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THE TRUMP CARD: A LAWYER'S PERSONAL CONSCIENCE OR PROFESSIONAL DUTY?

Julie A. Oseid
*Stephen D. Easton**

This article is an exchange between Stephen D. Easton, Dean and Professor of Law at the University of Wyoming College of Law, and Julie A. Oseid, Associate Professor of Law at the University of St. Thomas School of Law in Minneapolis, Minnesota. The two are lifelong friends (and also brother and sister). They often consult each other about ethical and professional issues.

Dear Steve,

A law student stopped by my office “just to say hi.” I am fairly new to the legal academy, but I have been around long enough to know that no student

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makes the effort to personally visit me “just to say hi.” I started to run through the most likely scenarios. Does she want to talk about her grade? Does she want a letter of recommendation? Is she, or a member of her family, in some legal trouble?

She came out with it: “I’m worried about what it is like to actually practice law. Do you think I’ll ever have to do something I just don’t think is right? Did you ever do something as a lawyer that bothered your conscience?”

I give her points for thinking about, and struggling with, this question. I suspect she may be like I was in law school—a little innocent about how this profession plays out in day-to-day life.

How should I respond? Should I tell her that her job will be to become a zealous advocate, and thus she should be prepared to both recommend and take actions that may bother her personal conscience,¹ but this behavior is acceptable and perhaps even mandated by the rules of professional responsibility? Should I tell her instead that she has the power and ability to influence what action her clients will take, and that as a legal counselor she need never recommend or do something against her own personal conscience? Or should I tell her she will often walk the middle ground between those two extremes because her real value as a lawyer will be to lay out all the permitted options and then cede ultimate authority about a final decision to the client?²

What would you tell her?

Julie

¹ In this article, conscience is used in its colloquial sense to mean an individual’s internal guide about what is right and what is wrong. See ROBERT K. VISCHER, *CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE* 3 (Cambridge Univ. Press 2010) (noting the prevailing understanding of conscience “as a person’s judgment of right and wrong”). Others point out that conscience should not be understood as an individual guide, but instead as a collective understanding of morality. Stanley Fish notes that the English philosopher Thomas Hobbes used the etymology of “conscience,” which means to know in concert with another, so that “[C]onscience, correctly understood, refers to those occasions ‘when two or more men know of one and the same fact . . . which is as much to know it together.’” See *Conscience v. Conscience*, <http://opinionator.blogs.nytimes.com/2009/04/12/conscience-vs-conscience/> (Apr. 12, 2009, 20:30 EST). Entire articles can and have been written about the definition and complexity of “conscience.” See Steven D. Smith, *Interrogating Thomas More: The Conundrums of Conscience*, 1 U. ST. THOMAS L.J. 580 (2003) (analyzing what Thomas More meant by “conscience”); Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325 (2005) (posing questions about what is meant by “conscience,” “freedom of conscience,” or the “sanctity of conscience”).

² Bruce A. Green explains this alternative option: “Personal values do not take the lead in professional decisionmaking, but neither are they shunted offstage. Instead, personal conscience plays a supporting role.” Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 56 (1997).

P.S. Don't think I wasn't listening to everything she said. Talk about conscience! My own conscience always goes into full alert mode when someone asks me what I actually did in my life. Does it help for them to know? Should I tell the real story or the one that makes me look the best? How much does it matter if I say, "This is what I did. When I look back I think some of what I did was right and some of what I did was wrong. You may decide to do something completely different when faced with a similar issue."

Dear Julie,

You know me. I have always been a "bad news first, good news later" type. And I believe our students, like our children, deserve honesty.³ When a student or, in my old practice days, when one of the younger attorneys in the office asked me if I ever had done anything as a lawyer that bothered my conscience, my honest answer is (and was), "Yup. And you will, too. At least I hope you will."

We lawyers are agents, not principals. Our primary (not exclusive—primary—there is a difference) obligation is to advance our clients' interests.⁴ It would be great if we always worked for wonderful people and entities who are doing wonderful things to make the world a better place. But that is not reality. I liked a lot of my clients, but there were some I did not like. Maybe even a few I almost hated. Some of our clients do things we should hate. They rob banks. Make cigarettes. Cheat on their taxes. Rape people. Yucky things.⁵

I hope there will always be a part of me, and I would call it a conscience (or part of a conscience), that does not like the fact that folks who do those yucky things are using my services. The nonlawyer part of me should not like that.⁶ If you are never bothered by that, your conscience is dead. So my hope for our students and our new lawyers is that they never completely get over being bothered by having their good work used to advance or protect bad behavior.

³ When our kids were little, I actually tried to convince Marivern that we should not do the "Santa Claus thing," because Santa Claus does not exist. I have always been way too literal.

⁴ Chief Justice Warren Burger emphasized the dual role of the lawyer as agent for the client, but also an officer of the court:

But that duty [first duty to client] never was and is not today an absolute or unqualified duty. It is a first loyalty to serve the client's interests but always within—never outside—the law, thus placing a heavy personal and individual responsibility on the lawyer.

In re Griffiths, 413 U.S. 717, 732 (1973) (Burger, C.J., dissenting).

⁵ Some of the yucky things that clients do are legal. See W. Bradley Wendel, *Moral Judgment and Professional Legitimation*, 51 ST. LOUIS U. L.J. 1071, 1079 (2007) (discussing the lawyer's responsibilities regarding "legal but immoral acts by clients").

⁶ See Patricia L. Rizzo, *Morals for Home, Morals for Office: The Double Ethical Life of a Civil Litigator*, 35 CATH. LAW. 79, 79 (1991) (discussing the clash between "personal and professional ethics").

Some profession we are in (and training people for), huh? Seems like a strange thing to wish for our best and brightest—a lifetime of at least some unease at one's life work.⁷

Is that too blunt? Too discouraging for folks who do not yet fully understand the profession they are about to enter?

Steve

Dear Steve,

I agree that honesty is important, but I think timing is also important. If someone asks me if a dress makes her look fat, I consider the surrounding circumstances before answering. If I am shopping with her and we are choosing from several dresses, I would likely suggest that another option might be more flattering. If we are about to walk out the door for a special event and I know she doesn't have another option, I would probably tell her she looks great.

I think timing is pretty critical for answering this question about conscience, too. It is tough to give that advice when the student does not really have a good understanding about how the conflict of conscience might arise. Still, it is important to discuss these important ethical issues both throughout law school and during the early days of practice.⁸ I think many students think these will be easy decisions between clearly good and clearly bad, and who doesn't want to come out on the clearly good side? In reality, I found that in law practice the vast majority of difficult conscience decisions involved gray areas.

Some might say it is legal training that makes lawyers able to justify just about any action and a belief that everything falls into the "gray" category. I don't think it is that simple. Instead, there are often very legitimate positions on both sides.

⁷ Others also believe it is important for attorneys to occasionally feel discomfort resulting from their nonlawyer sense of morality. See Arthur Gross Schaefer & Leland Swenson, *Contrasting the Vision and the Reality: Core Ethical Values, Ethics Audit and Ethics Decision Models for Attorneys*, 32 PEPP. L. REV. 459, 472–73 (2005) ("Ethically sensitive attorneys who choose to shut out moral decisions by adopting the amoralist's view of morality will experience internal conflict and unhappiness about themselves and their legal career. Thus, in searching for solutions that enhance lawyer morality, the amoralist's view of morality does not provide a workable solution.").

⁸ See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 74 (1992) ("[E]thics can and should be taught pervasively, in almost every law school course."); Vanessa Merton, *What Do You Do when You Meet a "Walking Violation of the Sixth Amendment" if You're Trying to Put that Lawyer's Client in Jail?*, 69 FORDHAM L. REV. 997, 1000 (2000) ("[I]t is important to acknowledge the impact of early, formative experiences of professional socialization on the ethical and moral perspective that a lawyer brings to bear on his experience."); Eleanor W. Myers, *"Simple Truths" About Moral Education*, 45 AM. U. L. REV. 823, 824 (1996) (contending that workplace experiences "have the greatest impact on shaping professional behavior").

Take your example of criminal defendants. The reality is that they have done some pretty awful stuff, but the reality is also that our justice system is based on the concept that everyone, no matter how despicable, is entitled to effective legal representation.

Maybe that is the point—we need to teach balance between competing interests. I don't think I had ever heard the word “zealous” used (except in relation to some religious figures) before I attended law school in the mid-1980s. I'm sure I learned many things about professional responsibility, but the one thing I still remember is that “zealous representation” was required.⁹ It seems to me that some are teaching the opposite end of the professional responsibility spectrum in the

⁹ The oft-cited attorney obligation to zealously represent a client has an interesting history. The ABA Model Code of Professional Responsibility, enacted by the American Bar Association in 1969, contained several references to this responsibility. Canon 7 of the Model Code stated, “A lawyer should represent a client zealously within the bounds of the law.” MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1) (1980). Pursuant to the Disciplinary Rules, a lawyer could not intentionally “[f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules,” with some exceptions. *Id.*

The ABA replaced the Model Code with the Model Rules of Professional Conduct in 1983. *See* AM. BAR ASS'N, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 1–2 (1987). None of the numbered Model Rules contain the requirement to “zealously represent” the client. It appears that this was an intentional change, designed as a response to the frequency with which attorneys justified their conduct as a means to zealously represent their clients.

Zealousness has not disappeared entirely from the ABA's outline of professional obligations. In describing the duties of an attorney in general terms, the Preamble to the Model Rules of Professional Conduct states, “As advocate, a lawyer *zealously* asserts the client's position under the rules of the adversary system.” MODEL RULES OF PROF'L CONDUCT Preamble 2 (emphasis added). The comments also note:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with *zeal* in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

Id. at R. 1.3 cmt.1 (emphasis added).

Many attorneys have not noticed the removal of the formerly explicit duty to “zealously represent” their clients. Indeed, many practicing attorneys still frequently defend their actions as necessary to zealously represent their client's interests. Indeed, if asked to name one “professional responsibility rule,” many attorneys would probably “quote” their alleged duty to “zealously represent” their clients.

twenty-first century by telling students that their own morality should influence their clients' decisions.¹⁰ I'm not really comfortable with either of those extremes.

I think the best advice lies somewhere in the middle. Yes, sometimes you may be required to do something that bothers your conscience. And, yes, if it is one of your core values or a core part of your morality then you should not do it, and withdraw from representation. Early in your career, draw that line in the sand which you will not cross. Do not cross that line, but recognize that there will be times when you will be forced to bump right up against it. If you cannot stand the thought of even bumping into the line (without actually crossing it) then perhaps you should rethink law as a profession.¹¹

One thing about your response puzzled me. You said that the nonlawyer part of you may not like something, but you imply that the lawyer part of you could still take that action. Is it possible to separate yourself like that?¹² Is it wise? Is it ethical?

Julie

P.S. I admire your direct response to the inquiring student or young lawyer. You don't seem troubled by sharing your own story. That seems like a very positive first step in the question of conscience—a willingness to discuss our own struggles with the question.

¹⁰ Fred C. Zacharias and Bruce A. Green also point out this distinction:

The traditional understanding of the ethics of advocates is that there are two seminal approaches—Brougham's model of zealous advocacy and Hoffman's emphasis on personal conscience and discretion. The common view is that professional regulation has veered between these two approaches, never fully embracing one or the other, and thus has remained unprincipled and, to some degree, incoherent.

Fred. C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 66 (2005).

¹¹ The legal profession is not the right profession for everyone. For example, people always morally opposed to arguing a position contrary to their personal beliefs "should probably find alternative careers that coincide more closely with their moral outlooks." Andrew M. Perlman, *A Career Choice Critique of Legal Ethics Theory*, 31 SETON HALL L. REV. 829, 858–59 (2001).

¹² Some scholars argue that a lawyer should not attempt to divide into separate personal and professional selves. "[N]arrative unity may function as a theory of professional ethics only if the actor's professional self and personal self are conceived of as unitary." W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 113, 205 (2000). Neil Hamilton objects to the separation of "personal conscience" and "professional conscience" because such a separation "does not recognize the interrelationship and synergy between personal conscience and the other principles of professionalism." Neil Hamilton, *Professionalism Clearly Defined*, 18 NO. 4 PROF. LAW. 4, 10 (2008) (promoting the terms "personal conscience" and "personal conscience in a professional context").

Dear Julie,

Sharing personal experience really helps, I think.¹³ Indeed, I am a big believer in “war stories,” despite what others sometimes say. The biggest problem with war stories is that the storyteller tends to tell stories that make him or her look good.¹⁴ My rule of thumb is to tell at least one story that makes me look bad (such as “this is the mistake I made that might have caused us to lose that trial”) for every story that makes me look good. In the context of our discussion, as you note, “good” and “bad” get mixed up into a whole lot of gray.

A few years ago, when I suggested that lawyers cannot always do what they personally think is “the right” thing in representing their clients, based upon their individual nonlawyer conscience, a whole lot of folks in legal academia blasted away at me.¹⁵ How dare I suggest to future lawyers that they should ever do something that made them personally uncomfortable?

¹³ Anita Bernstein contends that sharing the perils and defeats of lawyers increases the strength of new lawyers. Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479 (2009). Professor Bernstein points out that specifics matter, and she uses a sports analogy to make her point:

[T]alking to students about contingencies ahead in the practice of law gives them a boost of vigor and optimism, in the way that athletes planning for a marathon or long bicycle ride seek out and relish any advance information they can get about the hill, the stretch of potholes, or the bad neighborhood on their route. Specifics matter. “You’ll have a rotten time; the road is awful” is not a pitfalls message, especially when it hovers unspoken in the air. “Look out for X, Y, and Z when you take off,” by contrast, anticipates a satisfying journey.

Id. at 501.

¹⁴ Stephen Gillers noted:

Few professions have a stronger oral tradition than law. War stories are a part of that tradition. . . . War stories are not presented as fictitious, of course, but like “the fish I caught in the summer of ’72,” they tend to get embellished with the passage of time.

Embellished or not, war stories about legal ethics dilemmas are exactly what we should include in our classes.

Stephen Gillers, *Teaching Legal Ethics: Improving the Required Ethics Course*, 58 LAW & CONTEMP. PROBS. 61, 66 (1995) (footnotes omitted).

¹⁵ The debate between those arguing for zealous representation versus primacy of the lawyer’s personal conscience is not novel. See *supra* note 9 and accompanying text. For a fascinating article about the 1908 controversy among the ABA Committee drafting the 1908 Canons of Professional Responsibility about a lawyer’s duty to evaluate the justice of her client’s cause, see Susan D. Carle, *Lawyers’ Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1 (1999). Carle labels the two opposing views as the “nonaccountability” and the “moral activist” approaches. *Id.* at 3–4. She lists the following academics as members of the moral activist group: David Luban (advocating that lawyers should insist clients take a “morally correct path in resolving their legal affairs”), William H. Simon (suggesting a discretionary approach where lawyers assess both the client’s individual interest and the interests of other affected parties), and Robert Gordon (arguing for a return to the “progressive lawyer–statesman” role). *Id.* at 5.

With all due respect (and we all know when lawyers say that, what they mean is that they think not all that much respect is due!), if our academic colleagues are suggesting to future attorneys that they will never have to do anything that makes them personally uncomfortable, they are doing those future lawyers a great disservice.¹⁶ Let's take that example of the criminal defendant. To make things really tough, let's make him (I know I am supposed to say "him or her" these days, but it is almost always "him") a person who is accused of child molestation. Let's say, further, that the lawyer is pretty sure that the client did indeed molest the child. What is that lawyer supposed to do?

Our academic colleagues who never really had to face a dilemma like that might¹⁷ suggest a quick out—simply withdraw from the representation of that client. That is not the cure—all they think it is, however. First, if you are counsel of record (as you might be if you work in the public defender's office), you have to get the judge's permission to withdraw under Model Rule 1.16.¹⁸ Second, even if we assume that you can get that permission, have you really solved anything? The next lawyer is going to have to represent that client. Under our system, the client deserves representation. Put another way, we all deserve for him to be represented, because we limit the power of the government to imprison folks arbitrarily by requiring the government to prove

¹⁶ Incidentally, the ability always to follow one's conscience is not the only personal freedom that a lawyer relinquishes when obtaining a law license. Lawyers give up some aspects of both freedom of speech and freedom of association. See Bernstein, *supra* note 13, at 497–99 (providing the following examples: lawyer not able to reveal client confidences; lawyer sanctioned for trying to maintain a women-only client base for her matrimonial practice; lawyer prohibited from having sex with client).

¹⁷ Most law school professors did not spend much time actually practicing law. See Mitchell Nathanson, *Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor*, 11 J. LEG. WRITING INST. 329, 337 (2005) (showing, via an analysis of the 2003–04 AALS Directory of Law Teachers Survey, that doctrinal professors have an average of 2.12 years of law firm experience). Some scholars suggest that law professors should spend time practicing law. See Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 LOY. L. REV. 623 (2004). Cohen proposes:

[L]aw professors should be encouraged, if not required, to stay connected to the world of practice.

....

... [N]ot only because it will make that professor a better teacher and a better scholar, but also a better, less cynical, more humble and appreciative representative of our profession—the one we share with the lawyers we have all educated and sent out to the world of practice.

Id. at 643–44.

¹⁸ MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2009) (Declining or Terminating Representation) ("A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating a representation.").

*guilt beyond a reasonable doubt.¹⁹ *If every criminal defense lawyer withdrew every time she believed her client did in fact commit the crime he is accused of (as those who indignantly ask “how can you represent a guilty person?” would like), there would be no putting the government to its burden of proof.**

Thus, while we must permit all lawyers to occasionally withdraw for reasons we might cover later, I would limit that to relatively unusual cases. Indeed, our system benefits when lawyers take on tough cases for clients they do not like, because that is how the criminal justice system limits the power of the government. In a freedom-loving society, all of us lawyers must be willing to take on unpopular cases for clients we do not like.

So where are we? Somebody is going to have to represent that defendant who is, probably correctly, accused of child molestation. If that lawyer represents his client well, it is entirely possible that he will escape punishment even though he did molest a child. If we assume that child molesters have anything more than a trivial recidivism rate,²⁰ it is also possible that he will molest another child during the period of time when he

¹⁹ The infamous trials of “the Scottsboro boys” provide an excellent example of the importance of counsel for all criminal defendants. The United States Supreme Court explained:

Let us suppose the extreme case of a prisoner charged with a capital offense, who is deaf and dumb, illiterate, and feeble-minded, unable to employ counsel, with the whole power of the state arrayed against him, prosecuted by counsel for the state without assignment of counsel for his defense, tried, convicted, and sentenced to death. Such a result, which, if carried into execution, would be little short of judicial murder . . . The duty of the trial court to appoint counsel under such circumstances is clear, as it is clear under circumstances such as are disclosed by the record here; . . . Attorneys are officers of the court, and are bound to render service when required by such an appointment.

Powell v. Alabama, 287 U.S. 45, 72–73 (1932) (citations omitted).

²⁰ To say that the relative rate of recidivism among child molesters, as compared to the recidivism rate among those who commit other crimes, is in dispute is to significantly understate the current extent of disagreement over the matter. For a small sample of the differing views, see, for example, PATRICK A. LANGAN, ERICA LEAH SCHMITT & MATTHEW R. DUROSE, U.S. DEP’T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 1 (2003) (finding that 3.3% of these released offenders are rearrested for another sex crime against a child within the first three years after release from prison); Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, 27 DEV. MENTAL HEALTH L. 34, 39 (2008) (noting that many legislators believe recidivism among child molesters is high, but then contesting the validity of this view); Andrew J. Hughes, *Haste Makes Waste: A Call to Revamp New Jersey’s Megan’s Law Legislation as Applied to Juveniles*, 5 RUTGERS J. L. & PUB. POL’Y 408 (2008) (observing that the New Jersey legislature found that recidivism was high among adult sex offenders, including child molesters, but also noting that juvenile sex offenders are not likely to recidivate); Autumn Long, Note, *Sex Offender Laws of the United Kingdom and the United States: Flawed Systems and Needed Reforms*, 18 TRANSNAT’L L. & CONTEMP. PROBS. 145, 161–62 (2009) (citing research indicating that recidivism rates vary “based upon characteristics relating to . . . individual offenses and the offenders themselves”); William E. Marcantel, Note, *Protecting the Predator or the Prey? The Missouri Supreme Court’s Refusal to Allow Past Sexual Misconduct as Propensity Evidence*, 74 MO. L. REV. 211, 230 (2009) (referring to “the threat of recidivism of sex offenders and child molesters”); Oriana Mazza, Note, *Re-Examining Motions to Compel Psychological Evaluations of Sexual Assault Victims*, 82 ST. JOHN’S L. REV. 763,

would have been in prison for the original child molestation, if the lawyer had not done such a good job defending him.

Let's ask a nonlawyer the following question: "Would you help someone who molested a child by creating the possibility that he could molest another child?" Pretty much every single nonlawyer would say, "Absolutely not. Help someone victimize a child? That is a terrible thing to do."

We lawyers recognize that, in the context of our profession, it is not only not a terrible thing to do, but also a noble and important thing to do.²¹ But that is the lawyer part of us. The nonlawyer part of us—our nonlawyer conscience—should not be exterminated by the lawyer part of us. That is why I say that we should hope the future lawyer who asked you the question retains enough of her nonlawyer conscience to occasionally be bothered by what she does as a lawyer.

I guess one way to say "I am never going to be bothered by what I do as a lawyer" is to just exterminate your nonlawyer conscience. In my view, that would be a terrible thing to do. Do our "you should never do something that bothers you" colleagues want that for our future lawyers? I certainly hope not. At least, I do not want that for our future lawyers. Instead, I want them to be bothered occasionally.

To bring this full circle to where I started this note, I will share a story from one of my most recent cases. The story might be helpful, because it establishes that this at least occasional thought that what a lawyer must do should occasionally conflict with one's nonlawyer conscience is not limited to those who represent child molesters, or even those accused of other crimes. In a recent jury trial, I represented the state in an action to commit the respondent to the care of the mental health department on the ground that he was a sexually violent predator.²² Based upon the evidence, I believed that

775 (2008) (alleging that "rapists and child molesters typically exhibit high recidivism rates"). See also John Matthew Fabian, *The Risky Business of Conducting Risk Assessments for Those Already Civilly Committed as Sexually Violent Predators*, 32 WM. MITCHELL L. REV. 81 (2005) (analyzing the continuing difficulty of determining the risks posed by sexually violent predators who have been civilly committed). It is safe to say that some policy makers and commentators believe the rate of recidivism among child molesters is quite high, while others believe recidivism rates among child molesters are lower than recidivism rates for those committing other crimes, and still others state the almost certainly correct point that the recidivism rates vary among categories of child molesters, but almost all seem to believe that the rate of child molestation recidivism is more than trivial.

²¹ Abbe Smith explains that "the right to counsel is the life blood of the fundamental principles afforded the accused in this country: the presumption of innocence, the government's burden to prove guilt, and the high evidentiary standard of proof beyond a reasonable doubt." Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 927–28 (2000) (defending a lawyer's decision to represent and zealously defend Officer John Volpe, who was accused of "shoving a broom handle into [the victim's] rectum so hard he caused massive internal injuries").

²² Statutes providing for the involuntary commitment of sexually violent predators following their punitive incarceration, many of which have been enacted recently, are controversial. For a sample of some of the views regarding these statutes, see, for example, John Douard, *Sex Offender*

he suffered from a mental illness that made it likely that he would commit a crime of sexual violence against someone if he was not committed for care and treatment. But it was a close case with conflicting opinions from psychologists. Two of the three psychologists who testified opined that he was not a sexually violent predator. With the help of the lone dissenter,²³ I fought hard to try to establish that he was.

Here is the rub. The respondent was in his early twenties. Based upon the history of the programs for the treatment of sexually violent predators, I knew that there was a very good chance that he would spend a very long time in a secure facility against his will. In other words, what I was trying to do was help the state take away his freedom for a long time. Even though that was, in my view, the correct result—indeed, the result that I was working until the wee hours of the morning to bring about—it was sad to think of putting someone that young into a secure facility.

The jury was out for a long time. Too long. I was pretty sure we had lost, because verdicts for the state usually come pretty quickly in sexually violent predator cases. When the call came that the jury at last had a verdict, I went back to court for that moment of truth for every trial lawyer—the return of the verdict. When the jury returned a verdict for the state, finding the respondent to be a sexually violent predator in need of treatment in a secure facility, his mother screamed “NO!” at the top of her lungs in the back of the courtroom.²⁴ I packed up my things and fled out of the

as Scapegoat: The Monstrous Other Within, 53 N.Y.L. SCH. L. REV. 31, 48–52 (2008/2009); John A. Fennel, *Punishment by Another Name: The Inherent Overreaching in Sexually Dangerous Person Commitments*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 37 (2009); Douglas G. Smith, *The Constitutionality of Civil Commitment and the Requirement of Adequate Treatment*, 49 B.C. L. REV. 1383 (2008); Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 38–41 (2008); Dr. John M. Fabian, *To Catch a Predator, and Then Commit Him for Life*, CHAMPION, Feb. 2009, at 44.

²³ Often the key issue in a trial to determine whether a respondent is a sexually violent predator is whether the respondent is likely to commit another crime of sexual violence. Determining the probability of future crimes of sexual violence is an inexact science with much disagreement among experts. See M. Neil Browne & Ronda R. Harrison-Spoerl, *Putting Expert Testimony in Its Epistemological Place: What Predictions of Dangerousness in Court Can Teach Us*, 91 MARQ. L. REV. 1119, 1167–1205 (2008); Douard, *supra* note 22, at 49–50; Scott I. Vrieze & William M. Grove, *Predicting Sex Offender Recidivism*, 32 LAW & HUM. BEHAV. 266 (2008); Fabian, *supra* note 22, at 32. Therefore, many of these trials feature differences in opinions by psychologists.

²⁴ Emotional outbursts, including those by relatives of the principals, are not unusual in courtrooms. See, e.g., Cheryl R. Bias, *From Darkest Night to Most Glorious Victory: Johnnie Cochran and the Geronimo Pratt Case*, 33 T. MARSHALL L. REV. 11, 34–35 (2007); Edward de Grazia, *The Haymarket Bomb*, 18 LAW & LITERATURE 283, 299–300 (2006); Hon. Denise M. O’Malley, *Impeaching a Jury Verdict, Juror Misconduct, and Related Issues: A View from the Bench*, 33 J. MARSHALL L. REV. 145, 171 (1999); Robert P. Mosteller, *Victims’ Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1703–04 (1997); Judge R.A. (Jim) Randall, *The Death Penalty*, 14 HAMLINE J. PUB. L. & POL’Y 154, 157 (1993); Andrew L. Johnson, Comment, *Sentence Modification in Texas: The Plenary Power of a Trial Court to Alter Its Sentence After Pronouncement*, 38 ST. MARY’S L.J. 317, 366 & n.265 (2006); Commonwealth of Pennsylvania v. Dion Horton, PITTSBURGH LEGAL J., May 26, 2006, at 125.

courthouse, then got into my car to drive out of town. I made it about two miles before I started crying.²⁵

Did I do the right thing? Sure I did, as a lawyer. I used my skills to bring about the result that my client sought. And it was the right result, in my mind. But the nonlawyer part of me—I guess you could call it my conscience—tugged at me with the thought of “you just ruined that guy’s life.” Lawyers need to hear that nonlawyer voice, not snuff it out of existence.

Steve

Dear Steve,

That last example is a pretty powerful one. It reminds me of the Biblical prodigal son story.²⁶ I never could stand that story because I always put myself in the role of the “good” son who followed all the rules, but never got credit or a big party like the lousy prodigal son. Then I had kids myself and I realized that there was another point of view—the father’s perspective. I finally realized that it wasn’t just a story about the good son and the prodigal son, but it was a story about the father finding the son he thought he had lost. It did not matter that the son was lousy—the father only cared that the son was found. It changed my entire understanding of the story. Hey, I still think the good son deserves a party, but these questions are not easy.²⁷

Don’t we lawyers get attacked so often because the public knows we are taught to see all sides of problems, and then we are accused of compromising on conscience because our training leads us to believe that there is no black and

²⁵ For a story of a similar, though more subdued, reaction by a trial advocate to a successful verdict, see Linda F. Smith, *Benefits of an Integrated (Prosecution and Defense) Criminal Law Clinic*, 74 MISS. L.J. 1239, 1277 (2005) (“The clerk of the court said ‘Guilty’ and that’s exactly how I felt. I had just finished a case that I’d been working on for five months, . . . and the clerk had announced that the jury found the defendant guilty. I was happy—and I was guilty. Part of me felt badly about how the rest of me felt.”).

²⁶ *Luke 15:11–32*.

²⁷ It is an indication of the richness and complexity of the story of the prodigal son, or its universality, or its power as analogy, or perhaps simply the overproduction of legal academics that one can easily find dozens of references to this story in legal literature. See, e.g., Raj Bhala, *Virtues, the Chinese Yuan, and the American Trade Empire*, 38 HONG KONG L.J. 183, 185 (2008); S.J.R. Bostyn, *The Prodigal Son: The Relationship Between Patent Law and Health Care*, 11 MED. L. REV. 67 (2003); Robert P. Cooper, III, *The European Community’s Prodigal Son—The Common Agricultural Policy Undergoes Reform*, 1 COLUM. J. EUR. L. 233 (1995); Randy Lee, *Reflecting on Negligence Law and the Catholic Experience: Comparing Apples and Elephants*, 20 ST. THOMAS L. REV. 3, 18 (2007); Michael Scaperlanda, *Religious Freedom in the Face of Harsh State and Local Immigration Laws*, 15 TULSA J. COMP. & INT’L L. 165, 177 (2008); David A. Skeel, Jr., *The Paths of Christian Legal Scholarship*, 12 GREEN BAG 2D 169, 178 (2009); Suna Chang, Note, *The Prodigal “Son” Returns: An Assessment of Current “Son of Sam” Laws and the Reality of the Online Murderabilia Marketplace*, 31 RUTGERS COMPUTER & TECH. L.J. 430 (2005).

white in anything, even in morality? I heard one quote that says, “Morality is always dreadfully complicated to a man who has lost all his principles.”²⁸ This puzzles me because if you have lost all your principles then isn’t morality pretty simple—you just choose the most self-serving action? On the other hand, morality can be complicated when considering the perspectives of several different actors. Obviously the parties involved in your case had very different perspectives. For purposes of this discussion, though, the lawyers also had very different perspectives. A prosecutor has one view; the defense attorney has another.

Plus, in the larger sense in which we are considering the question of conscience, the lawyer and client may have different perspectives. Our focus has been on the lawyer’s perspective, but the client often has a different perspective.²⁹ Both the client and others in the public may be concerned that a lawyer’s ability to insert his or her personal conscience into legal representation will affect both the client’s autonomy and the client’s access to justice.³⁰

So maybe the advice to the student is both more simple and more complex than I originally envisioned. Perhaps the simple advice is that no lawyer, in any practice area, is guaranteed a professional life free from conscience conflicts.³¹

²⁸ This quotation is often falsely attributed to G.K. Chesterton. E-mail from Dale Ahlquist, President of American Chesterton Society, to research assistant Franz Vancura (June 1, 2009) (on file with author Oseid).

²⁹ For example, lawyers and clients have different views about professional responsibility. Lawyers tend to emphasize partisanship and moral nonaccountability in legal ethics discussions. Leslie Griffin, *A Clients’ Theory of Professionalism*, 52 EMORY L.J. 1087, 1087 (2003). The main complaint clients have about lawyers is that lawyers neglect their legal matters, so clients would like a system of punishment based on lawyer neglect. *Id.* at 1101.

³⁰ See Hamilton, *supra* note 12, at 11.

³¹ Many people performing different jobs struggle to balance their job duties with their personal consciences. Muslim taxi cab drivers must decide whether to refuse to transport customers who intend to carry alcohol in the cab. Kari Lydersen, *Some Muslim Cabbies Refuse Fares Carrying Alcohol*, WASH. POST, Oct. 26, 2006, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/25/AR2006102501727.html>. Pro-life pharmacists must decide whether to refuse to fill emergency contraceptive prescriptions. See Edmund D. Pellegrino, *The Physician’s Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective*, 30 FORDHAM URB. L.J. 221, 221 (2002) (“Except for the amoral sociopath, conflicts of conscience are a regular feature of the moral life. Even for the extreme relativists, resolving these conflicts is a constant challenge.”). Honest academics must decide whether to reveal that a colleague does not work very often or very hard. Like all lawyers, legal academics also face dilemmas grounded in conflicts between personal conscience and professional duties. “Ironically, those in higher education whose mission is scholarship and teaching, have rarely chosen to study the ethics of their own profession.” Neil W. Hamilton, *The Ethics of Peer Review in the Academic and Legal Professions*, 42 S. TEX. L. REV. 227, 231 (2001) (noting that academic ethics require an ethic of duty, which sets a minimum standard and penalty for noncompliance with the minimum standard, and an ethic of aspiration, which should reflect the highest goals and ideals of academic professionals).

Law is a self-regulated profession. We lawyers enjoy access to the judicial system, but we also have the responsibility to “obtain fair and just results by fair and decent methods.”³²

The more complex advice is that every law student and lawyer should spend some time thinking about that inevitable clash between personal conscience and professional life. Have you heard the song from the musical *Wicked* entitled *Dancing Through Life* which talks about the value of the unexamined life?³³ I do

³² Warren E. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 12 (1967).

³³ The trouble with schools is
 they always try to teach the wrong lesson
 Believe me, I've been kicked out
 of enough of them to know
 They want you to become less callow
 less shallow
 but I say: why invite stress in?
 Stop studying strife
 and learn to live “the unexamined life” . . .

Dancing through life
 skimming the surface
 gliding where turf is smooth
 Life's more painless
 for the brainless
 Why think too hard?
 When it's so soothing
 Dancing through life
 No need to tough it
 when you can sluff it off as I do
 Nothing matters
 but knowing nothing matters
 It's just life
 So keep dancing through . . .

Dancing through life
 Swaying and sweeping
 and always keeping cool
 Life is fraught less
 when you're thoughtless
 Those who don't try
 never look foolish
 Dancing through life
 mindless and careless
 Make sure you're where less
 trouble is rife
 woes are fleeting
 blows are glancing
 when you're dancing
 through life . . .

not recommend that law students or lawyers live the unexamined life,³⁴ but I recognize that this refusal to reflect prevents any conflict of conscience.

An attorney's career choices will affect the frequency of conscience dilemmas. The lawyer who believes in our American criminal justice system where every defendant is entitled to representation will not have as many conscience conflicts when representing criminal defendants as will the lawyer who believes that the state should punish wrongdoers.³⁵ A natural career choice for the first is the public defender's office. A natural career choice for the other is the prosecutor's office.³⁶ Of course, this examination of conscience is not limited to those interested in criminal law. A law student committed to representation of the underserved and marginalized will not have as many conscience choices if she practices in a legal aid clinic. A law student committed to the protection of intellectual property developed by large corporations will not have as many conscience choices if she joins a large law firm. Note that I do not say that these career choices will eliminate all conscience conflicts. I think we agree that that result is simply not possible.

Julie

P.S. I agree with your assessment about the value of war stories. Because conscience struggles are very personal, I am inclined to tell the difficult conscience decisions I made as a lawyer but to keep the details a little vague so that the student is able to put herself in my position. (I am worried that if I make it too specific, the student will think that she will never have that problem because she does not have an issue with the action that tweaks my conscience.) I also share at least one story in which I struggled with my conscience and made a decision

³⁴ Reflection is a critical exercise in effective lawyering. Robert E. Rodes, Jr. emphasizes the importance of reflection as it relates to conscience: "Your faculty for moral discernment is called your conscience. It is your duty to form it by study and reflection if necessary, and once it is formed, to follow it." Robert E. Rodes, Jr., *On Lawyers and Moral Discernment*, 46 J. CATH. LEGAL STUD. 259, 270 (2007).

³⁵ See Smith, *supra* note 21, at 935 n.61 (explaining that she became a criminal defense lawyer "out of a concern for social justice" and that "criminal defense lawyering is not merely a political imperative, but a moral one").

³⁶ Ralph Nader and Alan Hirsch propose a right of conscience canon of ethics, so that lawyers with a highly developed civic consciousness can work for the government. Ralph Nader & Alan Hirsch, *A Proposed Right of Conscience for Government Attorneys*, 55 HASTINGS L.J. 311 (2003). Nader and Hirsch point out that, unlike private attorneys, government attorneys cannot withdraw from representation.

that I regret. Stories make a concept much easier to remember,³⁷ and stories with a conflicted or surprise ending are even more memorable.³⁸

Dear Julie,

You hit on something that is really important: Pick your job carefully. This does not eliminate conflicts between your nonlawyer general world view and what you are required to do as a lawyer, but it sure can reduce them.³⁹

As is often the case, the criminal context presents a stark contrast to help illustrate the point. If you are someone who wants, above all, to fight for the individual rights in the Constitution (and keep people out of an awful place like prison), go to the public defender's office. If you want to fight to help the jury find the truth (as in "did he do it?"), go to the prosecutor's office.⁴⁰ Either world view is legitimate. Both are needed for our criminal justice system to work. But those who are making it work will

³⁷ Psychologist Jerome Bruner notes, "For better or worse, [narrative] is our preferred, perhaps even our obligatory medium for expressing human aspirations and their vicissitudes, our own and those of others. Our stories also impose a structure, a compelling reality on what we experience, even a philosophical stance." JEROME BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* 89 (1st Harvard Univ. Press paperback ed. 2003).

³⁸ See *id.* at 4–5, 31 (observing that Aristotle taught the value of a *peripeteia*—a sudden reversal in circumstances—and further noting that both children and adults are "highly attuned to the unexpected, even attracted to the odd").

³⁹ See Perlman, *supra* note 11, at 832, 868 (noting that legal ethicists focus on client and tactical choices in resolving ethical conflict despite the fact that attorneys have limited client and strategy selection opportunities in most legal practices, so "career decisions now offer many lawyers their primary source of discretion").

⁴⁰ That is not to suggest that prosecutors should ignore constitutional rights, or that defense attorneys should not care about "the truth." The United States Supreme Court explained the role of federal prosecutors as follows:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice should be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. . . . But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). Further, both defense counsel and prosecutors have "a different role and different duties but each of them—the prosecutor and defense counsel—is absolutely bound to perform his duties *within* the framework of a set of rules, not outside the rules of law and ethics." Burger, *supra* note 32, at 16.

have fewer (though not zero) moments of conscience-driven heartburn if they pursue careers consistent with their overall worldview.⁴¹ The same, of course, is true in the civil justice system.

Steve

Dear Steve,

I agree that choosing a specific job is a critical part of reducing conscience dilemmas. Don't we give this advice to students and young lawyers in other areas? For example, I am having coffee with a student later this morning who said she wants to talk to me because she "would love to hear more about how I have balanced family and work throughout my career." I am definitely not the expert in this area, and I will freely admit that my work–family balance has not always been in perfect harmony. Still, when someone asks me for advice I often think about what I wish someone had told me. In the area of work–family balance I wish someone had told me that the specific lawyer job I chose would not eliminate all the struggles between work and family, but wise choices could certainly reduce the number of those struggles. I guess this is a great time to tell her a couple of war stories because, early in my career, I did not always make the wisest choices when picking a specialty area that would help me balance work and family. This seems to be exactly on point for the conscience dilemma question. A wise career path choice will reduce, but not completely eliminate, the number of conscience struggles a lawyer will face.

Although I do agree that choosing a job with a good conscience fit is critical, I would add that the decision about who to practice with is just as critical.⁴² I had lunch last week with a partner at the large metropolitan law firm where I worked twenty years ago. We talked about the tough economic realities facing all law firms. Many firms in our area have laid off lawyers and staff. His firm made a different decision. The partners decided that they would not eliminate any lawyers or staff, but instead ride out this current storm together with reduced compensation for all working at the firm. I am certainly not making a judgment about which is the better course of action. Instead, I tell the story to say that I was struck by the gratitude I sensed in this partner. He was grateful that he worked with others who shared his values, and when a tough decision had to be made,

⁴¹ Nader and Hirsch point out, "The government attorney who frequently finds assignments morally unpalatable is probably working in the wrong place, and will presumably realize as much." Nader & Hirsch, *supra* note 36, at 317.

⁴² Michael J. Kelly notes, "[T]he culture or house norms of the agency, department, or firm play a dominant role in the way a lawyer practices." MICHAEL J. KELLY, *LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE* 18 (Univ. of Michigan 1996). Bruce A. Green suggests that "each law firm should develop a 'code of professionalism' to govern the conduct of its lawyers in areas of professional discretion" and then make their individual codes available to the public. Bruce A. Green, *Public Declarations of Professionalism*, 52 S.C. L. REV. 729, 733–34 (2001).

he was confident that these trusted and respected partners would make a good decision. Maybe not necessarily the “right” decision—who knows if any plan to deal with the economic downturn will work—but the decision that he could live with because it comported with his values.

Many of our parents taught us that we should pick our friends carefully. That sound advice applies just as powerfully to the decision about picking our law partners, associates, mentors, and friends.

Julie

Dear Julie,

Good point. It is not just about choosing the type of work you are the most comfortable doing, most of the time. It is also about choosing a group of people who share your sense of values. Both will lead to fewer clashes between one's nonlawyer conscience and one's duties as a lawyer.⁴³

*But it won't eliminate them entirely, if the lawyer retains his or her conscience. Let's go back to your quote about morality being complicated if you lose your principles, and the lyrics from *Wicked*, which is a rather interesting title given this discussion. I think we are in agreement that a lawyer should not simply forfeit his or her nonlawyer sense of morality. That might be the only way to completely eliminate conscience-based heartburn, but it comes at too high a cost.*

Lawyers are human beings. The best human beings have highly developed consciences. Although lawyers often have to overrule their nonlawyer consciences to fully represent their clients, they should not obliterate their consciences altogether, in my view.

So now we have our lawyer with a conscience who has chosen a line of work and colleagues that are generally consistent with that conscience. But she now finds herself facing a clash between her nonlawyer conscience and her duties as a lawyer. It does not happen as often as it would have if she had not thought carefully about her job. But it is happening now.

As we discussed earlier, her duties as a lawyer should trump her personal morality, most of the time, when the two conflict. When a client hires a lawyer, he generally should not be required to determine whether the lawyer's sense of morality aligns with

⁴³ Schaefer and Swenson note that the “distance between an attorney's value structure and actual law practice” can cause much unhappiness for the lawyer. Schaefer & Swenson, *supra* note 7, at 461.

*the client's own world view.*⁴⁴ *Most of the time, the lawyer must fulfill her duties as a lawyer. She owes that to her client and to the justice system.*

Is there room for exceptions? If a lawyer retains her nonlawyer sense of morality, can a lawyer ever let her conscience overrule her duty as a lawyer? Can a lawyer ever refuse to do something that the morality of the profession (as articulated, in part, by the Model Rules)⁴⁵ requires, because it violates that lawyer's conscience so severely?

Steve

Dear Steve,

You really have become the law professor. I sense that you have a few answers to those questions that you just posed, but you are giving me the first shot at them.

In response to your last question about whether personal conscience can override a professional duty as a lawyer, I think the answer has to be yes. Once again, I think that answer is yes, not just for us, but for every human being. Just like doctors, police officers, administrative assistants, teachers, professional athletes, and cab drivers,⁴⁶ we get to have a line in our sand that we will not cross. We are humans who happen to practice law. We are not lawyers who happen to be human.

Early in our discussion you suggested that these occasions must be rare. Do you remember that I faced just such a conscience dilemma on my very first day of practice? That was the day I had been waiting for: my chance to be a real lawyer. Then a partner asked me to work on a brief for a client who manufactured a product to which I was personally opposed on moral grounds. What should I do? I called you, of course. You helped me decide that only I could draw my own line in the sand. You advised me that my personal conscience could override my professional obligation only very, very rarely—perhaps once or twice in a

⁴⁴ Some believe that clients should make this determination about the lawyer they hire. Nathan Crystal suggests that lawyers should be required to inform their clients about their philosophy of lawyering, including how they will handle the following problems: how the lawyer will exercise professional discretion on behalf of a client, when the lawyer will withdraw because the lawyer concludes the client is acting immorally, and how the lawyer will prevent a client from doing harm to others. Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75, 96–97 (2000).

⁴⁵ “The professional norms [such as the Model Rules of Professional Conduct related to competence and candor] embody the professional community’s understanding of what it means to be a good lawyer, [so] they are presumptively justified and worthy of respect.” Green, *supra* note 2, at 59.

⁴⁶ See *supra* note 31.

fifty-year legal career. But you also said, “Julie, this may be one of those times. Bad luck for you, but if this is your line, I guess you have to decide if you are willing to cross today.”

I suspect your answer will also be that personal conscience, in certain limited and extreme circumstances, can override professional duties. Let me add one additional consideration. What about the differences between people’s individual consciences?⁴⁷ Most people would not be bothered by representing the client mentioned above. Other people would have a crisis of conscience in a situation that would not even register on my conscience radar. What if you have a highly sensitive sense of personal conscience? For example, what if you stop at every stop sign, even when you are on a bike. What if your personal conscience is less sensitive? For example, what if you pretend you know a lot about a certain area of the law when a client asks if you have experience in that area. You never lie, but you definitely frame your answers to suggest that you are an expert in the area. Isn’t this part of the value of the Model Rules? Don’t they form, or at least outline, a sort of collective conscience?⁴⁸ Isn’t it best if we advise new lawyers to replace varying levels of personal conscience with this collective set of rules?⁴⁹

Julie

⁴⁷ A classic example of the difference between two consciences garnered some media attention recently. In May 2009, the University of Notre Dame announced that it would not award its Laetare Medal for the first time in 120 years. Professor Mary Ann Glendon rejected the medal and declined to speak at graduation. Judge John T. Noonan, Jr. delivered an address at the graduation. *See Notre Dame Award Shelved*, WASH. TIMES, May 1, 2009, <http://www.washingtontimes.com/news/2009/may/01/notre-dame-award-shelved/>. Both are preeminent Catholic legal scholars. Judge Noonan noted in his remarks that he respected Glendon’s “lonely, courageous, and conscientious” decision to decline the Laetare Medal, but then noted, “I am here to confirm that all consciences are not the same.” Judge John T. Noonan, Jr., Laetare Remarks at the University of Notre Dame Commencement (May 17, 2009) (speech available at <http://video.nd.edu/200-commencement-2009-judge-john-t-noonans-laetare-medal-remarks>).

⁴⁸ Even though the Model Rules, or some variation of those rules, govern all lawyers, lawyers in different legal communities often follow different traditions. *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, 718 (1998) (suggesting that each legal community develops its own culture with “posted” and “real” rules for sanctioning unethical conduct which are similar to the “posted” and “real” speed limits in each community). W. Bradley Wendel notes that in many ethical conflict situations “there will probably be a narrow range in which agents may resolve dilemmas differently, but there naturally will be many other possible solutions that are out of bounds for the community.” Wendel, *supra* note 12, at 205.

⁴⁹ Still, “many lawyers with deeply held moral views would reject the idea that the legal profession, any more than the client, is the keeper of his or her conscience.” Green, *supra* note 2, at 59. Patrick J. Schiltz noted “[t]he [formal rules of professional responsibility] are important, for they affect the conduct of lawyers (in both anticipated and unanticipated ways), and they influence the values of the profession.” Schiltz, *supra* note 48, at 713. Schiltz goes on to point out that ethical legal practice requires more than just compliance with the rules, because the formal rules often do not address the decisions a lawyer faces when practicing law. *Id.*

Dear Julie,

Am I really that obvious? Then I have a ways to go as a law professor. The good ones are a bit more subtle. (Or maybe not. It was pretty obvious that Professor Kingsfield knew how he was going to respond to whatever answer his students gave, before he asked the question.)⁵⁰

You have predicted my response accurately, of course, as you know me well. And, as you note, we have had this conversation before, when it was not just theoretical, but a live issue for you. Since that conversation a few years ago (and we old folks like to say “a few years ago” without doing the math, because the real math reminds us we are old folks!), I have thought more about this issue. My basic bottom line position has not changed—the lawyer must reserve the right to say: “I am not going to do it, even though other lawyers would and perhaps should, because it violates my moral compass too substantially.” But I also continue to believe that one only gets a couple (or, at most, a few)⁵¹ of those trump cards to play in an entire career.⁵²

Now, though, I think there are three ways to play the trump card. Well, maybe two ways to play the trump card and another way the lawyer might be able to avoid having to play it.

The first option for the lawyer is the way that might help her keep the trump card in her hand, unplayed on this particular occasion. That option is to try to talk the client out of pursuing the course of conduct that the lawyer finds immoral.⁵³ Folks do sometimes call us “counselor,” after all, and counselors should provide counsel. When doing so, Model Rule 2.1 says we “may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”⁵⁴ Again, this must not be overdone. The lawyer who constantly harps on

⁵⁰ See JOHN JAY OSBORN, JR., *THE PAPER CHASE* (Houghton Mifflin 1971).

⁵¹ See Wendel, *supra* note 5, at 1080 n.34 (“[T]he law of lawyering contains an implicit cab-rank principle that morally motivated refusals to represent clients (or to withdraw from representation) should be reserved only for extreme cases.”).

⁵² For an outline attorneys can use when facing ethical decisions, see Schaefer & Swenson, *supra* note 7, at 476–77.

⁵³ See Wendel, *supra* note 5, at 1080 (discussing “attempts at counseling and persuasion”).

⁵⁴ MODEL RULES OF PROF’L CONDUCT R. 2.1 (2009); accord Kim Diana Connolly, *Navigating Tricky Ethical Shoals in Environmental Law: Parameters of Counseling and Managing Clients*, 10 WYO. L. REV. 443 (discussing Rule 2.1 and an environmental lawyer’s ability to withdraw from representation under Rule 1.16 if a client acts in a way that the lawyer finds repugnant or with which the lawyer fundamentally disagrees); Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 229 (2006) (calling for “the legal profession to recognize that an attorney’s moral perspective often determines the advice she gives, and that clients will be better off if that perspective is articulated openly and deliberately instead of being left to operate beneath the surface of the attorney-client dialogue”).

clients about the alleged immorality of their every action is not going to have clients for long. Much of the time, the lawyer should keep personal views of minor client moral indiscretion unspoken. When it is a big deal, though, the lawyer should consider trying to talk the client out of the immoral (in the lawyer's view) action.⁵⁵ That counsel might lead to a resolution of the "duty as a lawyer v. personal conscience" dilemma.

That will not always work, of course. Indeed, it is not always even a realistic option. In your situation, there was no way the client would have decided to quit producing the product because some young associate thought the product immoral. Raising the issue of your moral view would have been a waste of time.⁵⁶

If the lawyer's counsel will not resolve the dilemma, the lawyer has to consider using one of the two trump cards. The first is withdrawing from representing the client. As noted above, it is not always possible, but often it is.⁵⁷ While I said before that I don't think withdrawal is a panacea to all ethical/moral dilemmas, I do think it is an option the lawyer should consider. But only a few times. If the lawyer is withdrawing from representations monthly or even yearly, she has not chosen the correct line of work.⁵⁸

While we are talking withdrawal, let's make sure we understand the stakes. Some withdrawals are easier, for the lawyer and everyone else, than others. When you are one associate among dozens in a big firm, the firm can respond to your personal withdrawal

⁵⁵ Vischer argues that a lawyer whose personal conscience will play a part in her provision of legal services must "ensure that her client is aware of those values and approves of their entry into the representation." VISCHER, *supra* note 1, at 39; *see also* Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181, 205 (1999) ("When the law allows or enables the client to do something wrongful or unjust, the lawyer ought to have an ethical obligation to point out to the client that injustice."); Rodes, *supra* note 34, at 273 (stating that differing views by a lawyer and client on a moral question that concerns them both should be treated with respect, and suggesting that the lawyer and client should discuss their moral discernment and reasoning). Vischer, a proponent of this type of conversation, also acknowledges that this will not necessarily resolve the conflict between personal conscience and professional duty:

Of course, often a fully informed client will take issue either with the lawyer's values, or, as is more likely, with the specific way in which the values are brought to bear on the pursuit of the client's lawful objectives. When there is an irreconcilable conflict between the lawyer's conscience and the client's wishes, the lawyer must give way, either by acceding to the client's wishes or by stepping aside in favor of another lawyer.

VISCHER, *supra* note 1, at 39.

⁵⁶ There is a great saying about the futility of trying to teach a pig to sing. "Don't bother trying," it is said. "It won't work, and it just frustrates the pig. And the teacher."

⁵⁷ Even from a client perspective, the ability to "discharge a lawyer at any time, with or without cause" may be limited in reality. *See* VISCHER, *supra* note 1, at 31 (observing that a client with a court-appointed lawyer would have to pay for another lawyer, but also noting that, in the current market, corporate clients usually have a variety of law firms and lawyers available).

⁵⁸ *See supra* notes 11, 36, 44, and accompanying text.

by assigning another associate. That does not mean to suggest that, in the situation you mentioned, it was easy for you to go to a partner and withdraw from the assignment. It was definitely not easy for a new associate to do that, and I admire you for having the guts to do it.

But sometimes the mechanics of withdrawal are more complicated. Perhaps the moral dilemma does not arise until the lawyer and the client have already invested months or years of time (and lots of client dollars) into the case. Maybe the lawyer is a public defender (or, perhaps less often, a prosecutor) or a civil practitioner, and she is the best in her field and her area at this kind of work, so withdrawal will mean the client will receive, at best, lower quality representation. Maybe the client is so reprehensible that he will have real trouble finding another lawyer to represent him. Perhaps the lawyer is a solo practitioner who has invested hundreds of thousands of dollars of advanced costs and expenses into this contingent fee case, so withdrawal will mean the end of the lawyer's practice (and the end of employment for her legal assistant, who has loyally stood by through thick and thin). Maybe the lawyer works with a firm or government agency that will fire her if she withdraws.⁵⁹ Sometimes the price of withdrawal is very steep.

If the moral concern is also extreme, the lawyer might just have to pay that price, no matter how steep. If we are serious about retaining our individual, nonlawyer conscience, that means that we might someday have to sacrifice a lot for that conscience.

Speaking of sacrificing a lot, there is another trump card: Doing what one personally believes is morally correct even though it violates the Model Rules or other professional obligations. I believe that the lawyer should retain enough personal humanity to say, if necessary, "I am going to do what I believe is right, even though it violates my professional obligation to my client." Obviously this is a very serious step that should be taken only in the most extreme cases where neither counseling nor withdrawal resolves the moral dilemma. The vast majority of lawyers will never face a situation this extreme.

But a few will. A classic example that we professional responsibility instructor types use involves the lawyer who is hired by a client who tells him, essentially, "I committed a murder, by myself, but the cops think Joe did it. I need you to watch out

⁵⁹ Nader and Hirsch give several such examples: a Minneapolis assistant city attorney fired for refusing to prosecute a case because he felt the state lacked probable cause for a search; a San Bernardino County attorney fired for refusing to prosecute a "third strike" case that could result in life imprisonment for a defendant possessing less than a quarter gram of cocaine; a Phoenix EEOC attorney resigning when his supervisors forbade him from divulging to the court a bribery scheme to obtain false testimony. Nader & Hirsch, *supra* note 36, at 314–15.

for my interests.”⁶⁰ *What happens when the lawyer sees Joe indicted for murder? Found guilty? Sentenced to death? Has an execution date set?*⁶¹

*Under the old version of Model Rule 1.6⁶² and the professional responsibility rules that still exist in many states, the lawyer’s duty is clear. As long as the client is engaging in no future crime, no exception to the lawyer’s duty of confidentiality exists. Under that version of the rules, the lawyer is required to remain silent.*⁶³

⁶⁰ Maybe you should not take this client. Deciding which clients to represent is like deciding where to work. Many scholars suggest that “the decision to undertake the representation of a particular client has moral significance.” Smith, *supra* note 21, at 934 & n.58 (citing MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 68 (1990) (“[T]he lawyer’s decision to take or to reject a client is a moral decision for which the lawyer can properly be held morally accountable.”)); Gerald B. Lefcourt, *Responsibilities of a Criminal Defense Attorney*, 30 LOY. L.A. L. REV. 59, 61 (1996) (“Lawyers are not busses, and they are not obligated to stop at every stop.”); accord Schaefer & Swenson, *supra* note 7, at 473 (“[A] lawyer must be willing to take the moral high road by not automatically accepting every financially appealing case.”). Sometimes, though, an unexpected problem comes from a client who seemed pretty “normal” when he first walked in the door.

⁶¹ This ethical dilemma has been called “almost a cliché.” Alex Kozinski & Leslie A. Hakala, *Keeping Secrets: Religious Duty vs. Professional Obligation*, 38 WASHBURN L.J. 747, 747 (1999).

⁶² The old version of Rule 1.6 provided:

Confidentiality of Information

- (a) [A] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (1) 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 (2001).

The current version of the rule makes a significant change to Rule 1.6(b)(1):

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm

MODEL RULES OF PROF’L CONDUCT R. 1.6 (2009).

Under current Rule 1.6(b)(1), the exception allowing a lawyer to share client confidences is not limited to situations where the client may commit a new criminal act. Thus, a lawyer presumably could reveal a client confidence to prevent a third party’s execution for a criminal act because the lawyer would be revealing that information to “prevent reasonably certain death or substantial bodily harm.”

⁶³ Even though state professional responsibility codes vary, “None [at that time] allows an attorney to reveal information proving a third party defendant innocent.” Kozinski & Hakala, *supra* note 61, at 755.

Counseling the client might be an option. But what happens if the client asks, "If I let you tell the cops that you know Joe did not do it, will I be at risk of being prosecuted?" Then the lawyer must give an honest response,⁶⁴ which would tell the client that there would be some risk to him that would not be present if Joe was executed. After hearing this advice, many clients will say, "Do not tell."

So counseling did not work.⁶⁵ How about withdrawal? That might be possible, but it does not resolve this ethical/moral dilemma. The client will presumably now know that he should either avoid hiring a new lawyer or at least avoid being so frank with that new lawyer about the murder, lest he create another potential source of information for law enforcement about his involvement. Thus, even with withdrawal, the lawyer who knows the client committed the crime alone, and that Joe had no involvement, faces the basic dilemma of following the professional responsibility rules ("Do not tell") versus his personal moral code (which would presumably not allow silence that would lead to the wrong person being killed).

What should the lawyer do?

My answer might surprise you: I do not know. Or, perhaps more precisely, "It depends."

On what? Largely upon that lawyer's resolution of this clash between the lawyer's professional responsibility duties and that lawyer's nonlawyer conscience. Different lawyers are going to resolve that dilemma differently. As someone who has argued that lawyers should not completely abandon their nonlawyer sense of morality, I have to live with that.⁶⁶

That gets back to your last point: Nonlawyer moral codes are individual.⁶⁷ That is the whole idea. A person's moral code may be shaped by outside sources like faith,

⁶⁴ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009) (Advisor) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.")

⁶⁵ Often, attempts to dissuade a client from a proposed action are unsuccessful, so the attorney faces the moral dilemma of deciding how to proceed when attempts at persuasion have failed. See Wendel, *supra* note 5, at 1080.

⁶⁶ See Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 391 (2005) ("Moral pluralism recognizes the existence of a diversity of reasonable yet irreconcilable moral viewpoints, none of which can be objectively declared to be 'right' or 'wrong' from a standpoint outside of its own theoretical framework.")

⁶⁷ This individual sense of conscience does not suggest that conscience operates in a vacuum. Our conscience will determine what action we will take in a given situation, and that action in turn affects others.

religion, and culture,⁶⁸ but it is, by definition, individual.⁶⁹ Indeed, a person's moral code may change over time.⁷⁰ There is no equivalent to the professional responsibility rules that apply to all in our profession.⁷¹

Steve

Dear Steve,

I plan to call that student back into my office.⁷² I'll tell her something like this: "I stumbled through our first conversation because these issues are serious and difficult. I was trying to find an easy answer, but no easy answer exists for your question. Yes, you may be asked to do something in your role as a lawyer that bothers your conscience. Yes, you may do that something. I did. But you have free will, so at some time you may decide that you will not do that something which conflicts with the very core of your value system. I did that, too.

"Two decisions will minimize the number of times you will face this conflict. First, choose an area of practice that comports with your value system. Second, choose your colleagues and associates wisely. When these conflicts still arise, as

⁶⁸ An individual's conscience is often formed by external sources. Professor Vischer contends that we should "recapture the relational dimension of conscience—i.e., the notion that the dictates of conscience are defined, articulated, and lived out in relationship with others." VISCHER, *supra* note 1, at 4.

⁶⁹ Judge John T. Noonan, Jr. emphasized that each individual's conscience is unique. See Judge John T. Noonan, Jr., *supra* note 47 ("By conscience, as you graduates of 2009 know, we apprehend what God asks of us and what the love of our neighbor requires. More than the voice of your mother, more than an emotional impulse, this mysterious, impalpable, imprescriptible, indestructible, and indispensable guide governs our moral life. Each one is different.").

⁷⁰ As early as ten years ago, scholars were noting that both empirical and anecdotal evidence shows that our moral character continues to develop even in our twenties and beyond. See Schiltz, *supra* note 48, at 776–77 ("It is almost surely true that the character of a student is largely formed by the time she leaves childhood . . . but . . . professors cannot avoid influencing the character of their students to some extent.").

⁷¹ Although lawyers probably never completely shared a common understanding of conscience, the increased diversity in practice today makes such a commonality virtually impossible. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1278–79 (1991) (contending that the legal profession's "governing norms no longer represent the shared understandings of a substantially cohesive group").

⁷² Professor Bernstein points out that we law professors should "look in the mirror" while teaching high principles and aspiring to be a person who will do the right thing:

Enjoying as we do the fruits of tuition revenue and professional status—and having constrained our students' prerogatives by requiring them to study their profession—we owe instruction in how lawyers can look out for their own occupational welfare. Manifesting concern about the opportunities and dangers that students face after graduation presents legal educators as lawyers working to fulfill their own professional responsibility, thereby providing students a model of the client service that instructors are training them to render.

Bernstein, *supra* note 13, at 516.

they most certainly will, I urge you not to ignore your personal conscience, but instead consider it as one factor in your ultimate decision about your action.”⁷³

Chief Justice Burger recognized that duty and conscience play a significant role in every lawyer’s life:

The very independence of the lawyer from the government on the one hand and client on the other is what makes law a profession, something apart from trades and vocations in which obligations of duty and conscience play a lesser part. . . .

. . . The crucial factor in all these cases [where the lawyers risked careers by asserting their independence in opposition to government and popular opinion] is that the advocates performed their dual role—officer of the court and advocate for a client—strictly within and never in derogation of high ethical standards.⁷⁴

I will tell my student that sometimes a high ethical standard might include a decision based on personal conscience.

I will also say, “Spend some time reflecting on the decisions you make as a lawyer and why you make those decisions. Your moral character will continue to grow and develop as you grow and develop as a lawyer. Please forgive yourself if you make mistakes. Making a mistake is a part of being human. You may decide that some action you took was not the right action, but that you will strive to make a better decision in the future.”⁷⁵

Finally, I will add, “I hope you have a trusted mentor or colleague who can, at a minimum, be a sounding board for all your concerns and deliberations when you are faced with that very real conflict. Do not be afraid to consult that mentor.”

Julie

⁷³ Chief Justice Burger agreed that it was important to consult personal conscience:

In a close and difficult situation the lawyer must always not only consult his private conscience, but he must also bear in mind that he is an officer of the court granted special privileges which are denied others and that he is an important mechanism in the administration of justice. If he perverts and prostitutes his powers and his position, he undermines the whole system.

Burger, *supra* note 32, at 15.

⁷⁴ *In re Griffiths*, 413 U.S. 717, 732–33 (1973).

⁷⁵ Many attribute a growth in moral philosophy to a growth in moral experience, so “when we see what we do to ourselves and other people there are some things we realize we should not have done, and these realizations enter into how we behave in the future.” Rodes, *supra* note 34, at 263 (citing JACQUES MARITAIN, ON THE PHILOSOPHY OF HISTORY 104–11 (Joseph W. Evans ed., 1957)).

Dear Julie,

Well said. Some might argue that a lawyer's well-defined professional responsibility obligations should never be trumped by something as idiosyncratic and changeable as a personal moral code.⁷⁶ Obviously, I disagree, though I do believe such instances should be rare.

Here is my bottom line: A lawyer is also a human being. As a lawyer, she often has well-defined duties. As a human being, she must be guided by a conscience that the lawyer should monitor, nurture, and follow, even, occasionally, when it leads to conduct different from that "required" by the lawyer's duties. Much as I believe in our justice system and much as I believe we should follow its guidelines almost all of the time, I want it run by folks who, every once in a while, say, "Not me."⁷⁷

Steve

⁷⁶ Of course, the lawyer's professional duties are not always well-defined. Steven H. Goldberg notes, "Practitioners know that the most difficult and absorbing ethics issues are not those addressed by the Code or the Rules, but those that slip between the cracks, leaving the lawyer with nothing on which to rely but judgment and a sense of professionalism." Steven H. Goldberg, *Bringing The Practice to the Classroom: An Approach to the Professionalism Problem*, 50 J. LEGAL EDUC. 414, 420–21 (2000). Sometimes, though, the Model Rules point clearly in one direction, and the lawyer's personal moral compass points in the opposite direction.

⁷⁷ William Kunstler, a civil rights lawyer, commented, "Everyone has a right to a lawyer, that's true. But they don't have a right to me." VISCHER, *supra* note 1, at 53 (citing *Sonya Live* (CNN television broadcast Nov. 5, 1993)).