule 1.1 unless they counsel their clients on nonlegal considerations.

b. Attorneys should be mindful that clients may incorrectly assume that certain nonlegal advice they provide is part of the legal representation and clients may rely on that advice to their detriment. Attorneys thus should provide some disclaimers if they sense the consultation moving to nonlegal matters. Although a full disclosure pursuant to Rule 5.7 may be impracticable and may frustrate the benefit of the nonlegal counseling, attorneys should at least let the clients know that they are not offering the advice "as their attorney."

c. Attorneys should also remember their duty under Rule 1.6 (Confidentiality of Information) to keep nonlegal discussions confidential if those discussions "relat[e] to the representation." If attorneys do not desire to be bound by confidentiality, they must obtain the client's "informed consent" (a very high standard) unless they have provided a clear disclaimer under Rule 5.7 that the counseling is not a legal service (also a difficult standard to uphold, in part because of the blurred line between legal and nonlegal counseling).

XV. Other Rules Related to Moral Integration and Professional Identity

a. ABA Rule 1.7—Personal Conflicts of Interest

i. Rule 1.7(a)(2) prohibits a lawyer from representing a client if "there is significant risk that the representation of one of more clients will be materially limited . . . by a personal interest of the lawyer" unless the representation satisfies certain standards in Rule 1.7(b). (Many state rules are identical in this respect.)

ii. Such "personal interests" that create conflicts of interest can include moral or political concerns the lawyer has related to the representation. *See* ABA Rule 1.10[3], which clarifies that such concerns can indeed create personal conflicts but that those conflicts are not imputed to the firm ("Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified.").

iii. Similarly, lawyers who are morally invested in a particular outlook on their client's matters may become so "emotionally attached" to that outlook that they cannot render competent advice. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-364 (1992).

iv. The lack of cases on personal, moral conflicts may stem simply from the fact that many lawyers' personal moral concerns do not affect their representation either because they intentionally leave their morality out of their professional role or because their personal moral code is so open-ended or ill-defined that it would not by its nature affect their professional role.

b. ABA Rule 1.2—Allocation of Authority

i. This rule provides the standard division of authority between lawyer and client: the rule states that the lawyer must abide by the client's decisions regarding the "objectives" of the representation and that the lawyer "shall consult with the client as to the *means* by which [those objectives] are to be pursued" (emphasis added). (Most state rules are essentially identical in this respect.)

ii. Attorneys thus who are counseling clients on the moral or other nonlegal implications relevant to the representation must consider this means/objectives distinction and must understand their jurisdiction's approach regarding the extent to which they must abide by their clients' "means" decisions normally reserved to the attorney. If attorneys cannot in good conscience proceed when they and their clients disagree, attorneys may seek to withdraw pursuant to Rule 1.16(b)(4).

c. ABA Rule 8.4—Restrictions on Nonlegal Conduct

i. The ABA has long clarified that an attorney can be ethically disciplined even when they are acting in a nonlegal capacity. ABA Formal Op. 336 (1974) (reasoning that a lawyer can be disciplined for "improper conduct in connection with business activities, individual or personal activities, and activities as a judicial, government, or public official").

ii. Rule 8.4 provides that it is professional misconduct for lawyers to engage in certain actions regardless of whether they specifically relate to the lawyer's legal practice.

iii. For instance, Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The rule does not expressly limit the prohibition to legal conduct, and it applies regardless of whether such conduct is prohibited by other rules. (Note that Virginia clarifies in the rule that such conduct is prohibited only if it "reflects adversely on the lawyer's fitness to practice law.")

iv. The predecessor to ABA Rule 8.4, DR 1-102(A)(6), provides that it is professional misconduct for a lawyer to "[e]ngage in any other conduct that adversely reflects on his fitness to practice law."

v. Although ABA Rule 8.4(g) has not been widely adopted by the states, attorneys concerned about the rule should consider whether their nonlegal counseling might not be considered the "legitimate advice or advocacy" excepted from the rule's general prohibition against "harassment or discrimination."

vi. In *The Florida Bar v. Johnson*, 511 So.2d 295 (Fla. 1987), the Supreme Court of Florida publicly reprimanded an attorney for violating 1-102(A)(6) in how he responded to a client who did not pay his bill. Specifically, the attorney, an ordained minister in the Church of Christ, wrote three personal letters to the client stating that God had given the lawyer a "revelation" that a variety of biblical curses would visit the client unless he paid the fee.

XVI. Hypotheticals for Discussion (Attachment B)

Selected References

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4. Freedman, Monroe H. & Abbe Smith, *Understanding Lawyers' Ethics* (2d ed. 2002).

5. Gantt, II, Larry O. Natt, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEORGETOWN JOURNAL OF LEGAL ETHICS 365 (2005).

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7. Granfield, Robert & Thomas Koenig, *"It's Hard to be a Human Being and a Lawyer": Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 495 (2003).

8. Higginson, Richard, *Integrity and the Art of Compromise*, in FAITH IN LEADERSHIP: HOW LEADERS LIVE OUT THEIR FAITH IN THEIR WORK AND WHY IT MATTERS 20-23 (Robert Banks & Kimberly Powell, eds. 2000)).

9. LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) (1998).

10. Madison, III, Benjamin V. & Larry O. Natt Gantt, II, *Morals and Mentors: What the First American Law Schools Can Teach Us About Developing Law Students' Professional Identity*, 31 REGENT UNIVERSITY LAW REVIEW 161 (2018-2019).

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ATTACHMENT A

Relevant ABA Model Rules of Professional Conduct
(The complete rules are available online at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/*)*

RULE 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.2: Scope of Representation

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

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

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

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

RULE 1.3: Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.4: Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

RULE 1.5(a): Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

* * *

RULE 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based

upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(6) to comply with other law or a court order; or
(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

RULE 1.7: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

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

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

RULE 1.16: Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

RULE 2.1: Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's

responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

RULE 5.7: Responsibilities Regarding Law-Related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

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 to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

ATTACHMENT B

Hypo #1—The Grief-Stricken Parents

An older couple retains you to handle a wrongful death case on behalf of their now deceased only child. The child was born late in their lives, after many failed attempts to have a child. He was 22 years old, just graduated from an expensive private college, had been loving, obedient and respectful to his parents, mature, level headed, bright, and showed great promise.

This only child was killed when the defendant, a 18 year old high-school drop out with a troubled past, drove drunk on the wrong side of the road, and hit their child's car head on. The clients' son was mortally injured and died slowly and in excruciating pain as rescue workers struggled to stabilize him and extricate him from the wreckage. The drunk teen was unhurt and wandered around the scene of the accident in a drunken stupor until the police arrived, cuffed him and put him in the police car.

When you first met with the couple they were composed, spoke softly, and seemed remarkably calm. You are now a few weeks into the case, and they come to your office by appointment. During the office visit, they exhibit a wide range of moods and emotions. One moment the wife goes into convulsive sobbing, the husband follows suit, and they are completely unable to talk. Their mood then changes and they launch into a fit of anger. The wife says with tearful sarcasm, "How can a loving God take my child this way?"

A little later, the husband says, "I don't care what it costs; I want to see that boy pay for the rest of his life. I want you to go after him and everything he and his whole family have! I want to break them, to make them feel what we feel! I want you to use every trick up your sleeve to punish him, take up his time, and put him through a tortuous ordeal every step of the way! And I want you to get a judgment so big he will never have enough insurance and will never earn enough to pay it!"

Their understandable grief is complicating your effort and making it difficult for you to prepare the case and impossible for you to settle, regardless of how forthcoming the defendant and his insurance carrier are.

Hypothetical from a problem in *Case Studies in Client Counseling: Ethical, Moral, and Practical Considerations,* a continuing legal education seminar led by Thomas M. Diggs and Charles E. Payne in April 2003.

How would you handle this situation? What would you say to these clients? Would you simply follow their wishes? What would a "competent" attorney do?

Consider particularly ABA Model Rules 1.1, 1.2, 1.4, 1.7, 1.16(b)(4), and 2.1.

Hypo #2—The Jack (or Jackette) of All Trades

You have been working with elderly clients for several years and have realized that your clients face many nonlegal issues that are related to the legal problems you have historically addressed. You have observed that your clients face issues not only in the areas of estate planning and tax advice but also in the areas of the need for financial advice, for advice on health care

(including issues related to the transition to a managed care facility), and for general emotional support.

You feel a strong conviction that you want to be able truly to help these clients, and you have been frustrated by thinking that you have only been able to address a portion of the many issues they face. You therefore are interested in providing more comprehensive services to your clients. For instance, you have taken an interest in financial planning and are considering being certified as a financial planner so that you can not only set up trust instruments for your clients but also provide financial advice to them as to how to invest those trust assets. You also have a passion for counseling and an interest in elder care, so you are considering being much more active in counseling your clients when emotional issues arise and they ask for your "advice" as to which managed care options they should pursue.

Hypothetical adapted and expanded from a problem in Nathan Crystal, *Problems of Practice and the Profession* (6th ed. 2017), pages 633.

What are the ethical implications of providing such nonlegal advice to your clients? Are there ways that you can provide your clients with such services other than your providing the services directly?

Consider particularly ABA Model Rules 1.1, 1.4, 1.5, 1.6, 1.7, 2.1, and 5.7.