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MODEL RULE 1.0: LAWYERS ARE MORALLY ACCOUNTABLE

Russell G. Pearce*

Deborah Rhode's recent book, *In the Interests of Justice: Reforming the Legal Profession*,[1] offers a bleak account of the legal profession at the start of the twenty-first century. Lawyers have tremendous responsibility for the administration of justice; yet they refuse to accept moral accountability for their actions. This essay explores whether the legal profession should address this problem, at least in part, through the addition of a Model Rule 1.0, which would hold lawyers morally accountable for their conduct. This Rule would not dictate a particular moral vision. Rather, it would direct lawyers with sometimes conflicting understandings of their role to wrestle with the moral implications of their conduct both as individuals and as a community.

Among elite lawyers, the dominance of the notion that lawyers are not morally responsible for the quality of justice in society is relatively recent. Through the 1960s, most elite lawyers viewed themselves as America's disinterested governing class with a special obligation to promote the public good.[2] After the 1960s, the dominant perspective changed as lawyers rejected responsibility for the public good in favor of client advocacy.[3] Murray Schwartz and David Luban have described the current standard conception of the lawyer's role as having two elements: "extreme partisanship" on behalf of the client and "moral non-accountability" for the lawyer's actions in pursuit of the client's goals.[4] As Richard Wasserstrom has noted, under this conception the lawyer becomes "an amoral technician."[5]

1. Deborah L. Rhode, In the Interests of Justice: Reforming the Legal Profession (2000).

2. Russell G. Pearce, *Lawyers As America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. Chi. L. Sch. Roundtable 381 (2001). While some members of the elite challenged this notion, they found themselves on the margin of the profession. *Id.* at 383.

3. *Id.* at 383-84.

4. David Luban, Lawyers and Justice: An Ethical Study 20 (1988) (suggesting that extreme partisanship and moral non-accountability are basic principles of lawyer ideology); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*,

This shift to an amoral perspective is not necessary to justifty zealous advocacy. Monroe Freedman is an excellent example of the zealous advocate with a deeply moral conception of the lawyer's role. He instructs lawyers and students that they "should be conscious ... of how [their] own decisions on issues of lawyers' ethics establish [their] moral priorities and thereby define [their] own moral profile."[6]

In Freedman's view, a moral understanding of the lawyer's role requires zealous representation, moral counseling, and moral evaluation of whether to represent a client. He describes lawyers as having personal moral responsibility for their decision to represent a client,[7] but "[o]nce the lawyer has chosen to accept responsibility to represent a client ... the zealousness of that representation cannot be tempered by the lawyer's moral judgments of the client or of the client's cause."[8] For Freedman, this zealous representation is not an amoral act. It is "essential ... to maintain[ing] a free society"[9] and promoting "the effective exercise of individual autonomy."[10] From this perspective, an "attorney acts ... immorally by ... preempting [clients'] moral decisions, or by depriving them of the ability to carry out their lawful decisions."[11] At the same time, the identification and pursuit of client goals requires the lawyer to "counsel[her] clients candidly and fully regarding the clients' ... moral responsibilities as the lawyer perceives them."[12]

Although Freedman has a well-developed moral conception of zealous advocacy, most lawyers do not. Unlike Freedman, most lawyers appear to have generalized the notion of moral non-accountability to all aspects of their role as lawyers.[13] Rhode notes that only one-fifth of lawyers believe that their work "contribut[es] to the social good."[14] She identifies the "sense that they have not been able to pursue justice" as "a primary source of career dissatisfaction among surveyed attorneys."[15] Freedman, too, acknowledges the

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66 Cal. L. Rev. 669, 671 (1978) (same).

    5. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Human Rights 1, 6 (1975).

    6. Monroe H. Freedman, Understanding Lawyers' Ethics 11 (1990). *But see* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am. B. F. Res. J. 613 (arguing for the amoral perspective on moral grounds).

    7. Freedman *supra* note 6, at 49-50, 57.

    8. *Id.* at 50.

    9. *Id.* at 13.

    10. *Id.* at 57.

    11. *Id.*

    12. *Id.*

    13. *See* Rhode, *supra* note 1, at 65.

    14. *Id.* at 8; *see also id.* at 11, 38.

    15. *Id.* at 65.

existence of "amorality and even immorality in the practice of many lawyers."[16]

While vast literature exists addressing what should be done about this problem, this essay offers a relatively simple proposal. Following Rhode's suggestion that lawyers should "accept personal responsibility for the moral consequences of their professional actions,"[17] Model Rule 1.0 would state only that "lawyers are morally accountable for their conduct as lawyers." Making Rule 1.0 the first rule would underscore its importance and would indicate that it applies to all aspects of a lawyer's work. The Rule would be aspirational, similar to Rule 6.1, which explains the lawyer's pro bono responsibility,[18] and would not define the term "morally," similar to Rule 2.1, which authorizes lawyers to "refer [to] moral, economic, social and political factors" in counseling clients.[19] The goal of the Rule would be to educate lawyers to their moral responsibility and to encourage lawyers as individuals and as members of the legal community to explore how their work "contribut[es] to the social good."[20]

The use of the ethical rules to educate lawyers to their moral responsibility falls squarely within the purposes of the ethics codes.[21] The Model Rules acknowledge that some of the rules are "constitutive and descriptive [of] a lawyer's professional role" and that they "serve to define" a lawyer's "relationship to our legal system" which is "vital [to] the preservation of society."[22] Indeed, precedent exists for enacting rules to encourage lawyers to accept moral responsibility. The 1908 ABA Canons of Professional Ethics, which sought to revive lawyers' commitment to the common good through aspirational rules, instructed a lawyer to "obey his own conscience and not that of his client,"[23] and to accept "responsibility for advising as to questionable transactions, for bringing questionable suits, [and] for urging questionable defenses."[24]

In a similar vein, commentators have previously suggested rules of conduct as a way to encourage lawyers' moral responsibility. In an effort to temper moral non-accountability in transactional representations, Murray Schwartz has proposed a Disciplinary Rule

16. *See* Freedman, *supra* note 6, at 50.
17. *See* Rhode, *supra* note 1, at 66-67.
18. Model Rules of Prof'l Conduct R. 6.1 (2001).
19. R. 2.1.
20. Rhode, *supra* note 1, at 8.
21. The actual function of the ethics codes is beyond the scope of this paper. For excellent discussions of this topic, see Richard L. Abel, Why Does the ABA Promulgate Ethical Rules?, 59 Tex. L. Rev. 639, 639 (1981); Deborah L. Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 Tex. L. Rev. 639, 689 (1981).
22. Model Rules of Prof'l Conduct scope and pmbl. (2001).
23. Canons of Prof'l Ethics Canon 15 (1908).
24. Canon 31.

prohibiting a lawyer from, *inter alia*, "assisting a client to gain 'an unconscionable advantage over another person.'"[25] William Simon has more ambitiously sought to reshape legal ethics into "a disciplinary regime consisting largely of contextual norms, and a set of rules designed to encourage voluntary ethical commitments and strengthen the forces that make for informal enforcement of such commitments."[26] Simon seeks to promote the view that "[l]awyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice."[27]

In contrast, Model Rule 1.0 would not take sides in current disputes regarding the lawyer's role. What it would do is move the debates regarding the lawyer's moral duties, like that between Freedman, who favors zealous representation, and Luban, Rhode, and Simon, who favor some significant limits on that representation, to the center of the bar's legal ethics conversations. While the bar currently pays some slight attention to these issues, Model Rule 1.0 would move them to a more prominent place in the bar's official deliberations and continuing legal education courses, as well as in the efforts of the conscientious lawyer to explore her own moral accountability.

Despite Model Rule 1.0's neutrality as to the competing visions of the lawyer's proper role, some lawyers might fear that any embrace of moral responsibility would undermine zealous advocacy. They might argue that the representation of unpopular clients requires lawyers to be able to tell themselves and the public that lawyers have no moral responsibility for their conduct. Indeed, to facilitate representation of "people ... whose cause is controversial or the subject of popular disapproval,"[28] Rule 1.2(b) provides that representation of a client "does not constitute an endorsement of the client's ... views or activities."[29]

But the argument that zealous advocacy requires an amoral defense is unpersuasive. The Rules themselves certainly do not require moral non-accountability. As a general matter, the Rules provide broad latitude for lawyers to exercise moral discretion.[30] Some rules even expressly condone morally based conduct. Rule 2.1, for example, provides that lawyers may counsel the client on "moral, economic, social and political" considerations.[31] Nor does a policy justification for representation of the unpopular require amorality. Even while arguing that the decision whether to represent a client is an exercise of

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25. Schwartz, *supra* note 4, at 688.
26. William H. Simon, The Practice of Justice: A Theory of Lawyers' Ethics 196 (1998).
27. *Id.* at 138.
28. Model Rules of Prof'l Conduct R. 1.2 cmt. (2001)
29. R. 1.2(b).
30. Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 Geo. J. Legal Ethics 19, 20 n.5 (1997).
31. *See also* R. 1.16.

moral responsibility, Freedman makes a morally based argument that the right of every person to counsel is "essential ... to a free society."[32]

Freedman also points out that the amoral justification is both ineffective and unnecessary. It has not succeeded in protecting lawyers who represent unpopular clients from "vilifi[cation], even by other lawyers and judges."[33] Nor has it proved essential. In the most notorious cases, there seems to be no shortage of lawyers. Freedman notes that "[d]espite the harshest public denunciation, lawyers have come forward to defend 'the meanest man in New York' and even to support the right of Nazis to march in Skokie."[34] Similarly, a New York lawyer has recently obtained extensive news coverage by publicly declaring his willingness to represent Osama bin Laden.[35]

By compelling zealous advocates or other representatives of the unpopular to explain their conduct on moral grounds, Rule 1.0 will not undermine their arguments and may make them more effective. The public—and other lawyers and judges—are much more likely to be persuaded (or at least less offended) by a moral justification of the advocate's role, like that proposed by Freedman, than by the bald assertion that "As a lawyer, I am not morally accountable."

Undoubtedly, though, Rule 1.0 would not suffice to prevent criticism of those representing unpopular clients or to guarantee that lawyers accept moral responsibility. It would, however, provide a concrete step toward Rhode's prescription for practicing law "in the interests of justice."[36] As Rhode suggests, if lawyers acknowledge their moral accountability, their personal and communal responsibility for justice will become integral to their practice.[37]

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32. Freedman, *supra* note 6, at 68.

33. *Id.* at 69; *see also* Rhode, *supra* note 1, at 75 (discussing an African-American lawyer representing the KKK).

34. *See* Freedman, *supra* note 6, at 69. Freedman previously represented "Dr. Bernard Bergman, a nursing-home owner who was ... characterized in the press as 'The Meanest Man in New York.'" Monroe Freedman, *We Are Publicly Accountable*, Tex. Law., Sept. 27, 1993, at 18.

35. Dave Saltonstall, *Lawyer Says He'd Defend Bin Laden*, Daily News, Sept. 26, 2001, at 20.

36. *See generally* Rhode, *supra* note 1.

37. *Id.* at 17-18.

Notes & Observations