

MY LAST LECTURE: UNSOLICITED ADVICE FOR FUTURE AND CURRENT LAWYERS

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The American Inns of Court selected this essay as the winner of its first annual Warren E. Burger Prize. According to the Inns of Court letter soliciting entries for this competition, the Burger Writing Competition was “designed to encourage outstanding scholarship ‘promoting the ideals of excellence, civility, ethics and professionalism within the legal profession,’ the core mission of the American Inns of Court.” Letter from Randy J. Holland, President, American Inns of Court, January 28, 2004. A distinguished panel, consisting of Dean Stephen Gillers of New York University School of Law, Professor Geoffrey C. Hazard of the University of Pennsylvania Law School, and Professor Nancy J. Moore of Boston University School of Law, judged entries anonymously, with all identifying references removed. *Id.* The *South Carolina Law Review* and the author thank the Inns of Court and the members of the judging panel for their support of this project.

In the “Last Lecture” series presented by the Newman Center at the University of Missouri-Columbia, professors are asked to assume that they are giving the last lecture that they will ever present to a group of students. The following Article, which expands Associate Professor Easton’s lecture, is based upon this same premise: If you knew that this was your last chance to communicate with students, what would you say? His lecture is reprinted here, with the hope that it may be of some value not only to future lawyers, but also to those already engaged in the practice of law.

INTRODUCTION

This is my last lecture, so it is the last chance I will have to exert any influence on you. Unless you teach, you may not understand the full impact of that statement. To a certain extent, we teachers live vicariously through you, our students. We have, in the main, foregone having a direct influence on the world in exchange for an opportunity to influence you, in the hope that you, in turn, will do good work and make us proud.

Although this decision may seem misguided to some, we are quite comfortable with our vocation. After all, though we who teach in law schools are blessed with sizable egos, we realize there is only so much a single attorney can accomplish. This realization is particularly acute for those of us who spent considerable time in practice trying to achieve as much as we could as that one attorney.¹ Each May, we who teach see dozens of our students stream across a stage with diplomas in hand, ready (if we momentarily ignore the minor impediment of the bar exam) to take on the world. Having the opportunity to have some influence on you is quite gratifying, though terrifying at the same time.

But today, by the end of this lecture, my attempt to influence you will end. I have given serious thought to what I should talk to you about in this short time. I have concluded the best use of my time will be to pass on a few suggestions about how to live the life of a lawyer. My suggestions are based largely upon my own efforts, both successful and unsuccessful, in the same endeavor.

Please note that this lecture’s topic is not “How to Achieve Constant Happiness with a Law License.” If there is a way to guarantee only happiness in your life as a lawyer, it has eluded my efforts to find it. This does not mean that life as a lawyer is without happiness: That has not been the case for me, and I certainly hope that it will not be the case for you. Indeed, my years as a lawyer have included several moments of not just happiness, but sheer, unmitigated ecstasy. Few experiences surpass successfully cross-examining a dishonest witness or hearing the clerk read the “right” verdict after years of hard work that included several days or weeks of sleepless nights and almost round-the-clock effort.

But no life in the law is filled only with glorious moments.² If there is nothing quite as wonderful as getting that verdict you so desperately hoped and worked for, there is nothing quite as awful as getting the “wrong” verdict after you invested just as much hope and work. Along with the obvious downfalls, there are other, less notorious, but still difficult times ahead for you. You will: have clients, crime victims, or witnesses sobbing in your office; face agonizing decisions about how to handle thorny ethical dilemmas and other difficult issues; see the wee hours of many mornings inside your office; and make mistakes that directly hurt your clients.

My aim, then, is considerably more modest than trying to outline a guarantee of unending happiness. In addition to as much happiness as you can garner, my hope for you is that you achieve contentment and perhaps pride in knowing that, armed with your law license, you have helped your clients and your community far more often than you have hurt them, have conducted your practice with dignity and honor, and have enjoyed the ride.

Without a doubt, the law license that you are working so hard to obtain will change your life, though perhaps not in the ways you might expect. With very limited exceptions, it will not make you rich or famous.³ It most assuredly will not make you popular.⁴

1. Relatively few law school professors have spent substantial time practicing law, and the number seems to be dwindling. See Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 873 (1999). Regardless of whether this is a positive or negative feature of law schools, I am a member of the endangered species of law school instructors who practiced for several years, and these comments reflect that experience.

2. Michael Traynor, *The Pursuit of Happiness*, 52 VAND. L. REV. 1025, 1031 (1999) (“Law is a demanding profession.”).

3. A few practicing attorneys, mostly those who are senior partners at large law firms, have very large incomes. Most practicing attorneys have above-average, but not spectacular, incomes. See Mary A. McLaughlin, *Beyond the Caricature: The Benefits and Challenges of Large-Firm Practice*, 52 VAND. L. REV. 1003, 1006 (1999). A few have relatively low incomes.

4. Many commentators make reference to the all-too-familiar public opinion polls and other indicators of the widespread public dislike of attorneys. See, e.g., John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 VAL.

With a law license, however, you will be an officer of the court, which is no small matter. Our judicial system, even with all of its flaws, remains the best system invented for peaceful redress of grievances. When you receive your license to practice law, you will be authorized to represent others in our flawed, but nonetheless magnificent, court system. People will not love you for that, but if you use your license carefully, they might respect you. Equally as important, you will respect yourself.

I stand before you, then, with the desire to share a bit of advice on how to use your law license. Of course, you will have to decide whether any of this advice is worth following or even considering.

A PRELIMINARY WARNING:
BE CAREFUL ABOUT GETTING ADVICE FROM AN OLD-TIMER

Speaking of whether you should consider or heed any of this advice, let me start with a warning. When receiving advice, especially unsolicited advice, about how to practice law (or how to do anything important), remember the advice is affected by the experience of the person offering the advice. That experience, of course, is a double-edged sword: on one hand, without the experience the advice would not be worthy of much consideration; on the other hand, the advisor's unique set of experiences will color the advice given.

In other words, my first piece of advice is to be careful about who gives you advice. At present, you will find many lawyers talking about "the good old days."⁵ In one sense, I am joining ranks with these lawyers when offering you this collection of musings about law practice. However, I have not been in this profession long enough to remember when the practice of law was radically different than it is today. Therefore, allow me a quick, partial, and admittedly somewhat half-hearted retort to those who wax poetically about the good old days, which as near as I can tell, ended at least a decade or two before I started practicing law.⁶

Maybe it was more fun to practice law in the good old days. Frankly, I do not know. Aside from what we can take from the good old days and adopt into current practice, however, the good old days are largely irrelevant, particularly if they were so different from today. It may be the case that it was substantially more enjoyable to be a lawyer in the good old days,⁷ but neither current nor future lawyers will have that opportunity.⁸ Instead, you will

U. L. REV. 563, 563–66 (1994); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1345–46 (1997); Randall T. Shepard, *The Personal and Professional Meaning of Lawyer Satisfaction*, 37 VAL. U. L. REV. 161, 162–65 (2002).

Though the public dislikes lawyers in general, most people are fond of their own lawyers. See, e.g., *Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association*, 112 F.R.D. 243, 253 (1986) [hereinafter *ABA Professionalism Report*]. Therefore, while your law license is not likely to make you popular among the public in general, you can take solace in the possibility that your clients may like you, especially if you are attentive to them. See *infra* Part VII.

5. See *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371, 375 (1991) [hereinafter *Seventh Circuit Interim Civility Report*]; see also Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 757–58 (1994) (discussing the causes of incivility in the legal profession and the impact of Bar growth on the problem); Chris Klein, *Big-Firm Partners: Profession Sinking*, NAT'L L.J., May 26, 1997, at A1 (asserting that a vast majority of "the partners polled believe the profession has changed for the worse" because today's lawyers, not to mention the practice itself, are driven by money).

6. Consider the following assessment:

Lawyers are now to a greater extent than formerly business men, a part of the great organized system of industrial and financial enterprise. They are less than formerly the students of a particular kind of learning, the practitioners of a particular art. And they do not seem to be so much of a distinct professional class.

ABA Professionalism Report, *supra* note 4, at 304 (quoting L.D. Brandeis, *The Opportunity in the Law*, LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 16 (G. Hazard & D. Rhode ed., 1985) (quoting Louis D. Brandeis, who reported this familiar lamentation in 1905)). Roscoe Pound gave a speech to the American Bar Association expressing concerns that sound quite familiar a century later. See generally The Honorable Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 35 F.R.D. 241 (1964) (discussing the legal profession's shift into a trade as a cause of dissatisfaction with the justice system).

I do not mean to suggest that widely perceived problems in the practice of law are not real. Instead, I simply suggest that perhaps it has long been the case that lawyers and others who care about our justice system can readily identify its flaws and that older attorneys long for the happier days when they first practiced law.

7. Perhaps there were some things about practicing law in the good old days that were better than practicing law today, some things that were worse, and at least a few things that were better or worse, depending on an individual's particular perspective. To take one oft-noted example of how law practice is different, almost, but not quite, Browe, *supra* note 5, at 773–74, everyone suggests that lawyers were more courteous to each other during this bygone era. See, e.g., *Seventh Circuit Interim Civility Report*, *supra* note 5, at 375 (noting several recent developments that allegedly are responsible for the decline in civility). Because I have no first-hand knowledge with which to refute the large numbers of more experienced attorneys who have made this claim, I am willing to concede the point. For the most part, wider civility should be considered a mark in favor of the bygone era, but even this feature of the past is a bit more complicated than it might appear at first glance.

The widely mourned collegiality of the past may have been at least somewhat related to the fact that almost all lawyers were white males who grew up in upper class or, at least, upper middle class families, while the current bar is considerably more diverse. See, e.g., Brief of Amici Curiae Hispanic National Bar Association and Hispanic Association of Colleges and Universities at 19, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (noting that admissions directors now attempt to increase the racial and ethnic diversity of law schools), *reprinted in* 14 BERKELEY LA RAZA L. J. 69, 81 (2003); Browe, *supra* note 5, at 775–77 (noting that the “Old Boys’ Club” has given way to diversity); Hannah C. Dugan, *Does Gender Still Matter in the Legal Profession?*, WIS. LAW., Oct. 2002, at 10, 12 (discussing the increase of women in the legal profession); Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 382 (1994) (noting that the number of minority applicants to law school has risen); Cynthia L. Spanhel, *Looking at Past and Current Demographics to Consider: Who, What, Where, and Why in the Future*, TEX. B.J., Jan. 2000, at 48, 50 (discussing the increase in minority lawyers in Texas). Collegiality perhaps was more prevalent in the past because of the bar’s homogeneity; it may have been somewhat easier for a group of people sharing similar backgrounds and experiences to be civil to one another. See Pat Ballman, *This is a Great Profession*, WIS. LAW., Aug. 2002, at 5, 5; Browe, *supra* note 5, at 758; Colin Croft, Note, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256, 1312–21 (1992). At the same time, few in our pluralistic society would argue that a predominantly privileged, white, male bar is superior to an increasingly diverse bar. See Browe, *supra* note 5, at 776 (“The collegiality that commentators describe as making the law practice more civil also contributed greatly to the difficulty women and minorities had breaking into the profession and taking active roles.”).

In addition, the profession had far fewer lawyers in past years. See Elizabeth Chambliss, *Professional Responsibility: Lawyers, A Case Study*, 69 FORDHAM L. REV. 817, 835 (2000) (reporting attorney populations of about 60,000 in 1880 and over 160,000 in 1930); Robert J. Kerekes, *The Crisis of Congested Courts: One Potential Solution*, 18 SETON HALL LEGIS. J. 489, 492 (1994) (putting the number of lawyers at “slightly less than 286,000” in 1960); David Segal, *Lawyer vs. Lawyer: The Quiet Bar Fight: Malpractice Suits Grow, But Out of Public Eye*, WASH. POST, March 18, 1997, at D1 (indicating that there were 542,000 lawyers in 1980, and 896,000 in 1996).

When there were fewer lawyers, those lawyers probably were more congenial and perhaps enjoyed the practice more, for at least two readily identifiable reasons. First, when the bar was smaller, the chances that one would come into contact with the lawyer currently across the table in a future case were greater. When a lawyer who was considering acting discourteously toward a fellow lawyer realized that the lawyer in question might have the chance to return the favor in some future matter, he (and it usually was a “he” in the past) had a strong incentive to avoid discourteous conduct. Byron C. Keeling, *A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH L. REV. 31, 32–34 (1993); see *Seventh Circuit Interim Civility Report*, *supra* note 5, at 375 (“[T]rial lawyers no longer appear frequently against the same opponent or before the same judge, thereby reducing opportunities for building mutual respect . . . [t]hus, the incentive to retain cordial relationships often dies because the relationship will not likely become an ongoing one.”); cf. Robert J. Sheran & Douglas K. Amdahl, *Minnesota Judicial System: Twenty-Five Years of Radical Change*, 26 HAMLINE L. REV. 219, 361 (2003) (“In the conduct of litigation [today], the opposing attorneys are often closer to being enemies rather than adversaries [T]he increase in the number of attorneys has contributed to the depersonalization of the practice, as it is unlikely that you will face opposing counsel in the near future, if ever.”).

Second, supply and demand play a role. Acquiring loyal and compliant clients would certainly be easier for any individual lawyer when competing with a smaller number of competitors, just as it would be easier for a grocer, newspaper publisher, sheep shearer, or anyone else offering goods or services. With fewer competitors willing to provide the goods or services that one is willing to provide, a provider can demand higher prices, customer loyalty, and other favorable terms. While this is a “better” world for the provider of goods and services, those who purchase those goods and services presumably would have a different view. As the logic behind this nation’s antitrust laws suggests, customers generally can demand lower prices and more customer-friendly conditions when competition increases. Some customers who would be unable to afford goods or services in a less competitive environment will be able to afford them in a more competitive environment. Indeed, as the number of lawyers has increased over time, more people have access to legal services. These new consumers include injured plaintiffs, indigent criminal defendants, tenants, potential recipients of government services, and others. See *ABA Professionalism Report*, *supra* note 4, at 251 (asserting that the legal profession “provides more legal services to more people today than ever before”); Eleanor M. Fox, *Being a Woman, Being a Lawyer and Being a Human Being—Woman and Change*, 57 FORDHAM L. REV. 955, 957–58 (1989) (noting that changes in the legal profession have given rise to greater accessibility to legal aid by the middle class and an increase in women and minority attorneys); Joseph H. King Jr., *The Exclusiveness of an Employee’s Workers’ Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405, 411 (1988); Robert MacCrate, “*The Lost Lawyer*” Regained: *The Abiding Values of the Legal Profession*, 100 DICK. L. REV. 587, 600–01 (1996) (noting that the number of lawyers and demands for legal services have increased significantly since World War II); cf. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y. U. L. REV. 982, 989–90 (2003) (noting that some who decry the alleged “litigation explosion” have asserted that the expansion of the bar has resulted in attorneys “pursuing more marginal claims or providing legal services to those previously unable to obtain representation”). Some do not appreciate the public’s increasing access to legal services because they are unwillingly pulled into the legal system. Neither a defendant sued by an injured plaintiff, a police officer who believes an indigent defendant has committed a crime, a government agency administrator who must process a claim filed by a lawyer on behalf of a potential recipient of government services, nor a landlord sued by a tenant is likely to view this as a positive trend. Thus, an individual’s impression of the effects of increased numbers of lawyers varies, at least to some extent, according to that individual’s circumstances.

Also, when customers have more power due to increased numbers of providers of goods and services, the providers will be forced to compete with each other in new ways. Sometimes this competition leads to aggressive interaction among competitors that some competitors find distasteful. See *Seventh Circuit Interim Civility Report*, *supra* note 5, at 382; Steven A. Delchin & Sean P. Costello, *Show Me Your Wares: The Use of Sexually Provocative Ads to Attract Clients*, 30 SETON HALL L. REV. 64, 119 (1999); Sheran & Amdahl, *supra*, at 361; Julius W. Gernes, *Professionalism Aspirations: Encouraging Professionalism*, BENCH & B. MINN., Apr. 2001, at 32, 32; cf. *ABA Professionalism Report*, *supra* note 4, at 261 (“While economic pressure cannot justify unprofessional behavior, it may help explain why some lawyers seem less selfless than before.”).

have to make the best of the practice environment that you enter. Lamenting your bad timing in being born fifty years too late seems to be a recipe for decreasing your satisfaction with your legal career.

Despite my own warning, I nonetheless relied upon my experience in compiling this set of suggestions for you. Thus, you need to know what that experience has been so that you are aware of the views and biases that result from that experience. Following my own graduation from law school more than two decades ago, I joined Pearce & Durick, a firm of about a dozen lawyers in my adopted home state of North Dakota. At this firm, I specialized in defending products liability and other personal injury cases. In 1990, I became the United States Attorney for the District of North Dakota. Three years and one presidential election later, I returned to Pearce & Durick. Finally, in 1998, I left the practice of law to teach at the University of Missouri-Columbia Law School.

As a result of my experience, I consider myself, first and foremost, a trial attorney. I had the opportunity to try a few dozen cases, several of which went to verdict and a few of which resulted in appeals. I am unabashedly and unrepentantly a believer in the wonderful, though flawed, American jury trial as a determiner of historical fact and as a democratic institution. Moreover, though I have observed attorney misconduct, I believe that most attorneys strive to behave ethically and act within the confines of the rules. Furthermore, I believe that attorneys' work in trials and elsewhere is important, because sometimes it can affect the outcomes of disputes. Finally, I believe that attorneys provide valuable services that help their clients.

These are some, though certainly not all, of my biases. You should keep them in mind while considering my suggestions for your life as a lawyer. In addition, remember that these suggestions, though given from the heart as my beliefs about how best to live your life as an attorney, are just that—my beliefs. None of them are universally accepted, and some of them might be quite controversial. Consequently, I urge you to also consider the wisdom of other lawyers you trust.⁹

In making these recommendations, I do not in any way mean to suggest that I have always followed them. To the contrary, many of these are lessons learned the hard way—from making mistakes and repeating those mistakes often enough to finally click on a lightbulb somewhere. In addition, I still break the rules on my list, even though I should know better. The life of a lawyer is neither simple nor easy. I am confident only that on the last day I practice law, I am certain to violate one of the decrees I am about to give you, at least in some small way. Nonetheless, being aware of these suggestions, striving to follow them, and recognizing violations of them have helped me do better work with my law license and feel better about that work.

I. DETERMINE WHAT IS WORTH FIGHTING ABOUT, AND CONCEDE EVERYTHING ELSE

The first suggestion ought to be the one thing that attorneys could do that would most increase their satisfaction with their careers. In that spirit, I offer this advice: When you encounter a potential dispute with one of your opponents, be it large or small, do not fight with your opponent over that issue until you first determine whether it is important to fight about it. If it is, fight hard, fight smart, fight with conviction, passion, and perseverance, and fight to win. If it is not worth fighting about, concede that issue to your opponent, or find a compromise that is acceptable to you, your client, your opponent, and your opponent's client.

A. *Identifying Matters That Are Not Worth Fighting About*

In suggesting that even the congeniality of the past was perhaps not the simple virtue that its mourners imply because it might have masked certain related concerns, I do not mean to imply that congeniality itself is undesirable. Now that the bar is both larger and more diverse and likely to remain large and diverse, we should strive to cooperate to the extent we can while acting in a manner consistent with our obligations to our clients. *See infra* Part I.A.

8. To the extent that the large number of lawyers contributes to problems for lawyers, there is certainly no relief on the horizon. *See* David A. Kessler, *Professional Asphyxiation: Why the Legal Profession is Gasping for Breath*, 10 GEO. J. LEGAL ETHICS 455, 460 (1997). Instead, the number of lawyers is likely to increase for the foreseeable future due to the large number of anticipated graduates. *See ABA Professionalism Report, supra* note 4, at 266; Kessler, *supra*, at 460.

9. To start, you might consider reviewing some of the sources cited here. These commentators have spent considerable time and energy in sharing their insights. Though I do not always agree with them, their thoughtful views are worthy of your consideration.

For the most part, the text of this Article will outline my idiosyncratic views of the issues confronting students and practicing lawyers contemplating their careers. The views of others, including both those who disagree and those who agree with me on these topics, primarily appear in the sources cited in the footnotes.

The key to determining whether to fight is this: Most issues that you could fight about are not worth fighting about. Once you discover this principle, your life as a lawyer will become far more enjoyable.

Generally, those of us who are attracted to this profession are fighters by instinct.¹⁰ In addition, we quickly learn that our primary loyalty in most instances is to our clients,¹¹ and we are proud of how hard we are willing to fight for them. Nothing I say here should diminish your willingness to fight for your clients about important matters.¹²

Instead, I am suggesting that many matters of potential conflict between attorneys are simply not matters of importance. The daily interactions between attorneys who represent opposing parties involve numerous potential matters for disagreement, including scheduling (of depositions, of court hearings, and continuances, of deadlines for discovery responses, and of trial), discovery, and communications between counsel. It is certainly possible to practice law by turning every interaction with opposing counsel into a chance to demonstrate your zeal, by barking at opposing counsel in telephone calls, face-to-face meetings, and letters, and by refusing to cooperate on any matter, regardless of how unimportant.¹³ If you adopt this strategy, you will not be alone.¹⁴ In fact, you might convince yourself that this approach to opposing counsel is required because any time you acquiesce to the other side on anything, you are somehow compromising your client's interests and therefore failing in your duty to zealously represent your client.¹⁵

That, ladies and gentlemen, is hogwash. The Preamble to the Model Rules of Professional Conduct cautions lawyers to "zealously . . . protect and pursue a client's legitimate interests, within the bounds of the law, *while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.*"¹⁶ In other words, though it might be easier to act like a jerk, whenever the possibility arises, on the grounds that you are somehow required to do so, the Model Rules hold you to a more nuanced and more difficult standard.

How do you decide whether a particular matter is one where the client has a "legitimate interest" or one where you can concede or resolve the potential conflict with opposing counsel as a matter of professionalism, courteousness, and civility? After wrestling with that distinction for a few years, I have a few thoughts for you to consider.

1. *The Value of Experience*

First, understand that this line will become easier to draw with experience. When you first are entrusted with the affairs and interests of another human being or entity (going by that magical term "client"), you will tend to think that everything is of critical importance.

At my first deposition, the more experienced lawyers in the room, following the standard practice in the area, closed the deposition by saying "waive any defects in notice." I responded by proudly and rather defiantly saying, "I am not waiving anything!" When I got back to the office and inquired into this seemingly odd ritual, an experienced litigator explained that an attorney was not really waiving much, if anything, when waiving defects in notice after the witness and the attorneys attended the deposition. This little ritual was simply a local custom whereby the attorneys reminded each other that there were at least a few things that were not in dispute.

Though I never again objected to this waiver under these circumstances, I still think "I am not waiving anything" was the proper response at the time. Unless you are certain you are not hurting your client by waiving

10. See Keeling, *supra* note 7, at 31; *cf. Seventh Circuit Interim Civility Report, supra* note 5, at 375 (observing that fictional representations of attorneys may lead young attorneys to believe "that they should act in some of the dramatic, abrasive ways portrayed").

11. See *infra* Part IV.

12. See *infra* Part I.B.

13. *Seventh Circuit Interim Civility Report, supra* note 5, at 385.

14. See *id.* at 375, 382–83. For a review of unnecessarily antagonistic attorney behavior that is simultaneously amusing and depressing, see Douglas R. Richmond, *The Ethics of Zealous Advocacy: Civility, Candor and Parlor Tricks*, 34 TEX. TECH L. REV. 3 (2002). For additional documentation illustrating some attorneys' willingness to fight and evidencing their pride in this willingness, as sometimes manifested in attorney advertising, see Bartlett H. McGuire, *Reflections of a Recovering Litigator: Adversarial Excess in Civil Proceedings*, 164 F.R.D. 283, 286 & n.14 (1996).

15. See Keeling, *supra* note 7, at 31–32; see generally Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995) (exploring the tension between the duty to loyally represent clients' interests and the duty to act objectively).

16. MODEL RULES OF PROF'L CONDUCT pmb1., ¶ 9 (2002) (emphasis added). Another portion of the Preamble states, "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." *Id.* ¶ 5.

(or for that matter, by doing just about anything else),¹⁷ do not waive. As you gain experience, you will be able to more easily identify which matters can be conceded, especially if you are willing to learn from more experienced attorneys.

2. *The Little Stuff*

Second, your client could theoretically gain some possible minor advantage any time you refuse to cooperate with opposing counsel. Consider the relatively common example of scheduling a deposition in a civil case.¹⁸ Assume that you have noticed a deposition to occur a month from now and the attorney representing the opposing party calls you to see if the deposition could be rescheduled because she will be out of the country on a family vacation.

Taking the “anything I do for my opponent might hurt my client” view, you would have to deny opposing counsel’s request. Your opponent is not likely to reschedule a trip to a foreign country just for one deposition, so he or she will have to find someone else to cover the deposition. Your client might benefit, because something might happen at the deposition that the substitute attorney might not recognize as being important. Although this is highly unlikely, you never know. If the deposed witness is important enough and your opponent recognizes the risk of sending a substitute, she might move for a protective order to reschedule the deposition. Again, there is some possible benefit to your client, because the necessity of a motion for a protective order might drive up the opposing party’s litigation expenses and therefore make the opposing party’s settlement posture more favorable to your client.

Some litigators have adopted this logic, but it is seriously flawed. This reasoning runs counter to the aforementioned concept of maintaining a “professional, courteous and civil attitude toward all persons involved in the legal system.”¹⁹ The Model Rules explicitly reject the notion of using delay to gain a tactical advantage,²⁰ which is related to the thinking outlined in the previous paragraph. According to the comment to Model Rule 3.2, “Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.”²¹ Also, this is no way to live. Life as an attorney is difficult enough—and relationships with opposing counsel are tricky enough—that there is no need to make it more tense by refusing opposing counsel’s reasonable requests on scheduling and other matters.

Although this is a matter of judgment, I suggest this rule: If opposing counsel makes a reasonable request and you cannot identify a significant client interest that would be sacrificed in granting this request, grant it. As noted below, there are enough important matters worthy of a fight in the practice of law to keep you busy and to satisfy your thirst for competition.²²

I will admit that I have not always operated under this exact rule. For quite a while, I added a major codicil to the rule, which went something like, “I will grant reasonable requests unless this particular lawyer has been unreasonable when I have made reasonable requests.” Like many other lawyers, I was once in the habit of keeping “the list.”²³ If I saw another lawyer acting badly, I made a mental note of that lawyer’s behavior, and then refused to grant that lawyer’s requests in the future, even when there was no significant client interest requiring protection. For many years, I could have told you exactly who was on that list.

Why did I drop the list? Although the problems of human and, especially, lawyer interaction made it possible to put someone on the list who did not deserve to be there, that possibility was not my primary motivation for

17. In most instances, you are not permitted to take actions that would hurt your client. However, there are a few exceptions to this rule that involve actions that you are required to take by your jurisdiction’s version of the Model Rules. For example, you are or may be required to disclose that previously offered evidence was false, to inform the court of adverse facts in an *ex parte* proceeding, or to make a reasonably diligent effort to respond to a discovery request, *id.* at R. 3.3, 3.4, even when doing so will hurt your client. In other words, there are instances in which you are ethically required to undertake actions that will hurt your client.

18. Some practitioners, scholars, and jurists who have studied the seemingly increasing tension between attorneys have suggested that scheduling of discovery events can be one source of this tension. See *Seventh Circuit Interim Civility Report*, *supra* note 5, at 385.

19. See *supra* note 16 and accompanying text.

20. Keeling, *supra* note 7, at 39 (“Much of the conduct pursued in the name of ‘client interest’ is designed to harass opposing counsel or stall pre-trial proceedings.”).

21. MODEL RULES OF PROF’L CONDUCT R. 3.2 cmt. 1 (2003). This comment also provides that “a failure to expedite [will not be reasonable] if done for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose.”

22. See *infra* Part I.B.

23. See *supra* note 7 (regarding retaliation against unreasonable attorneys as a control mechanism).

dropping the list. After all, I am happy to report that my list was rather short. Earning your way onto my list was no small feat, so I am relatively certain that everyone or, at least, almost everyone on it deserved to be there. Instead, I had a different reason for dropping the list: self-interest. It just became too much trouble to: (a) continuously monitor the behavior of other attorneys to keep the list current; and (b) deal with the unpleasantness associated with denying reasonable requests, even when the requester “deserved” this treatment.²⁴ Maintaining a grudge takes too much time and energy that can be put to more productive uses.

3. *Discovery*

A category of potential disputes among attorneys deserves special mention because it has come to dominate the life of the civil litigator: discovery. Many civil litigators spend most or all of their time drafting discovery requests,²⁵ compiling and reviewing documents and data to respond to discovery requests, drafting discovery responses, filing motions for protective orders regarding discovery or motions to compel discovery, responding to these motions, and otherwise fighting over discovery issues.²⁶

With a reminder that this is simply the perspective of one attorney turned legal academic, and therefore neither necessarily correct nor universally accepted, allow me to be blunt: Discovery and, more particularly, discovery fights,²⁷ are ruining the practice of law. Of all of the fights over matters not worth fighting about that attorneys engage in, the most common, the most wasteful of resources, and the most needlessly destructive are discovery fights.²⁸ While I admit that occasionally attorneys must contest a few discovery matters, I firmly believe that we would do much to improve the practice of law if we found a way to eliminate the vast majority of the fights that currently litter the landscape of discovery.²⁹

After considerable thought, here is my complex, two-part suggestion:

- (1) For parties seeking discovery: Be reasonable in what you request.
- (2) For parties responding to discovery requests: Give it to them.

These radical suggestions come from my experience in two different arenas. First, I spent most of my fifteen years in the active practice of law as a civil litigator, with an emphasis in product liability litigation, one of the

24. To be completely candid, I must admit that I still have a list, but it is a different one than the list I once maintained. In the past, the title at the top of my list (if it had ever been reduced to writing) would have been something like, “Lawyers for Whom No Favors Should Be Done—EVER!” The new list would carry a title like, “Lawyers Who Should Not Be Trusted.” When I have discovered that a lawyer has been less than honest with me, that lawyer will find it harder to convince me that I should take at face value what he or she is saying in a future case. This is a different matter than whether the lawyer has been unreasonable. However, my experience suggests that there is substantial, but not complete, overlap between these two lists.

25. See, e.g., *Seventh Circuit Interim Civility Report*, *supra* note 5, at 383 (classifying discovery as “civil litigation’s principal activity”); cf. The Honorable Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1408 (2002) (noting the small and decreasing percentage of civil cases that are tried); James P. Buchele & Larry R. Rute, *The Changing Face of Arbitration: What Once Was Old is New Again*, J. KAN. B. ASS’N, Aug. 2003, at 36, 36 (indicating that in 2001 only 1.5 percent of federal civil cases resulted in jury trials); The Honorable William G. Young, *An Open Letter to U.S. District Judges*, FED. LAW., July 2003, at 30, 31 (“[W]e are today more . . . concerned with the procedural mechanism that blocks jury trials than we are with the trials themselves.”).

26. See *Seventh Circuit Interim Civility Report*, *supra* note 5, at 375 (noting that the decreasing percentage of cases that are tried has “produc[ed] a new crop of case manager ‘litigators’ who are not courtroom trial lawyers in the traditional sense”).

27. For reviews of common, unnecessarily adversarial, discovery tactics, see *Seventh Circuit Interim Civility Report*, *supra* note 5, at 386–87; Keeling, *supra* note 7, at 34–35.

28. One commentator who has studied discovery and its problems, both as an academic and an adjudicator, expressed the matter this way:

The academic and judicial proponents of the modern rules of discovery apparently failed to appreciate how tenaciously litigators would hold to their adversarial ways and the magnitude of the antagonism between the principal purpose of discovery (the ascertainment of truth through disclosure) and the protective and competitive instincts that dominate adversarial litigation.

Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1303 (1978); see also, e.g., *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546 (11th Cir. 1993) (commenting on the prevalence of discovery abuses); McGuire, *supra* note 14, at 284–86.

29. For a few examples of those who have complained that discovery is far more contentious than it should be, see *ABA Professionalism Report*, *supra* note 4, at 319–20; *Seventh Circuit Interim Civility Report*, *supra* note 5, at 375, 378, 380, 383, 385–87; Browe, *supra* note 5, at 761–62; Higginbotham, *supra* note 25, at 1417; Keeling, *supra* note 7, at 31–32; Shepard, *supra* note 4, at 171.

fields where discovery fights are most common. In case after case, I observed and participated in protracted and often vitriolic disputes over the extent of discovery.³⁰

To mix several metaphors, plaintiffs' attorneys, engaged in usually quixotic searches for the holy grail of a "smoking gun" document that would instantly win their case, pushed for excessively expansive discovery. For example, a plaintiff's attorney in a design defect case about "Car X" would want the design drawings related not just to Car X, but to Cars W, V, U, T, S, R, and so on, which preceded Car X in design and production, and Cars Y, Z, AA, BB, and CC, which were produced after Car X. The rationale underlying such a request would be that perhaps one of those documents might reveal that an engineer believed that some car in the product line should have been designed differently. Even in the absence of a smoking gun document, the plaintiff could gain a negotiating advantage from driving up the cost of discovery compliance.³¹

On the other side, the defense bar would fight just as vigorously to keep the scope of discovery limited to Car X, or perhaps to one car before and one car after Car X.³² Defense counsel would be primarily concerned with two consequences of expansive discovery: revelation of a bad document and the expense of responding to discovery requests. Thus the battle lines would be drawn, and the attorneys would spend many hours negotiating, arguing, and threatening in phone calls and letters, with the ultimate destination often being a hearing before the unfortunate judge assigned to manage the case, or at least its discovery phase.³³

Here is the kicker. In the products cases that I tried, guess how many times the drawings were offered into evidence at trial? To the best of my recollection, only once, and the defendant, rather than the plaintiff, offered that drawing. We in the civil bar have allowed our focus to be skewed by that rare document that (1) is not obtainable through a reasonable scope of discovery and (2) actually sways a case. We should focus on the more numerous cases in which such a document would be found through reasonably wide discovery, or the even more common cases when the result will not hinge upon documents.

The other experience base that leads to my two-part suggestion was criminal litigation. This is admittedly an unusual source of information about how best to conduct civil discovery, but please bear with me. When I became a prosecutor after spending six years as a civil litigator, I speculated that prosecutors and criminal defense attorneys engaged in even more hostile discovery disputes. After all, I thought, at least in civil cases the basic discovery principles are outlined in detail in the procedural rules, while the equivalent criminal procedural rules say little about discovery.

After three years in the criminal justice system followed by a return to civil practice, I have come to the opposite conclusion. Though discovery in criminal cases operates largely on an informal basis, it is, surprisingly, more efficient and less contentious, in most instances. Although I realize that there are occasional vitriolic discovery disputes in criminal cases—particularly about whether prosecutors have fulfilled their obligations under *Brady v. Maryland*³⁴ and Model Rule 3.8(d)³⁵ to produce exculpatory evidence—in the run of the mill criminal case the informal discovery system operates smoothly. What is that system? In most cases, the prosecutor provides a copy of all, or almost all, of his or her file under what has come to be known as an "open file" system. In other words, by and large, the system in criminal cases is based on suggestion (2) above: "Give it to them."

This system works only if the attorneys believe that their opponents are not likely to cheat. This does not mean that criminal defense attorneys believe that no prosecutors ever cheat, and I do not mean to suggest that no prosecutors ever cheat. In any system run by human beings with common human frailty, some of those humans will cheat. Nonetheless, the instances of cheating are rare enough that the system can operate on trust. If civil attorneys could develop a similar level of trust, they could spend far less time and effort fighting about discovery and more time and effort fighting over things worth fighting about.³⁶

30. *Seventh Circuit Interim Civility Report*, *supra* note 5, at 386 (noting that discovery "is [often] used as a weapon rather than a fact finding tool").

31. *ABA Professionalism Report*, *supra* note 4, at 278–79.

32. *Cf. id.* at 279 ("Hypertechnical interpretations of discovery requests are made so as to withhold documents.").

33. *See Seventh Circuit Interim Civility Report*, *supra* note 5, at 390 (noting "[h]ostile, abusive, unnecessarily adversarial attitudes demonstrated verbally, telephonically, in writing, [and] sometimes in court, i.e., excessive motion practices for items that should be easily resolvable or really are non-issues"); Browe, *supra* note 5, at 761; Keeling, *supra* note 7, at 34.

34. 373 U.S. 83 (1963).

35. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2003).

36. I am not alone in my conclusion that, due in large part to the relative absence of protracted discovery fights, "the world of criminal litigation is simply a more pleasant place to practice law" than the world of civil litigation. Shepard, *supra* note 4, at 171.

B. *Fighting the Good Fight over Matters Worth Fighting About*

The question then becomes, “what fights are worth fighting?” Please note that my first suggestion is not “do not fight.” In suggesting that *most* fights are not worth fighting, I do not mean that *no* fight is worth fighting. If no fight was worth fighting, there would be no need for lawyers.

Lawyers are called into action when there is a conflict. A seller wants to sell a piece of property for the highest possible price and a buyer wants to pay the lowest possible price. Business *A* wants a contract on terms favorable to Business *A* and Business *B* wants the contract on terms favorable to Business *B*. A plaintiff wants to receive money to compensate her for damages she suffered, and the defendant does not want to pay. Police officers and the victims of a crime want the defendant to be convicted and imprisoned, and the defendant wants to avoid conviction and prison.

Although it is perhaps understandable that the people involved in these conflicts do not relish them and therefore tend not to see the lawyers who manage these disputes in a favorable light, nothing is shameful about this work. Indeed, it is we lawyers who create the mechanism for people involved in serious conflicts to peacefully resolve their conflicts in a system that places a search for the truth as a centerpiece of dispute resolution. That is important and noble work.³⁷

Negotiating a settlement between conflicting parties is often the best way to resolve their conflict. But this is not always the case. Settlement, after all, is a resolution that requires compromise, and sometimes the parties should not compromise. In the criminal context, if a defendant has not committed a crime, the criminal justice system should not expect the defendant to plead guilty to *any* crime, even a lesser offense. Alternatively, if the prosecutor is capable of proving that the defendant has committed a serious felony, there should be some concern over the prosecutor allowing the defendant to plead guilty to a lesser charge merely as a matter of judicial economy. In the civil context, if the plaintiff’s injuries were not caused by the defendant, the civil justice system should not expect the defendant to settle the case. Alternatively, if the defendant has caused the plaintiff’s injuries, there should be some concern over the expectation that the plaintiff should forfeit some portion of the damages to which he or she is entitled merely as a matter of judicial economy.

In other words, although I applaud the growth of the alternative dispute resolution system and efforts to improve the mechanisms for settling cases where settlement is appropriate, I part company with those who suggest that trials are an inappropriate or overly costly³⁸ means for resolving disputes.³⁹ Some issues are worth fighting

37. As one bar leader recently stated, “[l]awyers are crucial to an orderly society.” Ballman, *supra* note 7, at 5. Over half a century ago, another bar leader proclaimed, “[W]e smooth out difficulties; we relieve stress; we correct mistakes; we take up other men’s burdens and by our efforts we make possible the peaceful life of men in a peaceful state.” The Honorable Larry M. Boyle, *Is There a Case for Lawyers? The Giants of Idaho Law*, *ADVOC.*, Dec. 2003, at 10, 10 (quoting Wall Street attorney John W. Davis, Special Meeting to Celebrate the Seventy-Fifth Anniversary (Mar. 18, 1946), in 1 *REC. ASS’N BAR CITY N.Y.* 100, 102).

Indeed, when one studies the origins of one of the quotations most commonly used to deride attorneys—Shakespeare’s “[t]he first thing we do, let’s kill all the lawyers”—one discovers that this is actually an acknowledgment of the critical role of lawyers in establishing an orderly, law-based society, rather than a tyranny. WILLIAM SHAKESPEARE, *KING HENRY VI, PART II*, Act IV, sc.ii. Those who have plastered this quotation across tee-shirts and bumper stickers have done so as a suggestion that society would improve once all the lawyers were killed. In fact, the line was uttered by a character who was outlining a means to overthrow the government and establish a despot. *Id.* In other words, William Shakespeare grasped that lawyers are needed in a society which places limits on governmental power and values human rights. See, e.g., Michael Herz, *Washington, Patton, Schwarzkopf and . . . Ashcroft?*, 19 *CONST. COMMENT.* 663, 678 (2002) (“[A]s Justice Stevens has pointed out, Shakespeare’s famous exhortation to kill all the lawyers is . . . one of the most flattering references to the profession . . .”); Al Harvey, *Leadership Through Advocacy: Who Speaks for Lawyers?*, *TENN. B.J.*, Dec. 2002, at 3, 3 (questioning who will explain to people that Shakespeare was actually “acknowledging the lawyer’s [positive] role” in society); Larry Lehman, *Passing the Torch*, *WYO. LAW.*, June 2002, at 13, 13 (explaining the context under which Shakespeare spoke those famous words and how they apply today); John Mayer, *In Defense of Shakespeare: An Open Letter to All Lawyers Who Think Shakespeare Said: “Let’s Kill All the Lawyers,”* *MICH. B.J.*, Feb. 2002, at 40 (explaining that Shakespeare’s quote actually supports lawyers). Though the wearer of a tee-shirt with the famous quote intends it as a curse against lawyers, the tee-shirt is in fact a compliment, though admittedly a back-handed and unintentional one. Given our popularity, or the lack thereof, perhaps we should accept compliments in whatever form they are offered. See *supra* note 4.

38. In most of the civil cases that go to trial, the bulk of litigation expenses are incurred in discovery and other pretrial processes, not in the trial itself. Higginbotham, *supra* note 25, at 1416–17. Often, alternative dispute resolution mechanisms like mediation take place only after the parties have already incurred substantial discovery and other pretrial expenses. Therefore, such mechanisms do not always result in savings as comprehensive as their proponents imply when criticizing the expense of trials.

39. Although critics of trials, or more generally, the adversary system are often careful to suggest that trials and other adversarial mechanisms might be appropriate in some circumstances, their views suggest that such circumstances are rather unusual, if not nonexistent. For a sample of the many recent scholars who seem to believe that trials and adversarial systems are dubious dispute resolution mechanisms, see Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 *WM. & MARY L. REV.* 5

about, and lawyers serve both their clients and the justice system as a whole when they focus their fights on those matters.⁴⁰ Therefore, I urge you to resist the considerable pressures that will be placed upon you to settle all cases.⁴¹ Some of the proudest moments for our profession have come when lawyers have refused to compromise their clients' rights and have instead defended those rights at trial.⁴² When the time comes, be prepared to fight the good fight.⁴³

II. HAVE THE COURAGE TO WIN AND TO LOSE

Once you have resolved yourself to fight, be prepared and willing to chance winning and losing, because both are valuable experiences that you can use to build your career. Unlike other lawyers who claim to have only won (and, therefore, should not be trusted),⁴⁴ I have had both experiences at trial.

Whenever you have the choice between winning and losing, I highly recommend winning. In the first place, victory is a lot more fun. In many offices, your coworkers will even throw you a party after the trial. In addition, winning helps you gain confidence, the trust of your bosses, and perhaps even new clients. Do everything you can do ethically to win.

Surprisingly, losing can also benefit your career. Defeat is, of course, no fun. But it has one huge advantage that winning will never have—it is far more educational. When you win, remembering all of the mistakes you made during the trial is almost impossible. When you lose, you remember every mistake.

I remember the details of my first criminal trial, which lasted a week. The jury got the case on Friday around 10:30 a.m. When I went home from work around 6:00 p.m., I already had a sinking feeling. Prosecutors do not like long deliberations. Around 10:30 p.m., I was so exhausted that I started to sleep, though rather fitfully. Sometime around 1:30 a.m. Saturday morning, the clerk's office called. I dutifully drove back to the courthouse. After more than fifteen hours, I was almost certain the news would be bad. I was right.

For the rest of that night and the next, I slept like a baby. You know how a baby sleeps, of course. Every two or three hours, I would wake up screaming, then cry myself back to sleep.⁴⁵ Our case was strong, so the acquittal could only be explained by my mistakes. The verdict was devastating.

(1996); Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 183–91 (2003); Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 144–45 (2004) (citing other commentators critical of adversarial systems), or the sources cited in these articles.

40. For an interesting analysis and at least partial refutation of “[t]he notion that civil litigants with money damage disputes prefer mediation to adversarial litigation and adjudication” that has become “so ingrained in contemporary legal culture,” see Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 83–84.

41. This pressure, along with the related reluctance of “litigators” to take cases to trial, has not been without effect. In the past three decades, the percentage of filed cases that are tried has dropped precipitously. Higginbotham, *supra* note 25, at 1408.

42. One well-known jurist contended:

Very high percentages of civil and criminal cases have historically settled—along a path to trial. It would be a mistake to assume that I do not see that circumstance as a public good. It is that good that this essay [defending trials] supports. Ultimately, law unenforced by courts is no law. We need trials, and a steady stream of them, to ground our normative standards—to make them sufficiently clear that persons can abide by them in planning their affairs—and never face the courthouse—the ultimate settlement. Trials reduce disputes, and it is a profound mistake to view a trial as a failure of the system. A well conducted trial is its crowning achievement.

Id. at 1423.

43. If the lawyer on the other side of the fight recognizes that the matter is one worth fighting over and that you are fighting well and hard, the fight will strengthen, rather than detract from, that lawyer's view of you. One of the assessments of my career that I hold most dear came on my last day as a prosecutor from a criminal defense attorney whom I faced in several trials and appeals. When I was making the rounds of the courthouse to say my goodbyes, that skilled defense attorney said, “Easton, I never thought I would say it, but I am going to miss you. You and I stabbed each other a lot in the last three years, but it was always from the front, never from behind.”

44. I am serious about not trusting an attorney who claims an “undefeated” trial record. When a lawyer claims that she has never lost a trial, there are only three possible explanations. First, the lawyer is simply wrong, due to either outright lying or a creative counting system that designates every result a “win.” Second, the lawyer is inexperienced. Before my first trial, I could honestly say that I had never lost a trial. After my first trial, I could not. Third, the lawyer is afraid to try tough cases. Protecting a perfect record is easy if an attorney settles any case that might plausibly result in a loss.

45. I stole this line from Bob Dole, who used it to describe his reaction to losing the New Hampshire Primary for the 1996 Presidential Election. Dole's humorous reaction is printed in *REPUBLICAN-ISMS: THE BLOOPERS AND BOMBAST OF THE GRAND OLD PARTY 10* (Nick Bakalar ed., John Wiley & Sons, Inc. 1996).

After those two restless nights, I snuck into my office to put the file away so that it would be gone before the start of the next workweek. As I did so, I took out a yellow legal pad and started writing down all of the mistakes I made during the trial. I quickly filled page after page with my rantings about my performance. Later I typed it up and asked several more experienced prosecutors to review it and provide feedback. Five years later, those notes became the basic outline for my trial practice book.⁴⁶

To this day, I wish I had won that trial. To this day, the mistakes I made in that trial gnaw at me. I have no doubt, however, that I learned more in that one unsuccessful and horrible trial than I have in the many happier trials before and after it.

Surprisingly, there is yet another unexpected benefit to your first loss. Once you have lost, you no longer fear that the next trial will result in your first loss. After the first loss, the worst thing that can happen in any future trial is simply another loss. Though losing can paralyze you if you let it, losing can also liberate you if you let it.⁴⁷

Once you lose, the key is to get back into the courtroom as quickly as possible, allowing time for enough preparation⁴⁸ to make winning possible. For what it is worth, I am happy to report that my second criminal trial, a case significantly tougher than the first,⁴⁹ resulted in a win.

Eventually you will come to understand that the difference between winning and losing can be somewhat haphazard and is often controlled by factors other than your skills and effort. After all, we do not ask jurors to decide which lawyer did a better job of trying the case. We ask them to determine disputed issues of historical fact. If the system is working properly and the evidence is against you, you generally should lose, despite your best efforts. Therefore, in many cases, you cannot control whether you win or lose, but you can control your effort. Ultimately, you will come to realize that your satisfaction must come not from winning, but from giving your all.

Thus, the key is not winning or losing per se, but the willingness to do either. As Theodore Roosevelt said:

The credit belongs to the man who is actually in the arena; whose face is marred by dust and sweat and blood; who strives valiantly; who errs and comes short again and again; who knows the great devotions, and spends himself in a worthy cause, who at the best knows in the end the triumph of high achievement; and who at the worst, if he fails, at least fails while daring greatly; so that his place shall never be with those cold and timid souls who know neither victory nor defeat.⁵⁰

The courtroom is a place of high achievement and excruciating loss. May you have the courage to encounter both.

III. BUILD AND GUARD A STRONG REPUTATION

A lawyer's single most important asset is his or her reputation.⁵¹ If judges and jurors trust you, they will believe your arguments and will be more likely to find in your favor.⁵² If opposing lawyers trust you, you will be able to secure more favorable settlements in negotiations. If your bosses—your potential partners—trust you, they will give you more responsibility and more desirable assignments. If your subordinates trust you, they will work harder for you. If your clients trust you, they will bring you additional cases and send you other clients.⁵³

46. See generally STEPHEN D. EASTON, HOW TO WIN JURY TRIALS: BUILDING CREDIBILITY WITH JUDGES AND JURORS (John B. Spitzer, A.L.I.-A.B.A. 1998) (guiding attorneys through the litigation process using honesty and credibility).

47. At my civil defense firm, we younger associates designated ourselves as the “kiddie lawyers.” By mutual agreement, we decided that one could shed this designation not by winning a trial, but only by losing one. Our standard was \$100,000, though the equivalent standard would presumably be much higher now. Until you had to call a client to order a check for that amount or more after a trial, you remained just a “kiddie lawyer.” With equal parts resignation and pride, I note that I am no longer a “kiddie lawyer.”

48. See *infra* Part III.B.

49. One reason the trial was difficult was that the defense attorney retained an expert witness, but we did not.

50. 15 THE WORKS OF THEODORE ROOSEVELT 354 (Scribner mem. ed., 1923–1926), *quoted in* James L. Robertson, *The Lawyer as Hero*, 53 MISS. L.J. 431, 436 n.13 (1983).

51. See Traynor, *supra* note 2, at 1026.

52. Timothy A. Rowe, *How to Litigate Auto Cases with Heart, Soul, and Compassion Without Burning Out*, in 2 ASSOCIATION OF TRIAL LAWYERS OF AMERICA CONVENTION REFERENCE MATERIALS 2263, § X (2003).

53. Marc S. Galanter & Thomas M. Palay, *Large Law Firm Misery: It's the Tournament, Not the Money*, 52 VAND. L. REV. 953, 958 (1999).

You cannot demand trust. It is something you must earn. How do you earn trust as a lawyer? Two things are essential: honesty and hard work.

A. *Honesty*

Some say that you start to build your reputation as soon as you are admitted to the bar. In reality, you started building your reputation, positive or negative, when you entered law school. Your classmates—the people scrutinizing you—are some of the same people with and against whom you will practice law. Their scrutiny of you will continue until the end of your legal career. Perhaps the most important question these potential opponents, partners, clients, and even judges, have been asking themselves about you is: “When _____ says something, is it true?” Therefore, the most important rule in building a positive reputation is this: If it is not true, do not say it.

That suggestion seems obvious, but it can be a hard rule to follow, for several reasons. First, a certain amount of lying—if we define “lying” as making statements that are not 100 percent true—is tolerated and even expected in our society. We all do it. Yes, that includes me. And you. As an example, what happens when your mother-in-law invites your family for dinner, cooks a bad meal that you are barely able to force down, and then asks you, “What did you think of the dinner?” You know what happens: You dare not answer that question with 100 percent honesty.⁵⁴

Because some dishonesty is allowed or encouraged in some circumstances,⁵⁵ some lawyers think they can get away with a bit of dishonesty when dealing with other lawyers, judges, or jurors. Thinking like that will get you into trouble.

As a common example, assume you are representing a defendant in a civil case. Following a series of negotiations, you sense you are nearing a settlement. In an attempt to move the plaintiff’s attorney closer to your figure, you say “I will offer \$250,000, but that is my final offer.” Later, the plaintiff’s attorney counters with a demand of \$275,000, and you are convinced that she will accept nothing less.

You have put yourself in a box. The logical response, and the response that your client may try to force upon you, is to settle the case for \$275,000. Why go through the expense of additional discovery and a trial over a \$25,000 difference, which is an amount that is sure to be less than the additional expense? If you accept the \$275,000 settlement, however, you have just demonstrated that when you say “final offer,” you do not really mean it. Word will spread among the bar, and from that point forward, every time you say you have made your “final offer,” the attorney on the other side will believe you are willing to go higher.

So what should you have done? The answer is simple: Do not make any statement that is not completely accurate. In the above example, you should not use the words “final offer” until you have actually reached the point where your client is not willing to add one more dime to your offer. Explain to your client in advance that

54. We have a name for this phenomenon. We call it a “white lie,” or sometimes, a “little white lie.” See, e.g., David Sally, *Social Maneuvers and Theory of Mind*, 87 MARQ. L. REV. 893, 893–94 (2004) (discussing the theory of mind capacity, the underlying cognitive capacity that allows humans to lie); John T. Kolinski, *Fraud on the Court as a Basis for Dismissal With Prejudice or Default: An Old Remedy Has New Teeth*, FLA. B.J., Feb. 2004, at 16, 20 (“However one’s moral compass views the concept of ‘a little white lie,’ there is an entire spectrum of subtle variations in the seriousness, materiality and impact of . . . litigation misconduct . . .”). Some of us even applaud those who tell such a lie, if we believe it is functional in bringing about some greater good. For example, the public believed Chief Deputy District Attorney Mark Pautler, who pretended to be a public defender in order to negotiate a suspect’s surrender, “should be spared” from discipline under these circumstances. Livingston Keithley, Comment, *Should a Lawyer Ever Be Allowed to Lie?* People v. Pautler and a Proposed Duress Exception, 75 U. COLO. L. REV. 301, 321–22 (2004) (noting that “[t]he editors of the Denver Post said that it was ‘obtuse’ to sanction Pautler for a ‘white lie that helped bring a triple ax murderer into police custody before he could kill again’”); see also Rebecca B. Cross, *Ethical Deception by Prosecutors*, 31 FORDHAM URB. L.J. 215, 224–25 (2003) (describing the strong support Pautler received from the community, the media, law enforcement, and the legal community for his actions).

55. In recognizing the reality of the “white lie,” I do not mean to suggest that the social acceptance of the supposed “white lie” is a desirable aspect of our culture. “White lies” can have adverse consequences. In the first place, a “white lie” is still a lie, and any untruthful statement might create unrealistic expectations and other problems both for the person telling the lie and for the person to whom it is directed. See Paul Buchanan, *Have a Plan, Be Direct*, BUS. L. TODAY, Nov./Dec. 2003, at 41, 45 (advising employers that, in the context of employee evaluations or adverse employment decisions, “[a] ‘white lie’ designed to spare a bruised ego at the time of an adverse decision may later provide the key evidence that keeps a case from being dismissed”). Second, a person’s first “white lie” in a given situation might start the erosion of that person’s integrity, which can lead to more serious dishonest behavior. Kenneth L. Jorgensen, *Integrity: That Initial Compromise*, BENCH & B. MINN., Mar. 2004, at 14, 14–15. Also, allowing “white lies” gives cover to those who claim to be telling them while actually prevaricating on a more serious level. See David Sweet, *Sacrifice, Atonement, and Legal Ethics*, 113 YALE L.J. 219, 233 n.45 (2003).

you are not going to use these words unless the client is prepared to walk away from settlement negotiations if the other side demands anything more.⁵⁶ If your client is not prepared to walk away, you should not say that the offer is “final,” because it is not. Many times you can avoid making a dishonest statement simply by not making *any* statement.

Unfortunately, silence will not always be an option. You will encounter situations in which someone will ask a question that, if answered honestly, will hurt your position in the short run. A potential client with a big case, who is also interviewing other lawyers, will ask for your assessment of her chances of success. An opposing attorney will ask if you have located any witnesses to support your potential claim. A judge will ask you whether the cases from a particular circuit favor your position. If the answer to any of these questions is going to hurt you or your client, and you cannot avoid answering the question, what should you do?

The answer is simple to state, yet painful to implement: Answer the question honestly. These are, after all, the precise circumstances in which your reputation is formed—more so than the situations when it is easy to give an honest answer. Even a dishonest person has no trouble giving an honest answer when that answer helps him or her. When you tell a judge that “the cases from Circuit *X* go the other way, Your Honor, but let me explain why we should still win,” you are establishing a reputation that will help you the next time when you say the cases support your position. Likewise, when you give your potential client, opposing counsel, or office colleagues an honest, but painful, answer, you are increasing the credibility of your other statements.

Although you are building your long-term reputation among the legal profession, this does not mean that the answer will not hurt you in the short run. When the judge hears that the cases from the controlling circuit are against you, you may lose your motion even though you presented your best argument for why you should still win. Similarly, the potential client may take her business elsewhere, the opposing attorney may take a tougher negotiating stance, and your colleagues may be upset with you. But that is the point. You build your reputation by being honest when it hurts.

B. Hard Work

Honesty alone is not enough to build the reputation you need as an attorney, because honesty alone does not lead to credibility and trust. To be believable, you must be both honest and knowledgeable.

In the practice of law, knowledge comes from hard work. Your goal, though not always obtainable, should be to know more about your case than anyone else, especially opposing counsel. I do not mean to say that you should claim to have a superior level of knowledge. Instead, you should establish this authority by the accuracy of your statements and the precision of your questions during direct and cross-examination.

Unless you are one of the unusual individuals who is blessed with a photographic or other extraordinary memory, you can acquire that superior level of knowledge only through hard work. Real estate agents are fond of saying that the three most important things are location, location, and location. For a lawyer, the three most important things⁵⁷ are preparation, preparation, and preparation.⁵⁸

C. Honesty vs. Preparation

During your career, you will occasionally encounter a conflict between honesty and preparation. Regardless of how hard you prepare, sometimes a matter you did not or could not anticipate, and thus for which you are unprepared, will arise. What do you do then?

Returning to our previous example, assume that a judge asks you whether the cases from a particular circuit favor your position, but you do not know the answer to this question. On the one hand, you could admit that you do not know, thereby suggesting that you have not adequately prepared. On the other hand, you could bluff and confidently state that the circuit’s cases support your view.

56. This explanation is an example of communicating with your client regarding the means you will use to attempt to achieve the client’s goals. *See infra* note 75.

57. Honesty is actually first on the list, *see supra* Part III.A, but we are assuming that element for the moment.

58. Rowe, *supra* note 52, § VII (quoting basketball coach Bobby Knight’s view that “[t]he will to succeed is important, . . . but I’ll tell you what’s more important. It’s the will to prepare . . .”; and fellow basketball coach John Wooden’s vision that “failure to prepare is preparing to fail”).

Once again, an honest answer is the best choice. Though potentially harmful in the short run, an honest approach will build your reputation in the long run. In fact, an occasional “I am not sure, but I will certainly check, Your Honor,” may enhance your credibility. Judges, jurors, lawyers, and others are legitimately suspicious of people who always claim to know the answer. Indeed, we have a derisive term for such a person—“know-it-all.”

Bluffing is foolhardy for two other reasons, irrespective of how much false confidence you can put behind that bluff. First, a wise opponent will make note of your bluffed answer and check its accuracy. If she is able to establish you were bluffing and that you guessed wrong, you will have little, if any, chance to restore your credibility. Second, knowingly making a false statement to a judge is a direct violation of the Model Rules.⁵⁹

IV. TO THINE OWN SELF BE TRUE (AT LEAST EVERY ONCE IN A WHILE)

Lawyers are often called upon to do things that they would not otherwise do if they did not occupy the important and unique role of an attorney representing a client. For example, the legal community generally expects a lawyer to protect the confidentiality of client information, even when a non-lawyer might disclose information to prevent harm to another person.⁶⁰ Furthermore, the lawyer must remain loyal to her client in almost all instances,⁶¹ even if the client engages in activity she dislikes.⁶² With rare exceptions,⁶³ lawyers are expected to

59. Pursuant to Model Rule 3.3(a)(1), “[a] lawyer shall not . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1) (2003). Even if the first clause of this rule does not prohibit a bluff, the second half would require the lawyer to correct the bluff if she discovered it was incorrect through later research.

60. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2003). Model Rule 1.6 generally prevents an attorney from “reveal[ing] information relating to the representation of a client unless the client gives informed consent,” with certain recognized exceptions. The rather tortured history of the Model Rules’ exceptions to confidentiality requirements reflects the tension, unease, and controversy within the profession about the appropriate circumstances for an attorney to reveal client information in order to prevent harm to a third party.

The American Bar Association’s (ABA) Kutak Commission, which drafted the original proposed Model Rules, would have allowed disclosure “to rectify the consequences of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services had been used.” MODEL RULES OF PROF. CONDUCT. R. 1.6(b)(2) (Proposed Final Draft 1981), *quoted in* Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 297 (1984). The ABA rejected this proposal when it adopted the original Model Rules, thereby leaving the prohibition against disclosure intact with an exception allowing, but not mandating, disclosure when necessary “to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.” MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (as amended 1983). In other words, under the pre-2002 version of Model Rule 1.6, an attorney could not disclose client information in order to prevent the following: a future death that might result from a past client crime; a nonimminent death; a significant, but not “substantial,” bodily harm; or any financial or reputational injury.

As passed by the ABA House of Delegates, the 2002 version of Model Rule 1.6 permitted disclosure “to prevent reasonably certain death or substantial bodily harm.” Thus, the requirement of a future crime by the client or of imminent death or substantial injury was dropped. Thus, the 2002 version of Model Rule 1.6 expanded the circumstances when a lawyer was permitted, but not required, to disclose client information.

Before many states could consider adopting the 2002 version of the Model Rules, the ABA House of Delegates again expanded the circumstances in which disclosure was allowed, but not required. Acting in response to Enron and other corporate scandals at the turn of the century and the resultant Sarbanes-Oxley statute and S.E.C. regulations that created pressure for increased disclosure, the ABA House of Delegates again expanded disclosure in 2003. Under the 2003 version of Model Rule 1.6, a lawyer is now also permitted, but not required, to disclose client information “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” or “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.” MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2)–(3) (2003).

Even with this expanded permissible disclosure, a lawyer still cannot reveal client information: to prevent an insubstantial physical or financial injury; to prevent a possible, but not reasonably certain, physical or financial injury; to prevent a financial injury that did not result from the client’s use of the lawyer’s services; or to prevent an unjust litigation result (absent a duty to disclose to protect the court under Model Rule 3.3). Thus, under some circumstances, the Model Rules prevent a lawyer from disclosing confidential information about a client even though a non-lawyer might disclose confidential information under similar circumstances.

61. The conflict of interest provisions of Model Rules 1.7 through 1.11, among others, are designed to require attorney loyalty to the client. *See* MODEL RULES OF PROF’L CONDUCT R. 1.7–1.11 (2003).

62. In a classic view of the attorney’s role, Justice Abe Fortas declared, “Lawyers are agents, not principals; and they should neither criticize nor tolerate criticism based upon the character of the client whom they represent or the cause that they prosecute or defend. They cannot and should not accept responsibility for the client’s practices.” Abe Fortas, *Thurman Arnold and the Theatre of the Law*, 79 YALE L.J. 988, 1002 (1970), *quoted in* Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 697 (1988).

63. Under the permissive withdrawal provisions of Model Rule 1.16(b), “a lawyer may withdraw from representing a client if . . . (4) the

diligently⁶⁴ use their skills⁶⁵ for their clients without regard to their own views about the morality of their clients' actions.⁶⁶ In other words, as some, including critics, have put it, lawyers are expected to act "amorally" in their careers.⁶⁷

Nonetheless, accepting a law license does not mean that you are no longer a human being. As a human being, you will maintain your own personal sense of morality, which you may base in part upon your religious faith.⁶⁸

A legal career will occasionally require you to do things that you would not do in your life outside the law. Most of the time, you should accept this requirement as the duty of serving as your clients' agent.

That having been said, I offer this admittedly controversial advice: Maintain, nurture, and develop your own sense of morality, even when it is sometimes inconsistent with your duties as an attorney. Though you should usually allow your duties under the law of professional responsibility to trump your personal conscience when acting as an attorney, be prepared to say you will not do things you find deplorable.

A. Resist Immoral Demands

Before you begin the practice of law, know how far you are willing to go in your duties as a lawyer, and mark well the line that you will not cross on a client's or an employer's behalf. Although your client has the power to force you to implement her wishes through the threat of firing you, you should retain the authority to say you are unwilling to be the lawyer who follows the client's orders to engage in activity you consider immoral, even if she can find another lawyer who is willing to engage in this activity.

To put this concept in context, consider a case where you could assist your client by engaging in a tactic you believe is immoral. To outline an example of a case that achieved certain notoriety, consider this summary from a professional responsibility text:

Two high school football heroes were accused of sexually assaulting a retarded seventeen-year-old young woman. It was alleged that the defendant brothers "invaded" the young woman "with a broomstick, a miniature baseball bat and another, unidentified elongated wooden object." As part of the defense, another young woman, a friend of the defendants, "entrapped" the victim into making statements that were surreptitiously recorded. The defendants' friend pretended to befriend the victim, telling her that she was a sexual novice who needed "advice from someone more mature."⁶⁹

With a slight twist, this set of facts presents a very interesting dilemma. Assume that you were the attorney representing one of the football players charged with the sexual assault of the retarded young woman. Further assume that the medical evidence of sexual abuse was strong, but that the prosecution's case rested largely on the retarded young woman's testimony about her lack of consent. Finally, assume that you have concluded that the best way to attack the young woman's testimony is to suggest that she consented and to point to whatever sexual history she either has or her popular "friend" can create. In your jurisdiction, as in many others, it is not illegal to surreptitiously tape a conversation, as long as one participant in the conversation acquiesces.⁷⁰ When the friend asks for your help in obtaining and taping these statements from the alleged victim, what do you do?⁷¹

client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (2003).

64. *Id.* at R. 1.3.

65. *See id.* at R. 1.1 (regarding attorney competence).

66. In a provision that is rather unusual, because it seems to speak not to lawyers but to non-lawyers, Model Rule 1.2(b) provides, "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." *Id.* at R. 1.2(b).

67. *See* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975), *excerpted in* JAMES R. DEVINE ET AL., PROBLEMS, CASES AND MATERIALS IN PROFESSIONAL RESPONSIBILITY 12-19 (3d ed. 2004).

68. For a discussion of the role of religion in shaping your sense of morality, see Howard Lesnick, *Speaking Truth to Powerlessness*, 52 VAND. L. REV. 995, 998-99 (1999).

69. DEVINE ET AL., *supra* note 68, at 497 (quoting Sidney H. Schanberg, *Lawyers' Tactics Confuse Legal, Right*, NEWSDAY, May 8, 1990).

70. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001) (concluding that such taping is allowed under the Model Rules, if state law does not prohibit it and the attorney does not represent otherwise).

71. To alter the hypothetical slightly, eliminate the tricking, taping, and mental retardation aspects, and assume you believe the rape

Are you required to pursue this tactic if you honestly believe, as an experienced criminal defense attorney, that it will increase your client's chances of avoiding conviction? Does it matter that you are convinced the victim is telling the truth and that you personally consider it reprehensible to take advantage of her mental handicap? After all, it is your obligation⁷² to represent your client to the best of your ability to bring about the result that the client desires,⁷³ and you believe tricking and taping the victim might be the best possible tactic for your client. If that is not a sharp enough dilemma, what if your client demands that you assist in arranging the tricking and taping?⁷⁴

Undoubtedly some would say that nothing would be served by your withdrawal because the client would presumably hire another lawyer—one who was willing to engage in this unseemly, but permissible, tactic. From the perspective of the justice system as a whole, this analysis may be correct. The client likely would be able to find someone else to do it.⁷⁵

But that someone would not be you. If the matter is important enough under your own personal morality, you should refuse to engage in the conduct and withdraw from the representation. Indeed, the Model Rules Preamble notes that, though the Rules guide attorney conduct, “a lawyer is also guided by personal conscience.”⁷⁶ Although you may not be entitled to maintain a large zone of conduct that you are unwilling to pursue for a client because it is personally repugnant, that zone should exist nonetheless. No case, no client, no employer, and even no profession should take away the entirety of your soul.⁷⁷

victim is testifying truthfully. If you believe your client's best chance for acquittal depends upon an artful cross-examination that suggests the rape victim is not, or at least might not be, telling the truth, are you required to conduct such a cross-examination? See Katherine R. Kruse, *Lawyers Should Be Lawyers, But What Does That Mean?: A Response to Aiken & Wizner and Smith*, 14 WASH. U. J.L. & POL'Y 49, 66–70 (2004).

72. Stephen L. Pepper, *Resisting the Current*, 52 VAND. L. REV. 1015, 1020–22 (1999).

73. McLaughlin, *supra* note 3, at 1012 (“What clients want from their lawyer is for the lawyer to win—to get them what they want.”).

74. Some might respond by suggesting that the situation described is not much of a professional responsibility dilemma because the attorney, not the client, bears ultimate responsibility for decisions regarding the means by which he or she pursues the client's objectives. This logic does not resolve the matter as cleanly as it first appears, however.

Ignoring the often inapplicable language about limiting the scope of the representation and attorney refusal to engage or assist in criminal or fraudulent conduct, see MODEL RULES OF PROF'L CONDUCT R. 1.2(a), (c), (d) (2003), Model Rule 1.2(a) provides that “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.” *Id.* at R. 1.2(a). By negative implication, this language suggests that the attorney is responsible for decisions regarding “means,” such as whether to trick and tape record an alleged sexual assault victim who suffers from a substantial mental disability (or whether to aggressively cross-examine a truthful witness), as long as the attorney “consult[s]” with the client about these matters. See *id.*

Note, however, that Model Rule 1.2(a) contains a specific cross-reference to Model Rule 1.4. Model Rule 1.4(a)(2) requires the attorney to “reasonably consult with the client about the means by which the client's objectives are to be accomplished.” *Id.* at R. 1.4(a)(2). Comment 5 to Model Rule 1.4 states, “The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.” *Id.* at R. 1.4 cmt. 5. If the client can “participate” in “decisions concerning . . . means,” those decisions are not within the exclusive domain of the attorney. *Id.* at R.1.4 cmt. 5. Of course, given the authority of the client to fire the attorney and the attorney's duty to withdraw upon being discharged, see MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(3) (2003), it would be folly for an attorney to believe that the client's wishes regarding means can be ignored.

Even if the client merely asked the attorney for advice regarding which means should be used to pursue the client's objectives, the attorney must “render candid advice.” *Id.* at R. 2.1. If the attorney remains in the case and honestly believes that the legally permissible tactic gives the client the best possible chance of gaining his objective of acquittal, even if the attorney finds the tactic personally immoral, Model Rule 2.1 presumably requires the attorney to tell the client that this tactic, in the attorney's view, presents the best prospects for acquittal. See *id.* To take matters one step further, even though Comment 5 to Model Rule 2.1 states that “[i]n general, a lawyer is not expected to give advice until asked by the client,” some would suggest that the attorney has an obligation to advise the client of a distasteful, but legal, tactic even if the client does not specifically inquire about it. *Id.* at R. 2.1 cmt. 5. Because the attorney is generally obligated to act in the client's interests, the attorney perhaps should not eliminate any legal options without first advising the client.

75. In the currently crowded legal marketplace, a paying client will be able to find an attorney willing to perform a permissible, but arguably immoral, act. From the perspective of an individual attorney, perhaps this represents one positive change.

When I was in law school, one of the classic ethical dilemmas was entitled, “The Last Attorney in Town.” The basic hypothetical involved an unpopular client who asked you to take his case. You did not support his activities—perhaps the client was a tobacco company, a serial rapist and murderer, an abortionist, or an abortion protestor. For whatever reason, you had no interest in helping him pursue those activities by representing him. If you did not represent him, however, he would not receive representation, because you were the last available attorney in town. Did you have an obligation to represent him?

That hypothetical carries little power today. Given the large numbers of attorneys competing for clients, see *supra* note 7, it is difficult to imagine a paying client who could not find an attorney to represent him and perform a permissible act. Therefore, you can usually refuse to perform an act which you find unseemly without leaving the client unrepresented.

76. MODEL RULES OF PROF'L CONDUCT pmb1. ¶ 7 (2003).

77. Although this ordinarily means that you would have to withdraw from a representation or resign from a job in order to maintain this personal morality zone, it also means you may have to be willing to forfeit your law license in an extreme case where the Model Rules require

Regarding this important point, permit me to recommend the role model that my law school professors recommended to me as a student: Thomas More. As portrayed in the Robert Bolt play, *A Man for All Seasons*,⁷⁸ a literary masterpiece that should be read or seen by all attorneys, More was an accomplished attorney who worked his way up to become Lord Chancellor, the highest attorney position in the English government. He certainly did not attain this position without performing exemplary service for his client, King Henry VIII. Presumably, he did not relish everything he did while climbing the career ladder to the exalted position of Lord Chancellor, but like other lawyers before and after him, he did those things for his client nonetheless. But More had his breaking point—his line beyond which he would not go. His line, perhaps like yours, was based in his faith. As a Catholic, More refused to break from his church and sanction King Henry VIII's divorce and remarriage. His client did not take kindly to his attorney's refusal to abide by his wishes. When More persisted in his refusal to sanction the divorce, King Henry VIII, acting through his government, stripped him of his office, imprisoned him, and eventually executed him.⁷⁹

For current purposes, ignore your view on the legitimacy of Thomas More's position on divorce, because that is not the point here. The point is that this man—this attorney—who had spent his life building his legal career through hard work and zealous representation of clients, would go only so far for a client, even when that client was the most powerful man on earth. For all his political and legal climbing, Thomas More was ultimately true to himself and his core beliefs. Though it is unlikely that you will be called upon to make the sacrifices demanded of Thomas More, I urge you to be prepared to draw the line, if necessary, and make the sacrifices that result from that stand.

B. Act Ethically When Nobody Is Looking

For most lawyers, dramatic instances of the conflict between personal morality and attorney amorality are rare. On the other hand, almost all lawyers will have to decide whether to be true to themselves in other more commonplace situations that often occur outside the view of anyone else. While judges, your opponents, your office colleagues, or your clients will review much of what you will do as a lawyer, you will also face numerous situations in which only you will know whether you are engaging in unethical conduct.⁸⁰

For example, assume that, like many other young associates,⁸¹ you have been assigned to review multiple boxes of your client's documents before providing them to your opponent in discovery. Your task is to decide whether any of the documents are protected by the attorney-client privilege, or the work product doctrine. Amidst the thousands of documents, you find an unusual "smoking gun" document that would be particularly damaging to your case.⁸² You then determine this is the only copy of the document that exists. Do you run it through the shredder?⁸³

A more common, less extreme, example is one that almost everyone destined to join a law firm will face. As a young associate, or even a partner, you will be expected to bill a certain number of hours every year. The billing requirement is rather high, so you must work extremely hard to meet it.⁸⁴ At the end of the day, you realize that you have only worked 6.5 hours researching a particular case, instead of the 7.5 hours you need to bill that day. You realize, though, that the well-heeled client will never miss the money it pays for the extra hour and that nobody but you will ever know if you massage that 6.5 hours into 7.5 hours.⁸⁵

My friends, that is a very real dilemma. How you resolve billing requirement shortfalls will determine what kind of person you will be in the practice of law. While you can never be absolutely sure that "nobody" will

you to engage in conduct that you are unwilling to pursue as a matter of personal morality.

78. ROBERT BOLT, *A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS* (Edward Thompson ed., Heinemann Educational Books Ltd. 1961) (1960).

79. The Honorable Peter D. Webster, *Who Needs an Independent Judiciary?*, FLA. B.J., Feb. 2004, at 24, 27 (summarizing *A MAN FOR ALL SEASONS*).

80. See Jorgensen, *supra* note 55, at 15 ("The occasion to compromise one's integrity occurs daily for most lawyers.").

81. Patrick J. Schiltz, *Provoking Introspection: A Reply to Galanter & Palay, Hull, Kelly, Lesnick, McLaughlin, Pepper, and Traynor*, 52 VAND. L. REV. 1033, 1039 (1999).

82. See *supra* text accompanying notes 30–34.

83. For another outline and discussion of this hypothetical, see McLaughlin, *supra* note 3, at 1005–06.

84. See *infra* Part IX.

85. For discussions of the temptation to pad time sheets, see Schiltz, *supra* note 1, at 917, 918–19; Schiltz, *supra* note 81, at 1041.

know, you will not be an ethical lawyer if you follow the rules only because you could be caught. Sometimes you can be almost certain that “nobody” will know. But you will know. Ultimately, that is what matters.

As hard as it sometimes is to stay on the right side of the ethics line, you must stay on that side. Once you cross that line, you have started down a dangerous path that tends to have a snowball effect. Since you probably will not get “caught” by anyone the first time you cross the line, it will be that much easier to cross the line the next time, the time after that, and the time after that time.⁸⁶

V. CHOOSE YOUR FRIENDS CAREFULLY

Withdrawing from representing a client is the most common way out of the unusual situation when you refuse to perform an act demanded of you by the client.⁸⁷ But withdrawal will not always be an available option. Even when you are allowed, or otherwise required, to withdraw, a judge can deny your request to withdraw, thereby forcing you to continue to represent a client and to use your resources and skills to further that client’s interests.⁸⁸

Even when withdrawal is allowed, it is an unpleasant experience. Refusing to continue client representation on the basis of principle is no simple matter, especially if that client is treasured by your firm for its long-standing relationship with the firm. Your refusal to represent your firm’s client may result in you looking not only for new clients, but for a new job. If your firm does not demand that you leave, your conscience might.

Even though attorneys cannot avoid all serious ethical dilemmas through good planning, foresight is important. Choose your employer and, to the extent possible, your clients carefully. Your life as a lawyer will be considerably less stressful if you work in an office with other ethical lawyers who value adherence to ethical principles, along with financial and other successes of the office.⁸⁹ Also, your life as a lawyer will be less stressful if you represent clients who want to win through ethical means, not by cheating.

Of course, it is easy for someone who already has a job to say that you need to be careful in selecting an employer. For some of you, finding your first legal job will be difficult, and you will be tempted to accept a job from the first firm or office that offers you employment. Be careful. Regardless of how much you want a job as a lawyer, you should research your potential employer while that potential employer conducts research on you. As noted previously, every lawyer and every law firm, government office, legal services provider, and legal public interest group, has a reputation among the bar.⁹⁰ Research about a potential employer’s reputation may save you a lot of trouble.⁹¹

If you choose a law firm and succeed there, that firm will eventually expect you to find new clients. This pressure is not unlike the pressure of finding your first job. Again, I am realistic enough to know that it will be hard for you to turn away a paying client, but my job today is to give you advice about how to live a reasonably pleasant life as an attorney. Therefore, I must again advise caution. Before entering into an attorney-client relationship with a new client, beware that this relationship could culminate in a nightmare ethical dilemma. You can often reduce, though certainly not eliminate, the possibility of ethical dilemmas by first conducting research about the potential client.

VI. FIND WORK YOU ENJOY, THEN ENJOY YOUR WORK

The fact that staggering numbers of lawyers are unhappy in their jobs is one sad reality of modern practice.⁹² Why are so many lawyers dissatisfied with their jobs? Although a multitude of reasons come to mind, I am willing

86. David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279, 285–87 (2003); see Jorgensen, *supra* note 55, at 14–15; Traynor, *supra* note 2, at 1026.

87. See *supra* notes 75–79 and accompanying text.

88. Model Rule 1.16, which outlines mandatory and discretionary circumstances under which a lawyer should or may seek to withdraw, makes withdrawal subject to judicial approval in some circumstances. MODEL RULES OF PROF’L CONDUCT R. 1.16(c) (2003).

89. See Schiltz, *supra* note 1, at 912 (quoting MICHAEL J. KELLY, *LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE* 18 (Martha Minow et al. eds., 1994)).

90. See *supra* Part III.

91. See Michael J. Kelly, *Thinking About the Business of Practicing Law*, 52 *VAND. L. REV.* 985, 991 (1999).

92. Compared with the population at large, and even with other professionals, lawyers apparently have substantially higher rates of depression, Daicoff, *supra* note 4, at 1347; Schiltz, *supra* note 1, at 874–75, substance abuse, Daicoff, *supra* note 4, at 1347; Schiltz, *supra* note 1, at 876–77, divorce, *id.* at 877–79, suicide, *id.* at 879–80, and job dissatisfaction, Daicoff, *supra* note 4, at 1346–47; McLaughlin, *supra* note 3, at 1011; Schiltz, *supra* note 1, at 881–88; Shepard, *supra* note 4, at 171–72. But see Margaret Cronin Fisk, *Lawyers Give Thumbs Up*,

to suggest an important one: Too many lawyers take jobs that they do not want. With the many different types of work that an individual can do with a Juris Doctor degree and a law license, this is unfortunate and unnecessary.⁹³

With the wide variety of jobs available to lawyers, why do so many accept jobs they hate? One of the primary reasons is money. Too many lawyers try to maximize their incomes, instead of their happiness. This is understandable, to a degree, considering the circumstances a new lawyer now faces when looking for a first law job. Many of you have acquired staggering student loan debt,⁹⁴ so the jobs that provide the most compensation seem the most attractive, regardless of whether you think you will enjoy the work required to earn that pay.⁹⁵ But I am not willing to let you off the hook that easily. Although it may be difficult to handle your student loan debt on the salary of a public defender, a prosecutor, or a legal aid attorney, it is not impossible. Thousands of lawyers manage to make ends meet on these salaries.⁹⁶

Too often, students use student loan debt as an excuse to cover up the reality that we human beings, particularly in our country, keep score with money. Sometimes without realizing it, we seem to believe that those with higher incomes are automatically doing more important work. In the competitive law school environment, the high-paying jobs, which are almost exclusively at large law firms in major cities, seem the most attractive.

Both law schools and law firms perpetuate this myth that work at large firms is more valuable. Law schools, who want their students to find jobs, are understandably anxious to invite any law firm or other employer who might hire their law students to interview on campus. Many of the law firms that accept these invitations indicate that they are only willing to interview students near the top of their class. During interview season, the students who were not selected for interviews repeatedly see select students roaming the halls with fresh hair cuts and fancy suits. Surely the jobs that these students are chasing are the most important, right?⁹⁷

Not necessarily. I am not saying that there is anything wrong with pursuing a job with a firm that interviews on campus, if you have determined that working for this type of firm is what will make you happiest. I have worked at a large law firm and have twice been a partner in a smaller firm. During most of my time at those firms, I enjoyed the work I was doing. Therefore, I do not subscribe to the view that law firm life is necessarily a drudgery to be endured and not enjoyed.⁹⁸

NAT'L L.J., May 28, 1990, at S2, S2 ("An overwhelming majority . . . of American lawyers say they are satisfied with their careers."); Kathleen E. Hull, *Cross-Examining the Myth of Lawyers' Misery*, 52 VAND. L. REV. 971, 971 (1999) (addressing Professor Schiltz's arguments about job dissatisfaction in the legal profession with recent data from a survey of Chicago attorneys and finding little support for the proposition that lawyers are unhappy).

93. Based only upon lawyers I know from studying alongside them in law school, working with them in practice, or teaching them, a partial list of jobs that require a Juris Doctor degree or a law license includes the following: solo practitioner; small or mid-size firm partner and associate; partner and associate in a large firm; prosecutor; public defender; judge; magistrate; law professor; law school dean and associate dean; law clerk; attorney general and assistant attorney general; in-house counsel to corporations, government agencies, and charitable groups; congressional committee counsel; Department of Justice attorney; and city attorney. Many of these jobs are available in both large cities and small towns. Attorneys in private firms practice a variety of specialties or combination thereof, including litigation, tax, estate planning, patent and other intellectual property, banking, real estate, and other transactional fields.

If none of these jobs appeal to you, consider one of the following alternative careers pursued by lawyers where a law license is not a prerequisite, but an asset: banker, business executive, business consultant, financial advisor, accountant, politician, political consultant or aide, lobbyist, charitable organization executive, movie producer, real estate broker, bureaucrat, detective, federal law enforcement agency special agent, writer, reporter, editor, court clerk and administrator, undergraduate professor, high school teacher, employment advisor, boxing promoter, trade group executive, bar association executive director, continuing legal education program coordinator, expert witness, and insurance claims manager.

If nothing on either list is appealing, you are not likely to be content in any career, so there is little that I can recommend. Far more often, though, a lawyer is attracted to a job on one of these lists, but ends up in a different one. Avoid this scenario if you can, but if it happens, correct the situation.

94. See Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U. L. REV. 501, 511 (2000) (estimating the average 1999 law school graduate's student loan debt at \$55,000, "425% more than graduating students of 1988").

95. See Philip G. Schrag, *The Federal Income-Contingent Repayment Option for Law Student Loans*, 29 HOFSTRA L. REV. 733, 736 (2001).

96. Schiltz, *supra* note 1, at 898, 935–36.

97. See Pepper, *supra* note 72, at 1016; Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367, 386 (1996); Schiltz, *supra* note 1, at 896–97.

98. Even though Professor Schiltz is careful to note that "[t]he culture in some big firms is better than in others," Schiltz, *supra* note 1, at 918; Kelly, *supra* note 91, at 987, he comes close to declaring large law firm life is drudgery to be avoided when he titles a major subsection of his groundbreaking article, *Avoid Working in Large Law Firms—or in Firms That Act Like Large Law Firms*, Schiltz, *supra* note 1, at 924. Professor Schiltz recommends small firms to law students who wish to work in private practice. *Id.* at 940.

Others disagree with Professor Schiltz's dim view of large law firms. See Galanter & Palay, *supra* note 53, at 956–57; McLaughlin, *supra* note 3, at 1004 ("I firmly believe that a first rate big firm is the best place for a new lawyer to apprentice—to learn how to be a

But work can be a drudgery for those whose passions lie elsewhere.⁹⁹ Before you take a job with a law firm, large or small, or any other type of law office, I urge you to ask yourself this question: Six months from now, when I am driving, riding, walking, or biking to work in the morning, will I look forward to getting there, or dread it? Of course, regardless of what job you accept, there will be occasional days when you dread going to work. If you expect those days to become the norm, though, do not take that job.

Too many students come to law school with dreams about what they will do with a law license, then toss those dreams aside to chase the highest paying job available.¹⁰⁰ I am not suggesting that you should be inflexible and closed to new possibilities. Replacing one dream for another is perfectly acceptable. But do not drop a dream for a paycheck, regardless of its size. If you came to law school to become a trial attorney and that is still your dream, find a job that will lead you into the courtroom. If you dream of pursuing justice for the poor, pursue it. If you dream of prosecuting, take that assistant district attorney offer. If you want to represent criminal defendants, go to work in the public defender's office.

Many people, including loved ones, will tell you that you would be crazy to turn down higher paying work to chase a dream. Fine. Be a little crazy. But do not let someone else tell you what should be important to you,¹⁰¹ and never forget to pursue happiness.¹⁰²

Others will suggest that you should simply put your dreams on hold for a while by saying, "Take the high paying job, at least for a while. If you still want to tilt at windmills three years from now, you can do it then." Be careful with this route because once you start earning the "big bucks," it will be very difficult to then deny yourself that income.¹⁰³ Never becoming accustomed to a large income in the first place is easier.

Nonetheless, I urge you to be prepared for the difficult task of getting out of a job that you thought you would enjoy, if it turns into a nightmare. Of course, I am not suggesting that you expect every day to be wonderful. Every lawyer's life has its share of tough moments, days, weeks, and months. Therefore, when these tough times arise, you should attempt to endure them, at least for a while. On the other hand, if the job turns out to be something that regularly makes you unhappy, look for a new job, even if it pays less.

A reasonable response from you is: "It is easy for you to tell us to take a lower-paying job, Easton, but does anybody ever actually do it? Have you ever done it?" The answer is "yes." On three different occasions in my career as a lawyer, I accepted jobs with substantially lower pay than my available alternatives.¹⁰⁴ On one of those occasions I reduced my income substantially by moving from private practice into teaching—my available alternative then was a job I already held. I will not tell you that I have not missed the extra money, but I will tell you that although I have regretted many decisions I have made in life, I do not regret any of those three decisions. I am confident that each of the lower-paying jobs was, for me, a better opportunity than the higher-paying alternative.

Once you find yourself in a job you enjoy, remember that you enjoy it. This task is just as important, but far easier, than getting the job. Every job, legal or not, has unpleasant aspects. The key to continuing to enjoy a good legal job is to recognize that those unpleasant aspects are simply the price you pay for the pleasure of having that good job. Concentrate on why you like your job.¹⁰⁵ If you let yourself focus on the negative aspects of the job, you will no longer be able to remember why you liked your job in the first place.¹⁰⁶

VII. RETURN PHONE CALLS

lawyer.").

99. Job dissatisfaction seems to be more prevalent among attorneys working in large law firms. Schiltz, *supra* note 1, at 886–88. *But see* Fisk, *supra* note 92, at S2 ("Sole practitioners . . . are considerably less happy than all other attorneys.").

100. *See* Schiltz, *supra* note 1, at 925.

101. Lesnick, *supra* note 68, at 997.

102. Traynor, *supra* note 2, at 1028. The Declaration of Independence, after all, identifies the pursuit of happiness as one of our three inalienable rights. It does not similarly mention the pursuit of money.

103. Schiltz, *supra* note 1, at 937.

104. For the story of a similar decision, *see id.* at 950–51.

105. The good news is that many attorneys, perhaps especially those who practice in small towns, in small firms, in government positions, or in public interest agencies, are quite satisfied with their jobs. *Id.* at 941.

106. To build upon a concept discussed earlier, *see supra* text accompanying notes 99–102, when you have a good job, remind yourself every morning of your good fortune. On the way to work, think about something that you are looking forward to doing that day. This simple exercise will do wonders for your job satisfaction.

Although this suggestion does not merit equal billing with something like, “To thine own self be true,” you would be astonished to know how many lawyers cannot follow this simple piece of advice. Furthermore, I am hoping to provide you not only with thoughts about how to handle the major ethical dilemmas that will only invade your career occasionally, but also with some practical advice that you can use on a daily basis.

Within that context, regular communication with your client is one of the most important obligations you have as a lawyer. In fact, the most common complaint filed with attorney disciplinary authorities is not that a lawyer has abused a client trust fund,¹⁰⁷ or even that a lawyer has missed the statute of limitations deadline.¹⁰⁸ The most common client complaint alleges that an attorney has failed to communicate with a client and, more specifically, that an attorney has not returned a client’s telephone calls.¹⁰⁹

Therefore, promptly returning your clients’ phone calls will substantially reduce the chances that one of your clients will file a disciplinary complaint against you. Although isolated complaints of this nature rarely result in substantial discipline, they can result in sanctions if the incidents establish a pattern of failure to communicate. Furthermore, a client who is agitated by your failure to communicate can generate an investigation into your practice, which is a very unpleasant experience.

More importantly, rifts between clients and attorneys are highly unpleasant affairs, even if they do not result in disciplinary complaints and inquiries. To avoid these unpleasant encounters, develop the habit of promptly returning phone calls, e-mails, and letters from clients.¹¹⁰ If you expect to be away from the office for a substantial period of time, arrange to have someone else communicate with the clients who attempt to contact you during this time. Upon your return to the office, attack the stack of unanswered phone messages as soon as possible. Be sure to make a record of your call-back attempts, even if it is simply a note on a phone message sheet that you toss into the matter’s correspondence file. This should offer some protection in case your client later complains, to you or to the disciplinary authorities, about your failure to return phone calls.

Develop the habit of returning phone calls and responding to e-mail messages and letters from non-clients as well. Your relationships with fellow attorneys and others will improve if they know that you will contact them as soon as possible after they have attempted to contact you.

Though promptly returning phone calls might seem to be a simple matter, I offer this important suggestion with an embarrassing admission: I hate the phone. Some flaw in my family’s genes makes us incompetent on the phone. I know it is incomprehensible—an attorney who despises the phone—particularly because attorneys spend a lot of time on the phone. Most of the time, however, there are dozens, if not hundreds, of things (including several that normal people would consider far less pleasant than making phone calls) that I would rather do than work my way through a stack of phone messages. Nonetheless, I have learned the hard way that communication must be a top priority.

For those of you who share my hatred of the phone, there is one little trick that helps me work through a stack of phone messages. First, I separate the messages into calls, from clients and calls from everyone else. Within each of those two stacks, I put the messages in order from the call I least want to make to the one I am least dreading. Then, I work my way through the client calls, because they are the most critical, starting with the one I dread the most. Next, I work my way through the non-client calls in the same manner. Under this approach, each subsequent call becomes easier than the one made before it.

While on the topic of practical tips that can help you avoid trouble, I will give you two more rules to follow. First, do not miss statutes of limitations or other deadlines. The best method to avoid deadline trouble is to have two separate and independent tickler systems. Different persons must run each system, and only one, by definition, can be you. If possible, only one of those systems should be computerized. Give the other person running a tickler system the right and duty to demand that you meet the tickler system deadlines.

107. Abuse of client funds is probably the most common reason for disbarment. Frederick Miller, *Client Funds Need U.S. Rules*, NAT’L L.J., Oct. 2, 2000, at A19.

108. Missing the statute of limitations deadline (or another deadline like the time for a notice of appeal) is probably one of the most likely reasons for an attorney malpractice claim payment.

109. Bernadine Johnson, *Legal Ethics: Avoiding Ethical Misconduct: What Are They Complaining About?*, 43 LA. B.J. 290, 290 (1995); Thomas L. Browne, *Avoiding Malpractice: Lawyers Need a Good Brief-Side Manner to Deal with Clients*, CHI. LAW., June 1994, at 11.

110. See Dana D. Peck & James J. Coffey, *Unhappy Clients May Lodge Complaints of Neglect Even When Malpractice Is Not an Issue*, N.Y. ST. B.J., May/June 1999, at 47, 49 (advising that attorney’s could avoid most client complaints through “a little effort,” common sense, punctuality, and effective communication with clients).

Second, never steal from, “borrow” from, or otherwise mess with the client trust fund. Never means *never*, even if you or your children are starving. No circumstance justifies your use or misuse of your clients’ funds. Doing so is the quickest way out of the legal profession.

VIII. KNOW THE RULES

As you practice law, it may be helpful to remember how the contemporary social commentator, Jerry Seinfeld, described your job, in the opening monologue for a 1993 episode of the sitcom *Seinfeld*. He said:

What are lawyers, really? To me a lawyer is basically the person that knows the rules of the country. We’re all throwing the dice, playing the game, moving our pieces around the board, but if there’s a problem, the lawyer is the only person that has read the inside of the top of the box.¹¹¹

Amazingly, despite that reputation, a substantial number of lawyers forget to peruse the inside of the box-top which, of course, is actually a series of books containing the rules that govern the practice of law.¹¹²

Regardless of what type of practice you enter, you should be generally familiar with the locally adopted version of the ABA’s Model Rules of Professional Conduct.¹¹³ After all, violations of these rules can result in disbarment or other unpleasant sanctions.

As a professional responsibility instructor of both students in law school classes and practicing attorneys at continuing legal education seminars, I am quite familiar with the lack of enthusiasm that law students and lawyers bring to the study of professional responsibility.¹¹⁴ With this awareness, I urge you to resist the universal temptation to forget about the Model Rules after passing the Multistate Professional Responsibility Examination.¹¹⁵

Some lawyers resist thinking about the professional responsibility rules because such thinking only seems to identify problems for attorneys, including some that the Model Rules do not resolve. That the Model Rules create ethical dilemmas and do not resolve all of them¹¹⁶ is no excuse for being unaware of their dictates. In many instances, the Model Rules create not an unresolved ethical dilemma, but a clear mandate for attorneys. If there is only one option for you and it is clearly spelled out in the Model Rules, you would be foolish to proceed without reminding yourself of the action you are required to undertake or refrain from undertaking. Even if the rules conflict, and therefore do not clearly identify the proper course of action, you will be in a much better position to evaluate the probable propriety of a potential course of action after you have reviewed the rules. If ignorance of the law is not an excuse for the ordinary criminal defendant, surely it has even less validity for an attorney who is expected to know the law.

This does not mean that you must memorize the local professional responsibility rules. I teach professional responsibility, and even I do not have the rules memorized. Nonetheless, you should recognize when you are facing a problem that the rules may discuss. In other words, you need to know when to reach for the rule book. Moreover, it helps to know which part of the book to turn to, though you can sometimes find the applicable rule quickly by using the table of contents or an index.

111. *Seinfeld: The Visa* (NBC television broadcast, Jan. 27, 1993).

112. Carol Rice Andrews, *Highway 101: Lessons In Legal Ethics That We Can Learn On the Road*, 15 GEO. J. LEGAL ETHICS 95, 105 (2001) (“Lawyers . . . are ignorant of at least some of their professional obligations. First, the lawyer may never have learned the rule.”).

113. To be complete, it should be noted that a few jurisdictions retain professional responsibility rules based upon the predecessor to the Model Rules, the ABA’s Model Code of Professional Responsibility. Also, at least one state, California, has a set of professional responsibility rules that follow the structure of neither the Model Rules nor the Model Code. See CAL. RULES OF PROF’L CONDUCT (West 1996 & Supp. 2004).

Most states have now adopted some version of the Model Rules, however, often with state-specific changes to individual rules. See ABA Ctr. for Prof’l Responsibility, Dates of Adoption of the Model Rules of Professional Conduct, at www.abanet.org/cpr/mrpc/alpha_states.html (last visited Oct. 12, 2004) (listing 43 states, the District of Columbia, and the Virgin Islands as having adopted the Model Rules).

114. See, e.g., David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 37–38 (1995) (discussing, from a teacher’s perspective, the students’ disdain for professional responsibility classes); Schiltz, *supra* note 1, at 906–07 (discussing the reasons students dislike ethics courses).

115. Cf. Andrews, *supra* note 112, at 105 (“The lawyer also may forget or confuse the rules she studied and once knew.”).

116. Cf. Pepper, *supra* note 72, at 1020–22 (discussing an example provided by Professor Schiltz).

In addition to the professional responsibility rules, most lawyers should be familiar with the procedural or other rules that control their practices. For civil litigators, the Federal Rules of Civil Procedure and the equivalent state rules or statutes are critical. For prosecutors and criminal defense attorneys, the Federal Rules of Criminal Procedure and state analogs occupy a similarly important role. For both civil and criminal trial attorneys, the Federal Rules of Evidence and similar state rules or statutes are fundamental. For tax attorneys, certain provisions of the Internal Revenue Code are cornerstones of practice. For some transactional attorneys, the Uniform Commercial Code is the primary road map.

Over time, certain portions of the rules should become familiar to you, but others will remain in the “know-when-to-reach-for-the-book” category. What is critical to remember is that our profession is rule and statute based. Case law and appeals to a judge’s sense of justice have their place in the practice of law, but a good lawyer also refers to the applicable rules or statutes. Grab the rules book or the code on occasion and spend some time perusing the rules or statutes. Because rules and statutes change, and because human memory is quite imperfect, the language of the rules might surprise you.

IX. MAKE TIME FOR LIFE AND FOR LOVE

We have addressed what you should do in your career as an attorney, but it is also important to emphasize what you should not do. Do not let the practice of law completely take over your life. It is perhaps true in all professions that no one looks back from his or her deathbed and says “I wish I had spent more time at the office,” but we lawyers are particularly prone to spending too much time working¹¹⁷ and later regretting this failure to balance work and family.¹¹⁸

Why do lawyers have this propensity? First, for an attorney, there is always more that can be done. For example, I have told you that preparation and hard work are critical to success. No matter how much you prepare, it is always possible to prepare more.

Second, on top of the constant pressure to work harder, which is certainly not unique to our profession, many lawyers must manage the particular pressure of the billable hour. In any practice where income is largely or wholly built upon billable hours, pressure to work more will always exist. When you are an associate, your firm will expect you to bill a certain number of hours and will probably give you a bonus for hours billed above this target. When you become a partner, there will still be a direct nexus between your billings and your compensation. Even solo practitioners know that their incomes are tied to the number of hours they work and bill.

You will figure how to do the math very quickly. Based upon your salary and bonus rates, you will know how much you can earn in a given time period by working and billing that work. For example, assume that as an associate in a prestigious firm, you bill \$150 per hour. Assume further that your salary is \$100,000, with a billing target of 2,000 hours.¹¹⁹ In other words, your firm expects you to bill \$300,000, and expects to pay you \$100,000

117. One scholar who has been particularly influential in reviewing attorneys’ dissatisfaction with their jobs expressed it succinctly: In every study of the career satisfaction of lawyers of which I am aware, in every book or article about the woes of the legal profession that I have read, and in every conversation about life as a practicing lawyer that I have heard, lawyers complain about the long hours they have to work.

Schiltz, *supra* note 1, at 889; *see also* Shepard, *supra* note 4, at 173 (discussing “the separation from family that long hours of practicing law can represent”). Even an ardent critic of Professor Schiltz and defender of the large law firm admits that “there may be times during the year when the number of hours one has to work in a day or a month leaves little time for anything else.” McLaughlin, *supra* note 3, at 1012.

118. *Cf.* Pepper, *supra* note 72, at 1022 (documenting attorney regret regarding career choices); Traynor, *supra* note 2, at 1027 (noting problems created by the pressure to bill).

119. Perhaps 2,000 hours is now a low billing target for large law firms. *See* Phyllis T. Bookspan, *A Delicate Imbalance—Family and Work*, 5 TEX. J. WOMEN & L. 37, 61 (1995–1996); Schiltz, *supra* note 1, at 891–93; Tina Gutierrez, “No Clean Socks”: *The Crisis of Lawyer Dissatisfaction*, LAW, HIRING & TRAINING REP., Feb. 1993, at 3. We will use 2,000, though, because it is a round figure and it will make my calculations easier for you to follow.

Before you take a job with a billing expectation of 2,000 hours per year, you might want to do another calculation. Assuming that you manage to squeeze in two weeks of vacation, including holidays, you are left with 50 work weeks in which to acquire those 2,000 hours of billings. If you have not worked as an attorney, you might think that sounds reasonable because it comes to 40 hours per week. Unfortunately, you do not yet realize how much time you spend at the office for which you will not be able to bill. If we estimate that you will actually work 1.5 hours for every hour that you bill, *see* James J. Alfani & Joseph N. Van Vooren, *Is There a Solution to the Problem of Lawyer Stress? The Law School Perspective*, 10 J.L. & HEALTH 61, 62–63 (1995–96); Schiltz, *supra* note 1, at 894–95, you are now up to 60 hours at the office per week for 50 weeks. Keep in mind, this figure is just to meet the “target” of 2,000 hours. *See* Traynor, *supra* note 2, at 1027 (noting the difficulty of meeting billing requirements). As you will soon discover, however, those who barely meet the billing target will not survive long in a law firm. Your goal will be to exceed the target by a significant margin. Now you are looking at spending roughly 70

to bill that amount. After checking with the associates who have been with the firm for a few years, you learn that, if you exceed the 2,000-hour billing target, you can expect a year-end bonus of approximately one-third of your excess billings. In other words, for every hour that you are able to bill, you will receive about \$50 (one-third of your billing rate of \$150).

You will be savvy enough to figure out your effective earning rate per hour in relatively short order. This is a good piece of information for you to have, but it is also dangerous. Once you know what you earn per hour, you will start to see that the old saying “time is money” is more valid in the law firm environment than in almost any other employment context. After you calculate your effective earning rate per hour, as long as there is billable work waiting to be done, you will find it impossible to ignore the “cost” of not doing that work.

Assume you are considering taking one of your children to a baseball game or a concert. The alternative is to stay at the office and complete some billable work that evening. “I sure would like to spend the evening with Tracy,” you say to yourself, “but I could get in at least five billable hours if I just stay at work. Five times \$50 is \$250. Can I really afford to give up \$250 with all the bills that are piling up at home?”

This question plagues every attorney whose compensation is tied to billings. My plea to you is that, when faced with the choice between family and work, at least a significant number of the times, you say, “I am spending the evening with Tracy.”¹²⁰

I am not suggesting that you can always expect to answer the question that way. If you expect to always answer the question in favor of your family, you should try to find a career outside the law, because lawyers work extremely long hours.

What I am saying instead is that sometimes you must be willing to turn down income, and perhaps even career advancement, in favor of spending time with the people you love.¹²¹ Although this may seem obvious, it is not easy to accomplish. The economic and other pressures of the practice of law have caused far too many lawyers to decide against spending time with family too many times.¹²²

As a soon-to-be lawyer, you may be telling yourself that the pressures inherent in deciding between work and family will fade as you advance in your career. You may think that when you become a partner and are earning \$100 (of your \$200 billable rate) per hour, you will only need to find two and half hours to earn that extra \$250. Sadly, it does not work that way. When you become a partner and generate \$100 of income for each of the five possible hours of additional work, you will have to turn down not just \$250 to spend the evening with Tracy, but \$500. Balancing family and work does not get easier with advancement. In fact, in a strange way, it gets harder.

Although these pressures are most extreme and direct for those whose compensation is tied to billings, other lawyers are not exempt from similar pressures. Prosecutors, public defenders, and other government attorneys earn promotions by putting in extra time. Even law professors feel the pressure to write more law review articles and spend more time preparing for class.¹²³ In almost any legal career, there will be pressure to spend more time at the office. Sometimes you must give in to that pressure, but sometimes you must resist it.

Finally, in the interest of full disclosure, I feel compelled to point out that, perhaps more so than in other areas I have outlined here, I have failed at this balancing process. As I look back on my own career, my primary regret is that I have too often resolved the tension between work and home in favor of work. Sadly, I am quite confident that I am not alone in this assessment.¹²⁴ The practice of law—any practice of law—can be a black hole that will swallow up all of your time and energy if you let it. One of your biggest challenges as a lawyer will be finding time to not be a lawyer.

hours a week at the office.

After doing this math, you will understand why some scholars and jurists have suggested that it may be close to impossible to be honest, ethical, and happy at a large law firm. See Schiltz, *supra* note 1, *passim*; Schiltz, *supra* note 81, *passim*. I believe this is an overstatement because there are attorneys who enjoy working enough to meet such challenging targets. However, I admit that it is difficult to be honest, ethical, and happy under these working conditions, even for these workhorses, and impossible for others who do not want to work that hard. With these demands in mind, I urge you to consider the implications of a job that requires working these hours before accepting such a job. If you cannot be happy facing and meeting such expectations, find another job that will be better suited for you. See *supra* Part VI.

120. Traynor, *supra* note 2, at 1031.

121. *Id.* at 1028, 1031 (“Most of all, it is essential to strive for a balance—for oneself and, if possible, for others.”).

122. Lawyers’ lamentations about constantly resolving tensions between work and family in favor of work are legion, and well documented. For a few examples, see the sources quoted and cited in Schiltz, *supra* note 1, at 889–90 nn.127–35.

123. See Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 748–52 (1998).

124. See *supra* notes 117–119, 123.

X. GIVE BACK

We lawyers are given many gifts. As is often the case for beneficiaries of largess, we sometimes forget how much we have been given. Allow me to quickly list just a few of the things others have given you. First, though you have certainly sacrificed a lot for the law license you will soon obtain, so have your parents and other loved ones. Second, by the time you have graduated from law school, you will have been the beneficiary of at least twenty years of education, much, if not all, of it subsidized by taxpayers. Third, when you get that law license, you will become a member of the only profession to which an entire branch of government is devoted. Think of it: courthouses, judges, clerks, bailiffs, jurors, and many other resources, all taxpayer-funded. Although taxpayers may hate us,¹²⁵ they have provided us with the infrastructure that makes our jobs possible.

So give something back. Not because you have to.¹²⁶ Because you should. It is undignified to take without giving in return.¹²⁷ Moreover, give because you can.¹²⁸ You have skills that can be very valuable to the community. Finally, give because it feels good.¹²⁹

Perhaps the best place to start is to provide pro bono legal services to the poor,¹³⁰ but this, at least in my view, is not the only valuable way to give back to the community. Aside from providing services to the poor, attorneys serve their communities by: sitting on boards of charitable organizations and offering their legal skills and advice without compensation; sacrificing income to run for office because they have unique skills for drafting legislation, advocating on behalf of constituencies, and resolving disputes; accepting low-paying legal jobs that help those who would otherwise go without legal services; and volunteering to assist public interest groups. There are countless ways for attorneys to offer their valuable combination of intellect, education, advocacy, conflict resolution, and logic skills. Find one or, better yet, several.

While service is on your mind, let me offer one specific suggestion. Before the end of your legal career, make sure you have been someone's Atticus Finch.¹³¹ At least once in your career, represent an unpopular client even though you will not make a dime (and may, in fact, lose income); even though your partners will complain about it; even though your other clients will be concerned that you are not paying adequate attention to them; and even though the judge will be irate that you are wasting her time.

125. See *supra* note 4.

126. To be honest, mandatory pro bono, with mandatory reporting requirements, has pretty much been a non-starter. Only one state (New Jersey) requires attorneys to do pro bono work and only one state (Florida) requires the reporting of voluntary pro bono hours worked. See DEVINE ET AL., *supra* note 69, at 131–32 (citing Kellie Isbell & Sarah Sawle, *Pro Bono Publico: Voluntary Service and Mandatory Reporting*, 15 GEO. J. LEGAL ETHICS 845, 856, 859 (2002)).

127. President Calvin Coolidge observed, “No person was ever honored for what he received. Honor has been the reward for what he gave.” Rowe, *supra* note 52, § IX.

128. See, e.g., Traynor, *supra* note 2, at 1031 (discussing lawyers who “made extraordinary contributions to the public and profession while living healthy and satisfying lives”).

129. Rowe, *supra* note 52, § IX (“There is nothing more rewarding and more satisfying in life than giving. As it has been written, it is more blessed to give, than to receive.”).

130. *ABA Professionalism Report*, *supra* note 4, at 297 (“There is a need for increasing the pro bono activities of the entire Bar, particularly to serve the needs of those groups that are unable to afford representation.”); James L. Baillie, *A Call to Honor: Increasing Our Pro Bono Services*, BENCH & B. MINN., Oct. 2003, at 5.

Representing pro bono clients is within all attorneys' scope of competence, so lack of skill or experience is no excuse. Every attorney has skills that can be put to work for persons who might otherwise go without representation. See, e.g., William F. Abrams, *Fighting for Life and Justice in Alabama: Observations from the Front Lines*, 35 U. TOL. L. REV. 585 (2004) (describing an intellectual property attorney's pro bono work for children and death penalty defendants).

131. Atticus Finch was the protagonist in a well-known novel and movie. See HARPER LEE, *TO KILL A MOCKINGBIRD* (1960). For those unfamiliar with the story, here is a concise summary:

Atticus Finch was a Maycomb, Alabama country lawyer who defended a . . . black man [who was wrongly accused] of raping a white woman in a town deeply infected by racial bigotry. Not surprisingly, the odds were decidedly stacked against the defendant. In the end the obligatory “good old boy” guilty verdict was rendered. However, Atticus Finch ploughed through the bigotry to demonstrate that fairness, gentleness, and goodness can force even the worst of humanity to acknowledge the truth. Atticus epitomized idealistic individualism and honor.

Robert Gerard, *Aloha for Lawyers—Aloha and Mahalo Atticus Finch*, ORANGE COUNTY LAW., Nov. 2003, at 4, 4; see also Kruse, *supra* note 71, at 59–60 (comparing the morality of a defense attorney's cross-examination of a truthful rape victim to Atticus Finch's “discrediting of a lying rape victim in *To Kill a Mockingbird*”).

Of course, the case need not be for a “client” in the traditional sense, and you do not have to be a private practitioner, but the idea is the same.¹³² I am talking about the kind of case that hurts you because it keeps you from other pressing concerns. At least one time, throw yourself into a case just because it is the right thing to do. At least one time, do what you came to law school to do—seek justice.¹³³

When you have represented your last client, that one case will mean more to you than any of the others, regardless of whether you “win” or simply spend every ounce of energy you can muster trying to win and nevertheless fail.¹³⁴ There is no higher use for a law license than for the person who holds it to fight against all odds, and perhaps even against all common sense, for justice.

CONCLUSION

As you strive for the law license that will become the cornerstone of your career, there is much that you simply cannot know about how that law license will change your life. Although a time existed when most lawyers ended their careers practicing law in the same firm that they entered immediately after law school, that is no longer the case. These days, most careers, including most legal careers, include several job changes.

You do know this, however. The day will come, perhaps a lot sooner than you expect, when you will no longer practice law. When that day comes, if you are fortunate enough to be able to look back on your legal career, the two questions you should ask yourself in order to measure your career are:

First, did that law license you worked so hard to obtain make your life a richer experience?
Second, did you use your law license to make your corner of the world a better place?

132. Indeed, my own Atticus Finch case did not involve representation of a client per se because I was a prosecutor at the time. The facts were difficult because the rape victim, a fifteen-year-old, had been drinking heavily and smoking marijuana before she was raped. Because the defense was consent, the victim’s illegal drinking and drug use presented substantial obstacles. In addition, the defendant, through a combination of charm, intelligence, and helpful law enforcement connections, had eluded conviction on previous occasions. Many believed the case was unwinnable and that pursuing it would only serve to waste the court’s time and put the victim through unnecessary anguish. They tried to talk me out of, what they saw as, a misguided interest in prosecuting the case.

But the victim was steadfast in asserting that, although she had done many things wrong that night, she had not consented. Moreover, she was already enduring the name calling and other public humiliation that too many rape victims suffer. Despite the long odds of a “he said/she said” case where “she” was drinking heavily and smoking marijuana, I was convinced she did not consent, and this conviction alone might have made the case one that needed to be prosecuted. What removed all doubt in my view about the need to prosecute, was the uniquely painful path the victim traveled after the rape. The appellate court described her plight as follows:

T.L. became pregnant with twins as a result of the rape. One twin died in utero. Because of complications with the pregnancy, T.L. was hospitalized and gave birth to the remaining child by cesarean. The baby girl was born with a fatal disease, osteogenesis imperfecta, that caused her bones to be extremely brittle. The baby died three weeks after birth.

T.L. had not attended school since the time of the rape and did not return until after her daughter had died.

United States v. Yankton, 986 F.2d 1225, 1227 (8th Cir. 1993).

So we tried the case on two counts, one of statutory rape and one of, as the verdict form described it, “causing another to engage in a sexual act, by using force against that other person.” The point is that we tried the case and poured our hearts, minds, and souls into it, so the verdict perhaps should be irrelevant to the current discussion. But the verdict is never irrelevant in such a case, so I will report it also. Those who said we would not win were right. Happily, though, they were only right about the statutory rape count that resulted in a not guilty verdict. The jury returned a guilty verdict on the forcible rape count. Thereafter, the defendant appealed and we cross-appealed on sentencing issues. The court affirmed the conviction and gave us the opportunity to lengthen the sentence on remand. *See id.*

The *Yankton* case burned a hole into my heart like none before or after it, including homicide and civil cases that involved tens and, in one instance, hundreds of millions of dollars. Enough time now has passed that I no longer remember the names of the homicide victims whose killers I prosecuted. As long as I am able to remember anything, though, I expect to remember that young rape victim’s name. Although I cannot say I am proud of everything I have done as a lawyer, I am very proud of fighting for justice for her and her community, and I am thankful I was fortunate enough to have the opportunity to do just that.

133. For an interesting story of another attorney’s Atticus Finch case, see Rabb Emison, *A Lawyer’s Compensation*, RES GESTAE, Feb. 1998, at 46.

134. As one commentator recently reminded us, even Atticus Finch lost his Atticus Finch case:

The truth is, though, he lost the case and his client died. Yet the story is inspirational and timeless. Why? Because when Atticus was asked to defend Tom Robinson, an indigent charged with a capital offense, he said “yes” without hesitation, and he defended Robinson with all his zeal and all his skill and in the face of personal danger and community prejudice—and was prepared to continue to defend him on appeal, even after the guilty verdict.

The Honorable Helen Berrigan, “*Speak Up. Spread the Word.*” *A Call to Action*, CHAMPION, Jan./Feb. 2004, at 28, 32.

My hope for you is as simple, and as complex, as this: When the time comes to ask yourself those two questions, I hope you can answer both of them “yes.” For each question, “yes” is neither automatic nor easy, but for each, “yes” is achievable.

Different attorneys define success differently, but I believe any lawyer who can honestly answer “yes” to both questions is a success, while a lawyer who must answer “no” to either is not. As you pursue your “yes” answers, wherever and however you pursue them, I wish you the best your life can offer, in the practice of law and outside that practice. May your journey to those two “yes” answers be full of challenge, adventure, joy, and love, with just enough heartache to remind you that, like all significant accomplishments, those two “yes” answers do not come without sacrifice.