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The Legal Profession, The Impact of Law and Legal Theory, Foreword

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SYMPOSIUM

THE LEGAL PROFESSION: THE IMPACT OF LAW AND LEGAL THEORY

FOREWORD

Geoffrey C. Hazard, Jr.

IT is a welcome development that the law of lawyering has received the concentrated attention expressed in the papers presented in this symposium. The law of lawyering has evolved over the last two decades from virtually a "non-subject"[1] to one that is not only of intense interest to lawyers and law students, but also one of peculiar complexity.

The law of lawyering has existed in Western society, in at least some form, ever since the legal profession emerged as a distinct calling in the eleventh or twelfth century. Paul Brand's excellent history of the early English profession[2] explicates the efforts of the courts and of Parliament to regulate lawyers. In the medieval era, the profession primarily consisted of two groups: the serjeants and the attorneys.[3] The serjeants, considered the elite of the profession, were the only lawyers permitted to speak directly to judges and were essentially part of the court rather than representatives of clients in the modern sense.[4] The primary function of attorneys—considered the "lower branch" of the profession—was to "attend court in place of [their] clients."[5] They thus directly represented clients.[6]

If the conduct of sergeants involved legal or ethical problems, there is little record of it. There is, however, a substantial historical record on the regulation of attorneys.[7] Professor Jonathan Rose, building on Mr. Brand's work, has recently published an illuminating study of the efforts to control various forms of misconduct on the part of attorneys—conflict of interest, overcharging, delay, cheating clients, etc.[8] Hence, we know that from an early date there was a law of lawyering, at least for the lower branch of the profession.

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1. *See infra* notes 11-13 and accompanying text.
2. Paul Brand, The Origins of the English Legal Profession (1992).
3. *See id.* at 70-85.
4. *See id.* at 94-105. The serjeants' function "was to 'serve' the whole of the king's people and [they] came to take an oath that they would do this." *Id.* at 95.
5. *See id.* at 87.
6. *See id.* at 89-91 (explaining how an attorney received "appointment" from a litigant or a court).
7. *See id.* at 128-35.
8. *See* Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 Syracuse L. Rev. 1 (1998).

Sir William Holdsworth, in his classic and still basic History of English Law, gave extensive coverage of the bar and its evolving role into the Victorian age.[9] By the early years of the present century, Edward Thornton had written a treatise on the subject of "Attorneys."[10] Thus, there certainly has been a law of lawyering for at least a century.

THE INVISIBLE LAW OF LAWYERING

Until recently, however, the law of lawyering was generally ignored by most lawyers.[11] The subject was not generally taught in law schools.[12] Indeed, until a couple of decades ago, many law schools offered at most an optional course or a seminar in professional ethics.[13] Courses that were offered focused on the codified ethics rules, such as the Canons of Ethics,[14] the Model Code of Professional Responsibility,[15] and, more recently, the Model Rules of Professional Conduct.[16] These courses, while better than nothing, ignored the interconnections of the ethics rules and the larger legal framework.

Some of those interconnections were implicit in the codified rules. For example, Rule 1.2(d) of the Model Rules provides that a lawyer shall not "counsel" or "assist" in conduct that is "criminal" or "fraudulent."[17] Understanding the Rule requires analysis of the concepts of accessory liability ("counsel" or "assist") under criminal and tort law,

9. 12 Sir William Holdsworth, A History of English Law 4-101 (1938).

10. Edward M. Thornton, A Treatise on Attorneys at Law (1914).

11. *See* Special Comm. on Evaluation of Disciplinary Enforcement, American Bar Ass'n, Problems and Recommendations in Disciplinary Enforcement 1 (1970). The Clark Report described lawyer discipline in 1970 as "scandalous," *id.*, and specifically identified 36 problems, including the lack of suspension procedures, the movement of disbarred practitioners to other locales, routine reinstatement of disbarred lawyers, reluctance of lawyers in small communities to discipline one of their own, and the undermanning and underfunding of state disciplinary agencies. *Id.* at 1-2, 19.

12. *See* James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere*, 60 U. Cin. L. Rev. 83, 86-87 (1991) (noting that by 1915, "fifty-seven of the eighty-one law schools offered a course on legal ethics," but "[t]hese lectures were often optional and their importance was down-played by the law schools"); *see also* Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 Loy. U. Chi. L.J. 719, 722-25 (1998) (detailing the disregard within the academic community for legal ethics").

13. *See* Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. Legal Educ. 31, 31 (1992) ("Legal ethics has long been a subject of popular polemics and bar platitudes, but only in the last two decades has it received serious academic treatment."); *see also* Pearce, *supra* note 12, at 722 (noting that in the 1950s, "most ethics courses 'consisted of only one hour of ungraded instruction each week'" (quoting Rhode, *supra*, at 36)).

14. Canons of Professional Ethics (1908).

15. Model Code of Professional Responsibility (1971).

16. Model Rules of Professional Conduct (1981).

17. The Rule provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may

as well as the criminal and civil concepts of fraud itself.[18] Yet most courses and course books on professional responsibility did not address those issues. Moreover, in my experience on the faculties of several law schools, the concepts of accessorial liability and the vague contours of "fraud" typically went unexamined, or were examined only cursorily, in the other courses taken by the students, such as Torts or Corporation Law. Hence, in most law schools, there was little or no discussion of these key limits of the law under which a lawyer is supposed to function.

Another example of the interconnection between lawyer conduct and the requirements of law is explicit in Rules 3.1 and 3.4 of the Model Rules of Professional Conduct concerning the obligations of litigation counsel.[19] Rule 3.1 refers to restrictions on frivolous litigation, such as Rule 11 of the Federal Rules of Civil Procedure.[20] Hence, Rule 3.1 poses the difficult question of whether a given "leading edge" legal claim or defense is within the protective umbrella of a "good faith" contention or outside that protection.[21] Rule 3.4 imposes various restrictions on "macho" litigating tactics,[22] but those restrictions are not independently defined in that Rule. Instead, Rule 3.4

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counsel a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Model Rules of Professional Conduct Rule 1.2(d) (1995). The key terms, "counsel," "assist," "criminal" and "fraudulent" are carried over from the Code of Professional Responsibility. *See* Model Code of Professional Responsibility DR 7-102(A)(7) (1980) (providing that a lawyer shall not "[c]ounsel or assist his client in conduct the lawyer knows to be illegal or fraudulent").

18. *See* Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 Fordham L. Rev. 327, 355-60 (1998); Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 Miami L. Rev. 669, 675-76 (1981) ("DR 7-102(A)(7) . . . expressly invites our attention to general law by using the term 'illegal.'").

19. *See* Model Rules of Professional Conduct Rule 3.1 (Meritorious Claims and Contentions); *id.* Rule 3.4 (Fairness to Opposing Party and Counsel).

20. *Compare id.* Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."), *with* Fed. R. Civ. P. 11(b) ("[Presentation to the court by an attorney of any motion or other paper certifies that] the claims, defenses, and other legal contentions therein are warranted by existing law or by nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]").

21. One of the leading cases on this issue under Rule 11 is *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986), *sua sponte request for reh'g en banc denied*, 809 F.2d 584 (1987). *See* Georgene Vairo, *Rule 11 and the Profession*, 67 Fordham L. Rev. 589, 630-31 (1998) (discussing *Golden Eagle*).

22. Specifically, Rule 3.4 provides that:

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. . . . ;

(b) falisfy evidence . . . ;

(c) knowingly disobey an obligation under the rules of a tribunal . . . ;

incorporates by reference the legal rules against concealment of evidence, falsifying evidence, illegal trial tactics, and so on.[23] In teaching professional ethics, however, there was a tendency to pass lightly over specific distinctions—for example, between declining to offer damaging evidence to an opponent and failing to come forth with damaging evidence when procedural law so requires, as under our discovery rules.[24] Other rules incorporated into Rule 3.4, and the specifics of procedural law which they incorporate, were often similarly bypassed.

Other interconnections between the codified ethics rules and the larger legal framework are implicit. Perhaps the most important of these interconnections is in Rule 1.13, which addresses a lawyer's representation of an organization.[25] A large majority of lawyers represent corporations some of the time and many lawyers represent corporations all the time.[26] Corporate law is very clear on the proposition that the corporate entity is a legal personality, distinct from its officers and employees.[27] As a matter of corporate law, therefore, corporate officers and employees are mere agents of the corporate entity.[28] Although this proposition had long ago been applied in the context of relationships between lawyer and corporation,[29] some lawyers still fail to appreciate the implications of this distinction.[30] In my observation as a law teacher, many students graduate without a clue

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(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . .; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party . . . .

Model Rules of Professional Conduct Rule 3.4.

23. *See id.*

24. An interesting judicial encounter with the law concerning spoliation of evidence, as applied to conduct of lawyers, is *Commonwealth v. Stenhach*, 514 A.2d 114 (Pa. Super. 1986). That the law against spoliation of evidence (the weapon in a murder case) should be applied to criminal defense counsel seemed to dumbfound the court as much as it dumbfounded the lawyers who committed the spoliation. *Id.* at 124-25.

25. Model Rules of Professional Conduct Rule 1.13 (Organization as Client).

26. *See, e.g.*, General Dynamics Corp v. Superior Court, 876 P.2d 487, 491 (Cal. 1994) (In Bank) ("According to a study conducted in the early 1980's, 50,000 lawyers were on corporate payrolls, a figure double that of 15 years earlier; a more recent survey indicates that more than 10 percent of all lawyers in the United States are employed in-house by corporations." (note omitted)).

27. 1 James D. Cox et. al., Corporations §§ 7.1, 8.1, at 7.2, 8.1-.2 (1998).

28. *Id.* § 8.1, at 8.1-.2.

29. *See, e.g.*, Meehan v. Hopps, 301 P.2d 10 (Cal. Ct. App. 1956) (holding that a lawyer who worked with an officer of a corporation while representing the corporation did not have an attorney-client relationship with the officer and could therefore represent the corporation in a suit against the officer).

30. *See, e.g.*, *In re* American Continental Corp./Lincoln Sav. and Loan Sec. Litig., 794 F. Supp. 1424, 1453 (D. Ariz. 1992) (rejecting a law firm's argument that "corporate representation often involves the distinct interests of affiliated entities" and reaffirming that "[a]n attorney who represents a corporation has a duty to act in the

as to its significance and hence enter corporate practice unaware that when the lawyer is employed by corporation, corporate officials are not clients in the strict sense of that term.[31]

Instruction in professional ethics is now much improved. Courses in legal ethics are universally required and there is a growing number of increasingly good casebooks[32] and of scholars with wider perspectives. We also now have a Restatement on the subject.[33]

Nevertheless, many lawyers remain ignorant of, or insensitive to, basic rules of ethics. Particularly persistent is ignorance of or insensitivity towards the rules of conflict of interest, including the rules whereby the conflict of one lawyer is imputed to the other lawyers in a firm through a concept of agency law.[34] As my colleague Professor Susan Koniak and I have previously observed, part of the reason for this attitude is that the law schools have not taught professional responsibility as "real" law.[35] Another contributing cause, in my opinion, is the mechanical approach to legal ethics in the Multistate Professional Responsibility Examination.[36]

There are perhaps two other factors that contribute to the difficulty that many lawyers have in recognizing and appropriately responding to the law of lawyering. One factor is the historical legacy that the norms of lawyer conduct have been considered a matter of "ethics" rather than of law. A related factor is one that might be called viewpoint.

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corporation's best interest when confronted by adverse interests of directors, officers, or corporate affiliates").

31. *See* Model Rules of Professional Conduct Rule 1.13(a) ("A lawyer employed or retained by an organization *represents the organization* acting through its duly authorized constituents." (emphasis added)).

32. *See, e.g.*, Nathan M. Crystal, Professional Responsibility: Problems of Practice and the Profession (1996); Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics (5th ed. 1998); Thomas D. Morgan & Ronald D. Rotunda, Problems and Materials on Professional Responsibility (6th ed. 1995); John T. Noonan, Jr. & Richard W. Painter, Professional and Personal Responsibilities of the Lawyer (1997).

33. Restatement (Third) of the Law Governing Lawyers (Proposed Final Draft No. 2, 1998); Restatement (Third) of the Law Governing Lawyers (Proposed Final Draft No. 1, 1996).

34. *See* Model Rules of Professional Conduct Rules 1.9-.12.

35. *See* Susan P. Koniak & Geoffrey C. Hazard, Jr., *Paying Attention to the Signs*, L. & Contemp. Probs., Summer/Autumn 1995, at 117, 117 ("Legal ethics remains the step-child of legal education. . . . And at most schools the 'pervasive method,' in which legal ethics is integrated into the standard coursework, is still little more than tokenism . . . .")

36. *See* Leslie C. Levin, *The MPRE Reconsidered*, 86 Ky. L.J. 395, 397 (1998) (stating that the Multistate Professional Responsibility Examination "has unintentionally trivialized the subject [of legal ethics] because it tests hypothetical standards, its range is very limited, and it covers some topics irrelevant to all but a tiny percentage of lawyers").

LAWYER NORMS AS "MERE ETHICS"

The legal profession's traditional understanding has been that the norms governing lawyer conduct were rules of ethics. In 1908, the norms the American Bar Association promulgated were Canons of Professional *Ethics*.[37] The ABA Canons were built on the foundation of a code promulgated in Alabama,[38] which was also formulated as a statement of ethical norms and which in turn was derived from lectures on ethics by David Hoffman and George Sharswood.[39] It was only in 1970, through the ABA promulgation of the Model Code of Professional Responsibility,[40] that the organized profession came to regard the norms to include legal obligations—i.e., the obligations stated as Disciplinary Rules.[41]

By the same token, the traditional mechanism of enforcement was understood by the profession to be the disciplinary procedure of a grievance committee.[42] A grievance committee was a fraternal body whose office was visualized as that of chastising lapsed brothers.[43] As I read the historical record, if a lawyer did really bad things, such as repeatedly stealing from clients, the way the system usually worked was that the local bar collectively and informally arrived at a decision that "something had to be done" about the miscreant—a decision that expressed ethical norms rather than applied legal standards.[44] Thereupon, the offender was brought before a grievance tribunal whose verdict was implicitly foreordained.[45] Thus, the norms governing lawyers

37. Canons of Professional Ethics (1908).

38. *See* Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 Ala. L. Rev. 471, 505 (1998) ("Virtually all of the thirty-two original Canons derive from one of the fifty-six provisions of the Alabama Code of Ethics [of 1887].").

39. *See id.* at 498 ("The influence of Hoffman and Sharswood is clearly visible in the code."); *id.* at 504 ("[T]he Alabama Code of Ethics adopts the lofty sentiments and assumptions about shared norms reflected in the writings of Sharswood and Hoffman."); Russel G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 Geo. J. Legal Ethics 241, 243-47 (1992) (discussing the role of Sharswood's work in the development of legal ethics codes); *see also* Marston, *supra* note 38, at 493-97 (providing background information about Hoffman and Sharswood); Pearce, *supra*, at 248-58 (discussing Sharswood's vision of legal ethics).

40. Model Code of Professional Responsibility (1980).

41. *See* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 Yale L.J. 1239, 1249-60 (1991) (discussing this transformation).

42. *See* Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 Geo. J. Legal Ethics 911, 919-20 (1994).

43. *See id.* at 919.

44. For an analysis of the empirical and functional differences between "ethics" and legal rules, see Geoffrey C. Hazard, Jr., *Law, Morals, and Ethics*, 19 So. Ill. U. L.J. 447, 448, 451, 453 (1995) [hereinafter Hazard, *Law, Morals, and Ethics*] (defining separately "law," which is norms formally promulgated from a political authority, "morals," which are subjective notions of right and wrong, and "ethics," which are shared norms based on reciprocal recognition).

45. *See* Geoffrey C. Hazard, Jr. & Cameron Beardley, *A Lawyer's Privilege Against Self-Incrimination in Professional Disciplinary Proceedings*, 96 Yale L.J. 1060, 1063 (1987) (stating that in a disbarment proceeding, "the burden of proof was on the

were considered substantively as something less than law and procedurally as enforceable through an informal procedure maintained by colleagues.[46]

In these terms, the norms of lawyer conduct were certainly not "law," at least as we currently understand it—rules formulated with the precision of a legal code, enforced through a procedure itself having similar precision.[47] Moreover, in recent years, enforcement of the norms often occurs outside the grievance machinery.[48] The law governing lawyers, including that codified in the ethics codes, is now typically enforced by courts in proceedings for disqualification and cost sanctions.[49] The courts, of course, are constitutionally required to function on the basis of substantive legal rules, administered through procedural legal rules. Hence, the rules of "ethics" have effectively become law governing lawyers.[50]

THE PROBLEM OF VIEWPOINT

The fact that the norms of lawyer conduct have become "legalized" poses a problem of viewpoint. Stated simply, a lawyer's viewpoint of "law" when the lawyer is providing representation of a client is quite different from her viewpoint of law as it is applied to herself as a lawyer.

A lawyer's viewpoint in representing clients includes the viewpoints of the advocate and of the office counselor or transaction lawyer. The advocate contemplates how the legal system is likely to respond to the client's cause. In this context, the legal system includes the opposing party, the opposing party's counsel, the court, the jury in a jury-triable case, and possibly others. How these players interact will determine the operative effect—the "cash value"—of the legal system to the client. It is this viewpoint which Oliver Wendell Holmes evidently had

attorney to prove his innocence"). In *In re Ruffalo*, 390 U.S. 544 (1968), however, the Supreme Court held that grievance proceedings had to meet minimum Due Process standards. *Id.* at 550. That decision was an important step in the procedural transformation of the norms of lawyer conduct from "ethics" into law.

46. *See* Devlin, *supra* note 42, at 918-19 (stating that early bar associations were concerned with "good fellowship," and also informally disciplined their members).

47. *See* Hazard, *Law, Morals, and Ethics*, *supra* note 44, at 454-55 (differentiating between law and ethics on the ground that ethical norms are developed through transactions between relevant community actors, and that law, once promulgated, is committed to applying itself to the same facts in similar ways).

48. *See* Benjamin C. Zipursky, *Attorney Malpractice and the Structure of Negligence Law*, 67 Fordham L. Rev. 649, 662-81 (1998) (discussing the application of tort law to lawyer malpractice). *See generally* Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice (4th ed. 1996).

49. *See* Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 Fordham L. Rev. 71 (1996) (discussing judicial responses to attorneys' conflicts of interest). An injunction remedy through an independent suit may also be available. *See* Maritrans v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1279 (Pa. 1992).

50. *See* Restatement (Third) of the Law Governing Lawyers §§ 5-7 (Proposed Final Draft No. 2, 1998) (cataloging remedies and sanctions).

in mind when he remarked that law is what "the courts will to do in fact."[51] This viewpoint is from an "external" position, where the lawyer makes a calculation of behavioral probabilities in the legal system considered as a whole. From this viewpoint, the lawyer addresses whether and how far she can maneuver within the system in a direction favorable to the client.

The viewpoint of the office counselor or transaction lawyer is also external, but one step removed. The lawyer as counselor gives advice based on a calculation of behavioral probabilities as to whether the legal system will actually be mobilized against the client and, if so, on what terms. Put crudely, the *legal* question for the office counselor may be whether the client can "get away with" pursuing a contemplated course of action. This viewpoint is what Holmes evidently had in mind in his projection of the viewpoint of the "bad man": "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict [what the courts will do in fact] . . . ."[52]

I put to one side the complicated issue of the extent to which the lawyer as advocate or as counselor may (or should) consider moral and ethical issues in addition to or beyond the law.[53] In my opinion, it is impossible for anyone, including a lawyer, to look at the law simply as a bad man would, i.e., to "know the law and nothing else."[54] Even bad men have consciousness going beyond the law. Lawyers are people before they attend law school, and most of them continue to be such after entering the practice.[55] We cannot forget what we learned as children[56] or what each of us has learned from the totality of our individual experience. Because lawyers know these things as people, lawyers cannot "unknow" them in our professional capacity.

Nevertheless, at least theoretically one can comprehend how a lawyer might seek to provide a client advice based solely on the law, without regard to other normative considerations such as morals, ethics,

51. O.W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897).

52. *Id.* at 459.

53. *See* Model Rules of Professional Conduct Rule 1.16(b)(3) (1995) (stating that a lawyer may withdraw if client insists on pursuing repugnant objective); *id.* Rule 2.1 (stating that a lawyer may refer to moral factors in giving legal advice).

54. *See* Holmes, *supra* note 51, at 459.

55. *See* Simon Yeznig Balian, *Personal Responsibility for Professional Actions*, 32 Cath. Law. 337, 352 (1989) (stating that by the time of a person's law school entrance, he or she has already formed the moral character necessary to act morally). Consider John Dean's admission: "I must say that I knew that the things I was doing were wrong, and one learns the difference between right and wrong long before one enters law school. A course on legal ethics wouldn't have changed anything." Thomas Lickona, *What Does Moral Psychology Have to Say to the Teacher of Ethics? in* Ethics Teaching in Higher Education 103, 129 (Daniel Callahan & Sissela Bok eds. 1980) (quoting John Dean).

56. *See* Robert Fulghum, All I Really Need to Know I Learned in Kindergarten: Uncommon Thoughts on Common Things (1989).

public opinion, etc. One can similarly comprehend a client asking, or even demanding, that a lawyer confine the professional advice to those limits. That is, we can imagine a differentiation in the communications among lawyers and clients between "the law" and "else," even while recognizing that such a differentiation is physiologically impossible in a single mind, even a legal mind.

Even imagining such a differentiation, however, presupposes two minds involved in structured and controlled communication. On one hand, the lawyer articulates *to the client* only "the law and nothing else" and, on the other hand, the client obtains *from the lawyer* only "the law and nothing else." This presupposition, however, does not entail that the lawyer actually have in mind only "the law and nothing else," nor that the client as a result of the communication contemplate "only the law and nothing else." On the contrary, both lawyer and client well know—whatever each might privately acknowledge or signal each other—that there is a great deal "else" in their respective cognitive and behavioral positions.[57]

The situation is very different with the law governing lawyers. There can be no presupposition of two participants in structured and controlled communication with each other, because there is in fact only one mind at work. The articulation of "the law" is performed by the lawyer himself, to himself as client, in his own mind. A conceptualization by the lawyer that he is "giving legal advice to himself," in the same sense as in giving advice to a client, is absurd or schizophrenic. In addressing one's self, it is a physical impossibility for a human mind, even a legal mind, to think in terms of "the law and nothing else." Hence, a lawyer, in dealing with the law governing lawyers, cannot simply "think like a lawyer."[58]

The realization that a lawyer cannot think like a lawyer when addressing his own legal duties leads to one obvious conclusion: A lawyer confronting something that seems to be an ethics problem should consult a colleague about whether there is such a problem and, if so, how she should go about resolving it. Thus, the very objectivity that we lawyers say is part of what we bring to clients' problems should also be brought to our own.

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57. For example, economics or politics may enter into a client's decision. *See* George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 Fordham L. Rev. 273, 278-79 (1998) (noting that clients may be motivated by economic self-interest); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 Fordham L. Rev. 569, 570-71 (1998) (discussing lawyers' representation of the NAACP in civil rights cases.

58. *See* Abbe Smith, *"Nice Work If You Can Get It": "Ethical" Jury Selection in Criminal Defense*, 67 Fordham L. Rev. 523, 560 (1998) (arguing that lawyers should not disregard racist and sexist tendencies in prospective jurors despite our law's color-blind aspirations).

This Symposium breaks down the barrier between the "mere ethics" of lawyer norms and "real" law and the barrier between the viewpoints of the lawyer-with-client and the lawyer-as-client. "Real" law", other than ethics, influences lawyer behavior in a myriad of ways.[59] Conversely, lawyer norms influence how lawyers apply "real" law to themselves.[60] Similarly, legal theories usually applied to "real" law can also be applied to ethical rules,[61] and theories of legal ethics can be used to explain lawyers' influence on "real" law.[62]

Perhaps, in time, lawyer norms, and thus the law of lawyering, will enjoy equal status with other areas of law in both the law schools and among practitioners. Until then, we must seize every opportunity, like this Symposium, to explore the interconnectedness of the law, legal theory, and the legal profession.

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59. *See, e.g.*, Green, *supra* note 18 (discussing the application of criminal law to lawyers); Robert W. Hillman, *The Impact of Partnership Law on the Legal Profession*, 67 Fordham L. Rev. 393 (1998) (discussing the application of partnership law to lawyers); Thomas D. Morgan, *The Impact of Antitrust Law on the Legal Profession*, 67 Fordham L. Rev. 415 (1998) (discussing the application of antitrust law to lawyers); Zipursky, supra note 48 (discussing the application of tort law to lawyers).

60. *See, e.g.*, Deborah A. Demott, *The Lawyer as Agent*, 67 Fordham L. Rev. 301 (1998) (discussing differences in the way agency law is applied to lawyers as compared to other professions); Joseph M. Perillo, *The Law of Lawyers' Contracts is Different*, 67 Fordham L. Rev. 443 (1998) (discussing differences in the way contract law is applied to lawyers as compared to others); Smith, *supra* note 58 (discussing how ethical concerns may prompt defense lawyers to evade restrictions on using preemptory challenges based on race or gender); Sullivan, *supra* note 57 (discussing various arguments that lawyers' speech should receive less First Amendment protection than others' speech); Vairo, *supra* note 21 (discussing how lawyers reacted to the promulgation of Rule 11 of the Federal Rules of Civil Procedure).

61. *See, e.g.*, Cohen, *supra* note 57 (discussing the application of Law & Economics theory to ethical rules); Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 Fordham L. Rev. 249 (1998) (discussing the application of Feminist theory to ethical rules).

62. *Compare* Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who has the Gold Really Make the Rules?*, 40 Hastings L.J. 577, 655 (1989) (arguing that the ethics rules prohibiting nonlawyers from involvement in the business of law "owe their surprising tenacity more to the fact that they serve the profession's economic self-interest that to any valid public purpose"), *and* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1 (1998) (arguing that confidentiality rules, including the ethical duty of confidentiality, benefit lawyers but are of dubious value to clients and society as a whole), *with* David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 Fordham L. Rev. 497 (1998) (discussing the role of bankruptcy lawyers in influencing the bankruptcy code).