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"Lawyer as Public Citizen" – A Futile Attempt to Close Pandora's Box

MATTHEW E. MEANY*

INTRODUCTION

The American Bar Association's Model Rules of Professional Conduct ("Rules"), adopted by every state legislature except California,¹ include a prescription for the duties and responsibilities of the legal profession.² In the Preamble, the Rules begin with the well-known premise and directive that lawyers should be zealous advocates in serving their clients' interests.³ The Rules further require that lawyers strive to prove facts and to provide legal bases in support of those interests,⁴ to abide by their clients' decisions regarding the objectives of representation,⁵ and to consult with their clients on the means pursued to reach those objectives.⁶ The Rules, therefore, cultivate an advocacy ethic that relies on the adversary system to yield the public values of truth and justice as a

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1. *Alphabetical List of States Adopting Model Rules*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Jan. 15, 2013).

2. MODEL RULES OF PROF'L CONDUCT (2009).

3. *Id.* pmbl. ¶ 2.

4. *Id.* R. 3.1 & cmt. 1.

5. *Id.* R. 1.2(a).

6. *Id.*

byproduct of opposing attorneys' efforts to secure a favorable outcome for their clients. Only later, however, do the Rules seek to limit this sweeping characterization of "lawyer as zealous advocate" by introducing a lawyer's conflicting and vaguely defined obligation to be a "public citizen."⁷ Indeed, the Rules provide little guidance on what a "public citizen" is and how to reconcile these conflicting roles.

This Article illustrates how the Rules themselves predispose practitioners to embrace the role of "zealous advocate" at the expense of "public citizen." Further, it shows how the legal education system and the myriad of pressures faced by a lawyer combine to marginalize "public citizen" considerations in representation. Finally, it proposes a solution that would minimize the cognitive dissonance felt by attorneys who seek full actualization of their duties under the Rules.

Section I establishes the origin of the problem in the Rules, which place conflicting professional duties on attorneys in relation to their clients and to society. Section I then develops the paradox by parsing the term "zealous advocate" and examining the etymology and connotations elicited by its use, followed by an exploration of the Rules' vague charge to attorneys as "public citizens" to act in the best interest of society, the law, and justice. Finally, Section I concludes with analysis exposing the impotence and inadequacy of the "public citizen" duty as a constraint on the means and ends adopted during representation.

Section II discusses the impropriety of establishing "zealous advocacy" as the starting point and model baseline for the legal profession, incorporating the perspectives of a few prominent legal ethics scholars. Section II then illustrates how the context and pressures of real world advocacy illuminate the practical shortcomings of the Rules, forcing practitioners to choose between roles that vary in their consequences for abandonment. Section II concludes by examining how the combination of skills, pressures, and insufficient guidance in the Rules exacerbates a lawyer's predisposition to embrace the "zealous advocate" role to the likely denigration of the "public citizen" role.

Section III discusses the emphasis of the current mainstream curriculum in legal education on the role and tools of "zealous advocacy" to the effective exclusion of "public citizen" concerns. In addition, Section III explores how the prioritization of winning in legal education and practice has Pyrrhic implications for both the lawyer and society.

Section IV critiques the proposals of several contemporary legal commentators, focusing on their practical shortcomings.

7. *Id.* pmbl. ¶ 6.

Section V concludes this Article by proposing an alternate and more comprehensive solution than legal ethics scholarship to date, culling various useful elements from existing proposals and combining them with elements and ideas that address a broader range of practical issues.

SECTION I

The Preamble to the Rules establishes the internal conflict of roles which, unsurprisingly, manifests itself in results unintended by the ABA drafters. The Preamble begins by broadly stating the three main roles a lawyer plays in the legal system: "a representative of clients, an officer of the legal system and a public citizen."⁸ By structuring the opening of the Rules in this manner, the drafters indicate that these roles carry equal weight and importance. However, the Rules quickly place paradoxical duties on attorneys when they proceed to define the conflicting loyalties associated with those roles in the Preamble's subsequent paragraphs.

In Paragraph Two, the Preamble defines "representative of clients" to include the duty to serve as a zealous advocate for a client's interests.⁹ Subsequently, the Preamble places on attorneys, as "public citizens," the duty to seek "the administration of justice."¹⁰ Although the Preamble fails to define these terms further, a problem in and of itself, the use of the terms "public" and "justice" reasonably means that attorneys have a duty to produce results that are *objectively* right and that correspond to societal values. Thus, these duties cause a pointed conflict every time an attorney engages in representation of a client whose successful assertion of claims or objectives would not comport with a "public" conception of justice.

The nature of the attorney-client relationship and client expectations illuminate the paradox. A client hires an attorney to produce an outcome favorable to that client, irrespective of whether that outcome is just or right in an objective sense. More than likely, the client's only concern is whether she ultimately prevails, not whether societal justice is achieved in the process. However, the Rules obligate her attorney to care about this second goal.¹¹ Thus, an attorney can only fulfill both duties under the

8. *Id.* pmbl. ¶ 1. This inquiry will focus on the roles of "zealous advocate," a subpart of "representative of clients," and "public citizen."

9. *Id.* pmbl. ¶ 2 ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

10. *Id.* pmbl. ¶ 6 ("As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.").

11. *See id.*

Rules when zealous advocacy for her client furthers the attainment of public justice. Stated differently, only when a client's subjective conception of justice corresponds to the public's objective conception of justice can an attorney fulfill both duties imposed on her by the Rules. When victory for a client through zealous advocacy is not objectively just, an attorney fails in her "public citizen" duty. Conversely, when an attorney facilitates a publicly just outcome that prejudices her client's interests in some way, she has failed in her "zealous advocate" duty. In short, an attorney must violate one of her duties under the Rules when a client's objectives are not aligned with public justice.

The ABA drafters explicitly reject this reality. Paragraph Eight of the Preamble states the drafters' contention that "[a] lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious."¹² As a central but undeclared premise, the Rules assume that the duties of the required roles typically coincide and are achieved simultaneously. By dismissing the probability of conflict between the roles in the first sentence, the ABA drafters fail to acknowledge every situation in which it is impossible both to win for one's client and to attain the objectively just result under the circumstances. Since the drafters discount the likelihood of such scenarios, it is not surprising that the Rules fail to provide guidance for reconciling these antithetical responsibilities. Beyond the discomfort felt by attorneys unable to reconcile their conflicting duties under such circumstances, they are often burdened with moral and ethical dissonance after being forced to pursue a course of action from an imperfect set of choices.

While failing to provide any kind of useful framework to help lawyers reconcile conflicts in their required roles, the ABA drafters did attempt to comfort lawyers by providing an unsatisfactory palliative for such situations. In the second sentence of Paragraph Eight of the Preamble, the Rules state that "when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time *assume* that justice is being done."¹³ Here, the drafters simply advise a lawyer to "assume" that the morally right party will always win if both parties are "well represented," another faulty premise that discounts the high probability of a dispositive mismatch between any two opposing counselors regarding their relative skill, experience, resources, or a factual or procedural advantage in any given case. If by "well represented," the Rules mean "equally represented," then the Rules again fail to connect with

12. *Id.* pmbl. ¶ 8.

13. *Id.* (emphasis added).

reality, because equal representation is rarely the case; the scales are almost always tipped from the outset.¹⁴

Further, and most importantly, the statement suggests that lawyers should not burden themselves directly with the "public citizen" concern of ensuring that justice is achieved and should simply "assume that [it] is being done."¹⁵ In doing so, the Rules essentially advocate willful blindness on the part of counsel, who may know very well under the posture of a particular case that zealous advocacy will thwart an objectively just outcome, especially where one of the aforementioned advantages exists. This rationalization comforts very few lawyers who care about fulfilling both the zealous advocate and public citizen roles. After all, lawyers are trained to recognize subtle, yet significant, distinctions and can easily see the inherent problem with assuming that they can fulfill their public citizen duty to administer justice by pursuing a course of action adverse to that goal. Besides, few would agree that something as important as justice should be left to assumptions.

By using "zealous," a term carrying historically violent and extreme connotations, the ABA drafters may have exceeded their intended characterization of a lawyer's advocacy responsibilities.¹⁶ People often have difficulty forgetting powerful imagery or applying subsequent limitations to such impressions to reduce their initial impact or potency.¹⁷ In other words, if an original description is too strong, it may prove to be resistant or even impervious to subsequent restrictions and modifications. One manifestation of this principle is the widely recognized "halo effect," which is the psychological phenomenon whereby a person who has made a strong, positive first impression on another maintains that high esteem, despite multiple instances of subsequent behavior that should logically reduce or negate the positive regard originally attributed to that person.¹⁸ On a broader level, this principle applies equally to negative impressions

14. See generally DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (2000).

15. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 8 (2009).

16. See, e.g., *Zealous Definition*, ONLINE ETYMOLOGY DICTIONARY, <http://www.etymonline.com/index.php?search=zeal> (last visited Jan. 15, 2013) (defining "zealot" as "member of a militant 1st century Jewish sect which fiercely resisted the Romans in Palestine").

17. See, e.g., Kayla Causey & Aaron Goetz, *The Halo Effect in Overdrive*, A NATURAL HISTORY OF THE MODERN MIND (Jul. 1, 2009), <http://www.psychologytoday.com/blog/natural-history-the-modern-mind/200907/the-halo-effect-in-overdrive> (describing the "halo effect," discussed *infra*).

18. *Id.*

and to those which concern one's understanding of a particular subject.¹⁹ The ABA drafters' choice of the term "zealous advocate" is one such example of this concept. It contains two terms that convey great strength²⁰ but likely exceed the scope of commitment to the client that the drafters intended to articulate. In particular, the modifier "zealous" bears many connotations that the drafters likely do not endorse.²¹ Consequently, a lawyer's understanding of her role after reading the tenacious "zealous advocate" characterization is not likely to be diluted or constrained by the limitations the Rules seek to impose through the subsequent and conflicting "public citizen" characterization.

In its tamest definition, the word "zealous" means "marked by fervent partisanship for a person, cause, or an ideal."²² While its meanings clearly include the kind of passion the drafters intended to instill in lawyers advocating the claims and causes of their clients, a closer look at the etymology of the word reveals that its use as a descriptor may be misplaced in light of the lawyer's "public citizen" duties. Although synonyms for "zealous" include "passionate," "devoted," "enthusiastic," and "keen," they also include "militant," "fanatical," and "rabid."²³ In several dictionaries providing usage examples, the term is used in the context of a sincere or fanatical devotion to religion.²⁴ Indeed, lexicographers universally incorporate violence, fanaticism, or intolerance to opposing views into their definitions of the root terms "zealot"²⁵ and "zealotry."²⁶

19. *Id.*

20. See *supra* note 16 and accompanying text; *Advocate Definition*, ONLINE ETYMOLOGY DICTIONARY, *supra* note 16, at http://www.etymonline.com/index.php?allowed_in_frame=0&search=advocate&searchmode=none (defining "advocate" as "protector, champion, patron").

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

22. *Zealous Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/zealous> (last visited Jan. 15, 2013).

23. *Zealous Definition*, THEFREEDICTIONARY, <http://www.thefreedictionary.com/zealous> (last visited Jan. 15, 2013).

24. See, e.g., *Zealous Definition*, WEBSTER-DICTIONARY.ORG, <http://www.webster-dictionary.org/definition/zealous> (last visited Jan. 15, 2013); *Zealous Definition*, YOURDICTIONARY.COM, <http://www.yourdictionary.com/zealous> (last visited Jan. 15, 2013).

25. See, e.g., *Zealot Definition*, SHORTER OXFORD ENGLISH DICTIONARY (Oxford University Press CD-ROM, 6th ed. 2007); *Zealot Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/zealot> (last visited Jan. 15, 2013); *Zealot Definition*, THEFREEDICTIONARY, *supra* note 23, at <http://www.thefreedictionary.com/zealot>; *Zealot*, THESAURUS.COM, <http://thesaurus.com/browse/zealot> (last visited Jan. 15, 2013); *Zealot Definition*, WEBSTER-DICTIONARY.ORG, *supra* note 24, at <http://www.webster-dictionary.org/definition/zealot>; *Zealot Definition*, YOURDICTIONARY.COM, *supra* note 24, at <http://www.yourdictionary.com/zealot>.

Historically, the Zealots were a fanatical Jewish sect most notorious for their militant resistance to the Roman Empire in the Iudaea Province in the first century A.D.²⁷ The Zealot movement, characterized by opposition to Roman rule via sporadic rebellions throughout that century, sanctioned the murder of Jews who they believed had collaborated with the Romans.²⁸ The term "zealot" derives from the Greek "zelotes," meaning "one who is a zealous follower," and its Hebrew counterpart, "kanai" or "qannaim," which is characterized as being "zealous for his God."²⁹ The Zealot movement is most notorious for the Great Jewish Revolt (A.D. 66–70), which led to the complete destruction of the city of Jerusalem.³⁰ In their final stand, nearly one thousand Zealots captured the Roman fortress of Masada, taking no prisoners and successfully repelling Roman attempts to recapture the stronghold for three years.³¹ When the Romans finally penetrated the fortress, they found that the Zealots had committed suicide in an act of defiance and devotion rather than allow themselves to be captured.³²

As the history that burdens the term's roots illustrates, the extremist connotations attributed to "zealous" are quite negative. One source aptly captures the overbearing essence of the term by defining its correlative, zealotry, as "*undue or excessive zeal; fanaticism.*"³³ This Article refers to the terms "zealous," "zealot," and "zealotry" interchangeably both because

26. See, e.g., *Zealotry Definition*, DICTIONARY.COM, *supra* note 25, at <http://dictionary.reference.com/browse/zealotry>; *Zealotry Definition*, THEFREEDICTIONARY, *supra* note 23, at <http://www.thefreedictionary.com/zealotry>; *Zealotry*, THESAURUS.COM, *supra* note 25, at <http://thesaurus.com/browse/zealotry>; *Zealotry Definition*, WEBSTER-DICTIONARY.ORG, *supra* note 24, at <http://www.webster-dictionary.org/definition/zealotry>; *Zealotry Definition*, YOURDICTIONARY.COM, *supra* note 24, at <http://www.yourdictionary.com/zealotry>.

27. FLAVIUS JOSEPHUS, *Antiquities of the Jews (Book XVIII)*, in 3 THE WORKS OF FLAVIUS JOSEPHUS 53, 53–57 (William Whiston trans., London, J. Richardson and Co. 1822); S.G.F. BRANDON, *JESUS AND THE ZEALOTS* 46–47 (1967).

28. BRANDON, *supra* note 27, at 46 ("To secure these ideals, [the Zealots] were prepared to resort to violent action against . . . those of their countrymen whose acceptance of Roman rule was particularly notable.").

29. BRANDON, *supra* note 27, at 43–44, 43 n.3; *Zealot*, ONLINE ETYMOLOGY DICTIONARY, *supra* note 16, http://www.etymonline.com/index.php?term=zealot&allowed_in_frame=0.

30. JOSEPHUS, *supra* note 27, at 54; BRANDON, *supra* note 27, at 30.

31. BRANDON, *supra* note 27, at 142–43.

32. FLAVIUS JOSEPHUS, *The Jewish War (Book I)*, in 3 THE WORKS OF FLAVIUS JOSEPHUS 251, 272–73 (William Whiston trans., London, J. Richardson and Co. 1822); BRANDON, *supra* note 27, at 58.

33. *Zealotry*, DICTIONARY.COM, *supra* note 25, at <http://dictionary.reference.com/browse/zealotry> (emphasis added).

they derive from a common origin and because their meanings are inextricably entwined. In any case, the use of the word “zealous” in its advocacy context is not a compliment. Its use carries with it extremist undertones that more aptly describe the type of “blind militarism” and willingness to sacrifice everything that modern Islamic Fundamentalists and terrorist groups employ in purported furtherance of their causes.³⁴ In this light, “zealous” suggests a willingness to employ any means necessary to achieve stated ends and to reject a thorough inquiry into the legitimacy or various costs of those means.³⁵ The lawyer analogue would be to win for one’s client with no regard to the sacrifices and costs involved, including, but not limited to, morality, ethics, and justice.

Certainly, the ABA drafters could not have intended such an extreme role with such sweeping implications for the range of conduct permissible in furtherance of a client’s ends under the Rules. But, even assuming lawyers understand “zealous” in its least fanatical sense, too great a risk arises of willful or negligent misinterpretation of the term by lawyers who may cite its codification in the Rules as an official justification for all action necessary to achieve victory at any cost. The use of “zealous” to modify “advocate” in the Rules creates a morally and ethically dangerous grey area that lawyers can leverage to their own, and their clients’, advantage.

The dangers of abuse are compounded by several additional factors, such as various pressures and insufficient limitations, which are expounded below.³⁶ The drafters erred in using such a poignant term to describe the ideal client representative, especially since the term “advocate” already carries a connotation of strength. Commonly defined as “one that pleads the cause of another” or “one that defends or maintains a cause or proposal,”³⁷ the term “advocate” also implies that the proponent possesses greater knowledge, skill, or ability than the represented party or general public. While the ABA drafters’ desire to enhance the characterization of an attorney’s role beyond a plain “advocate” is understandable, they could have achieved a more precise result by using a modifier such as “ardent,”

34. John Morreall, *Religious Faith, Militarism, and Humorlessness*, 1 EUR.’S J. PSYCHOL. 3 (August 2005), available at <http://ejop.psychopen.eu/article/view/369/272>.

35. See, e.g., Allen K. Harris, *The Professionalism Crisis – The ‘Z’ Words and Other Rambo Tactics: The Conference of Chief Justices’ Solution*, 53 S.C. L. REV. 549, 569–70 (2002) (“The phrase ‘zealous advocacy’ is frequently invoked to defend unprofessional behavior and a ‘Rambo,’ or ‘win at all costs,’ attitude.”).

36. See *infra* Section IV.

37. MERRIAM-WEBSTER, *supra* note 22, at <http://www.merriam-webster.com/dictionary/advocate>.

"fervent," "strong," "committed," or a list of several other adjectives that both convey strength and remain unburdened by the treacherous connotations and risk of misunderstanding posed by "zealous."

One of the central problems plaguing legal ethics theory and practice is that the "public citizen" role is an elusive concept. Finding a functional definition of "public citizen" in the Rules, or anywhere else, is a frustrating and fruitless endeavor. At a minimum, an attorney cannot derive much confidence in her understanding of "public citizen" from any formulation she assembles under the Rules or from scholarly analysis. This conundrum is, in part, due to the Rules' delineation of distinct roles, followed by extremely brief, generalized, and inadequate explanations of those roles.³⁸ Other provisions, such as Paragraph Eight, then exacerbate the problem by suggesting that there is no distinction between the "zealous advocate" and "public citizen" roles in most scenarios.³⁹ Contemporary scholarship on the topic is afflicted by the fact that its authors are mostly lawyers⁴⁰ whose point of reference and longtime guiding principles are the Rules themselves.

Thus, the daunting task of defining "public citizen" must begin by looking to the root of the problem: the Rules. In Paragraph Six of the Preamble, the Rules state that a lawyer's role as a "public citizen" includes obligations to "seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession."⁴¹ However, the subsequent explanations of each of these charges seem no more informative than the statement of the duties themselves. In particular, the explanation of the duty to "seek . . . the administration of justice" requires a lawyer only to "be mindful of deficiencies in the administration of justice and . . . to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel."⁴²

This explanation is problematic for two main reasons. First, it prescribes a fairly passive role for the lawyer in administering justice in her community; it only requires that a lawyer be aware of the system's shortcomings, a proposition fundamentally incongruent with the magnitude

38. See generally MODEL RULES OF PROF'L CONDUCT pmbi. (2009) (providing an overview of the multiple duties and roles of attorneys).

39. *Id.* pmbi. ¶ 8.

40. See, e.g., Harris, *supra* note 35, at 549 n.1.

41. *Id.* pmbi. ¶ 6.

42. *Id.*

of the public value the Rules seek to further.⁴³ Surely, lawyers can recognize when societal justice is not being administered, but recognition alone clearly will not cure the underlying deficiencies. The Rules, however, suggest no remedial action that the lawyer can or should take. The Rules do encourage the “lawyer as public citizen” to assist people in obtaining access to the justice system, the same system just characterized in the previous sentence as deficient.⁴⁴ The glaring problem, of course, concerns the lack of responsibility the lawyer has to ensure an objectively just outcome once she has ensured the requisite access to the system. It defies logic to proactively connect victims of injustice with a system that fails to command its officers to take any tangible action calculated to promote the effective administration of justice. Thus, the Rules merely create confusion and frustration regarding the meaning of the “public citizen” role rather than provide any concrete and universal understanding of the role.

The context in which the lawyer’s “public citizen” role is typically discussed illuminates the definitional conundrum from a different angle. “Public citizen” is most often referred to as a lost role⁴⁵ that needs to be reclaimed.⁴⁶ A simple Internet search for “Lawyer as Public Citizen” provides only links to the ABA Rules themselves and a few law review articles advocating its resurrection.⁴⁷ Among these documents is the transcript of a recent law school commencement address encouraging the graduates to incorporate this role into their professional lives.⁴⁸ While these proponents recognize the importance of the “public citizen” role and

43. See *id.* (acknowledging that attorneys must “be mindful of deficiencies in the administration of justice”).

44. *Id.*

45. See, e.g., Stephen N. Limbaugh, Jr., Chief Justice of the Supreme Court of Mo., Introductory Speech at the Missouri Bar/Judicial Conference (Sept. 12, 2002), available at <http://www.courts.mo.gov/page.jsp?id=1778> (explaining the need for lawyers to overcome the perception of “greed and incivility”); see also Robert E. Scott, *The Lawyer as Public Citizen*, 31 U. TOL. L. REV. 733, 733–37 (2000) (discussing how the role of attorneys as public citizens “has been largely ignored in the current debate about the decline in professionalism”).

46. Michael S. Greco, The University of Akron School of Law Commencement Address (May 20, 2007), in 41 AKRON L. REV. 337, 345 (2008).

47. The ensuing discussion is derived from a Google search for “Lawyer as Public Citizen” conducted on Oct. 2, 2008.

48. Greco, *supra* note 46, at 345 (“We must reclaim that important role of Lawyer as Public Citizen—for the personal fulfillment of each individual lawyer who engages in pro bono and public service, for the betterment of our profession, and for the benefit of the American people.”).

its deficient execution in practice, none attempt to define it. Perhaps they are as unsure about its meaning as the ABA drafters. Perhaps the drafters intended for lawyers to supply their own definition.⁴⁹ Virtually anything is possible, as there is no legislative intent to aid in the interpretation of the concept. The Rules fail even to suggest a philosophical model of "public citizen" from which a lawyer's duties can be inferred, a problem that this Article revisits in Section V.

Despite their inability to articulate the duties of the term, scholars and critics appear to agree that the profession fails to fulfill its "public citizen" role.⁵⁰ However, where one cannot define the duty, one cannot establish a violation of that duty. Moreover, a fundamental principle of law is that one cannot prosecute that which cannot be proven. Therefore, the definitional dilemma has serious consequences for enforcement of the "public citizen" duties as well, making it extremely difficult to establish professional misconduct under the Rules absent concurrent legal misconduct.

SECTION II

Aside from the denotative and connotative problems described above, the structure of the Preamble itself marginalizes the "public citizen" role.⁵¹ This section addresses the impropriety of establishing "zealous advocate" as the starting point and baseline for the characterization of the model lawyer that the Rules seek to promulgate.

When describing a new concept, its proponent must first select a baseline characterization or framework familiar to her audience. The

49. The past actions of the ABA defeat this proposition. For instance, the 1969 *Model Code of Professional Responsibility* was divided into "Disciplinary Rules" and "Ethical Considerations," the latter of which were only "aspirational" and unenforced. MODEL CODE OF PROF'L RESPONSIBILITY (1969). Recognizing that such a precatory statement of ideals was ineffective in securing compliance, the ABA recast many of them as sanctionable, black letter rules in the 1983 *Model Rules of Professional Conduct*, which are currently in effect, as amended. MODEL RULES OF PROF'L CONDUCT (2009). Thus, the ABA drafters clearly understood the danger in leaving broad discretion in the ethical realm to the legal profession and would likely not leave the definition of such a core duty in the hands of the group which is bound by it. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 14–15 (1998) (explaining the implication of "black letter rule[s]" within legal ethics and arguing that "the important issues of legal ethics require complex, contextual judgment" (alteration in original)).

50. See, e.g., Greco, *supra* note 46, at 345 ("[W]e have too few lawyers performing public service and pro bono work today in our communities."); Scott, *supra* note 45, at 733 (noting the "decline in professionalism").

51. See generally MODEL RULES OF PROF'L CONDUCT pmb. (2009).

proponent then adds and subtracts components of other familiar concepts in shaping her concept, including expansions and limitations on the degree of those components. Once the concept has been adequately distinguished and refined, the formulation is complete. However, although the subsequent modifications of the initial framework shape the distinct final product, the initial concept remains the core factor influencing the overall meaning of the new concept. While important, the subsequent modifications are necessarily less fundamental. Further, a failure to articulate or explain such modifications sufficiently could cause the proponent's audience to discount or ignore their application to the new concept.⁵²

In characterizing the model lawyer in the Rules, the ABA drafters engaged in the reasoning process just described, placing the lawyer's duties as "zealous advocate" in this baseline role. In what he calls the "Dominant View," William Simon asserts that "zealous advocacy" is the core principle of the Bar's disciplinary codes.⁵³ Regarding this role, Simon states, "The basic precept is nearly always qualified by some norms intended to protect third-party and public interests. But the basic precept remains the governing norm. It influences and structures discussions. It functions as both starting point and presumptive fallback position."⁵⁴ Evidence supporting these assertions permeates the Rules. "Zealous advocate" is mentioned first in the Rules, it is defined and explained first, and it is discussed more frequently than the "public citizen" role.⁵⁵ Furthermore, as an affirmative charge, "zealous advocacy" is structured as an empowering concept or, as Simon puts it, the "governing norm."⁵⁶ The role of "public citizen," introduced subsequently, only functions as a modifier or "qualifying norm" for the basic precept of "zealous advocate."⁵⁷ As a limitation on the baseline concept, "public citizen" is structurally a much less fundamental component of the model lawyer under the Rules.

At this juncture, two further observations are critical. First, as discussed in Section I, subsequent limitations or restrictions may not easily modify a strong initial impression.⁵⁸ The strong historical connotations

52. This framework for describing a new concept is one that I developed and was inspired by William Simon's work in the discussions that follow.

53. SIMON, *supra* note 49, at 7–8.

54. *Id.* at 8.

55. See MODEL RULES OF PROF'L CONDUCT pmbl.

56. SIMON, *supra* note 49, at 8.

57. See *id.*

58. See discussion of "halo effect" *supra* Section I.

burdening the "zealous advocate" term, as both the "starting point" and "governing norm," coupled with its greater emphasis in explanations and discussions relative to "public citizen," may actually inhibit its modification by the latter term. Second, as also discussed in Section I, the lack of definition of the "public citizen" role may combine with the very real possibility that a proponent of a concept or characterization could fail in causing her audience to incorporate intended and desired modifications to that concept or characterization if she fails to articulate or sufficiently explain those modifications. Most commentators agree that the "public citizen" role suffers greatly from lack of definition.⁵⁹ As Simon succinctly puts it, the "public citizen" role "is less defined than the Dominant one."⁶⁰

This lack of definition could prove fatal to a lawyer's understanding of the broader, intended characterization of the model lawyer and could thus inhibit the incorporation of "public citizen" considerations into her decisions and actions. Even if an attorney wants to fulfill the "public citizen" role, this noble aspiration is thwarted by the deficiencies in definition and philosophical guidance needed to reconcile this duty with the affirmative duty to act in ways inuring to the client's benefit under the "zealous advocate" role. Likewise, Simon's characterization of "zealous advocate" as the "presumptive fallback position" is particularly astute.⁶¹ It encapsulates the truism that when a person cannot reconcile two conflicting duties and must, therefore, choose between them, she will choose the default position.⁶²

For society, the adoption of "zealous advocate" as the default in the Rules could have a devastating impact on the preservation and promotion of justice. Each time the duties of "zealous advocate" and "public citizen" conflict, a lawyer will presumptively gravitate towards loyalty to the client.⁶³ This tendency may well account for Simon's word choice in his assertion that "[t]he basic precept is nearly always qualified by some norms *intended* to protect third-party and public interests."⁶⁴ Rather than saying "norms *which* protect," Simon's use of "norms *intended* to protect" suggests that it is at least the perception of some scholars that the "public

59. See, e.g., SIMON, *supra* note 49, at 8; Scott, *supra* note 45, at 733–37.

60. SIMON, *supra* note 49, at 8.

61. *Id.*

62. *See id.*

63. *See id.* (maintaining that the zealous advocate role is the "fallback" position).

64. *Id.* (emphasis added).

citizen” restrictions on “zealous advocate” that the drafters incorporated into the Rules often fail to protect these interests.⁶⁵

Just as conceptual deficiencies and default rules undercut the likelihood of equal expression of the roles in practice, the reality in which lawyers operate may also further encourage the predisposition of a practitioner to fulfill her “zealous advocate” role at the expense of her “public citizen” duties in many circumstances.

Whether such a result is objectively right or not, a client seeks victory for her cause when she employs a lawyer.⁶⁶ In fact, for the money she is paying, she certainly expects it. As Rudolph Gerber asserts in his critique of the realities of legal ethics practice under the Rules, “the [legal] system and its participants seek victory, not truth. Litigation tactics are means to the only goal that counts: a successful outcome, which, needless to say, is unrelated to the right outcome.”⁶⁷ Conversely, society values objective justice and demands that a lawyer aid in its administration through the codification of the “public citizen” role. Unlike the client, society is concerned with the “right outcome.” Although these goals are not mutually exclusive, *per se*, they will conflict a significant percentage of the time, placing the lawyer in a moral and ethical tug-of-war concerning her professional duties to her client and to society.⁶⁸ As previously argued, such scenarios implicate the default rule and its dominant expression over other considerations and duties.

Aside from the pressures from the client to “zealously advocate,” Gerber argues that compliance with the “public citizen” duties remains unlikely due to lack of meaningful enforcement.⁶⁹ He observes that lawyers go largely unchecked in their adherence to “zealous advocacy” because “[t]rial and appellate judges, typically drawn from the litigation bar, rarely have the spleen to control or denounce the tactics described here.”⁷⁰ Even where a fairly obvious dereliction of the “public citizen” duty exists, a lawyer can be confident that neither opposing counsel nor the judge will fault her for choosing to fulfill the “zealous advocate” duties at the expense of objective justice.⁷¹ Gerber emphasizes the frequency of this

65. *See id.* (emphasis added).

66. *See* RUDOLPH JOSEPH GERBER, *LAWYERS, COURTS, AND PROFESSIONALISM: THE AGENDA FOR REFORM* 117 (1989) (noting that the point of a lawsuit is to seek victory).

67. *Id.* at 117.

68. *See* Scott, *supra* note 45, at 733–37.

69. *See* GERBER, *supra* note 66, at 117 (citing the complacency of the judiciary).

70. *Id.*

71. *See id.*

circumstance by stating: "The Anglo-American adversary system has strongly encouraged the role model judge as a smiling, passive ticket holder at a lawyers' nightclub act. . . . We have cast our lot with our litigation peers rather than with the public."⁷² Thus, even the fear of reprimand by the bar is often remote in practice, a fact that reinforces an attorney's alignment of priorities with "zealous advocacy" rather than "public citizen" under ambiguous or conflicting circumstances.

The potential for malpractice liability also underlies and influences the "zealous advocate—public citizen" conundrum.⁷³ Especially with the minimal chance of censure for failure to fulfill the "public citizen" role, a lawyer faces a far greater danger when leaving the "zealous advocate" duties unfulfilled.⁷⁴ Although a lawyer may serve the ends of justice when she comports with her "public citizen" role, a frustrated client is not likely to appreciate that result the same way the attorney may. When failing to act or acting contrary to one's "zealous advocacy" duties in favor of "public citizen" concerns, moral and ethical serenity may come at a high price. A slighted client has recourse both at law⁷⁵ and through the Bar.⁷⁶ Such a perceived dereliction of advocacy duties could become a non-frivolous professional malpractice suit for performance below the standard of care expected in the field.⁷⁷ The client could alternatively or additionally file a colorable grievance for failure of the lawyer's duties of diligence⁷⁸ and competence⁷⁹ in handling the client's business. Beyond these severe considerations, the potential for censure by one's firm, detriment to one's reputation in the legal and general community, and the prospect of losing valuable client relationships steer a lawyer towards the default role. Therefore, aside from being the expectation of one's client and one's firm, "zealous advocacy" appears to be both the path of least

72. *Id.*

73. See, e.g., John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 117 (1995) (noting that judges and juries should rely on professionalism rules in delineating the details of lawyers' duties to their clients in the context of a legal malpractice claim).

74. *Id.*; see also *Williams v. Callahan*, 938 F. Supp. 36, 49 (D.C. Cir. 1996) (involving a plaintiff bringing a legal malpractice action against his counsel for "failure to zealously advocate plaintiff's cause").

75. *Id.*

76. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3 (2009).

77. David J. Beck, *Nature of Legal Malpractice*, 43 BAYLOR L. REV. 43, 43 (1991) (citation omitted) ("[T]he ultimate issue in a legal malpractice case is whether there has been a breach of duty which causes damage.").

78. MODEL RULES OF PROF'L CONDUCT R. 1.3.

79. *Id.* R. 1.1.

resistance and the path of least risk. Despite the attending self-effacement, an attorney immersed in a moral and ethical dilemma may often act in fulfillment of the “zealous advocate” role, left to take consolation in the fact that she satisfied at least one of her duties under the Rules.

SECTION III

The previous sections have articulated many of the conditions predisposing a lawyer to conform to her “zealous advocacy” role when faced with a conflict between the duties, including various external pressures and fears, the divergent enforcement of the roles in practice, and insufficient guidance in the Rules themselves for handling such scenarios. This Section focuses on arguably the most dominant factor predicting fulfillment of the “zealous advocate” role at the expense of the “public citizen” role: legal education.

In its current design, legal education provides abundant reinforcement of “zealous advocacy” by inculcating impressionable future lawyers with a thorough understanding of this duty as well as the skills to achieve it successfully.⁸⁰ Conversely, the typical law school experience fails to provide meaningful instruction regarding a lawyer’s “public citizen” duties and the skills needed to work through the moral and ethical conflicts they will inevitably face at some point in their careers.⁸¹ This dearth of guidance leaves future lawyers poorly equipped to manage the most difficult, and arguably most personally and societally consequential, decisions they will make in their professional lives.⁸²

In its intensive study of sixteen representative law schools during the 1999–2000 academic year, the Carnegie Foundation found a shocking uniformity of this phenomenon among law school programs.⁸³ The Report Summary epitomizes these deficiencies in legal education by stating: “In

80. Indeed, since the founding of the National Institute for Trial Advocacy in 1971, trial advocacy has become an established part of the law school curriculum in the United States. Peter Toll Hoffman, *Law Schools and the Changing Face of Practice*, 56 N.Y.L. SCH. L. REV. 203, 210 (2011/12).

81. See, e.g., Carnegie Foundation for the Advancement of Teaching, *Summary of WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 6* (2007), available at http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf (discussing the lack of support for developing ethical and social skills as one of the major limitations of legal education).

82. See Christina Harrison, *A Crisis in Ethics*, *The National Jurist*, Oct. 2009, at 16 (citing the financial crashes or near misses of AIG, Citibank, and Goldman Sachs in concluding that ethics should be more greatly emphasized in legal education).

83. Carnegie Foundation, *supra* note 81, at 6.

their all-consuming first year, students are told to set aside their desire for justice. They are warned not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analyses."⁸⁴ While this request to table moral and ethical considerations is arguably for very practical reasons, i.e., to learn how to isolate the legal issues involved in a problem with precision, the lack of emphasis on reintroducing those considerations back into the analysis before moving on to the next topic is more than a little disconcerting. The Carnegie Foundation researchers reported that "[i]ssues such as the social needs or matters of justice involved in cases do get attention in some case-dialogue classrooms, but these issues are almost always treated as addenda."⁸⁵

In particular, the cursory and post hoc treatment of issues which bear such heavy personal and societal consequences creates three problems. First, assuming that a graduate can recognize the moral and ethical issues she later faces in practice and would like to reconcile her conflicting duties to the client and society, her legal education poorly equips her to integrate those important factors into her analysis.⁸⁶ Second, the under-emphasis of moral and ethical concerns consonant with the "public citizen" role communicates the message that such considerations are less important, or at least more tangential, than successful execution of one's "zealous advocate" duties, socializing students to disregard such analytical factors.⁸⁷ Third, after three years of checking morality at the door, graduates of the current law school system may simply become jaded or indifferent to moral concerns, robotically applying the legal analytical process to each fact pattern without regard to its potentially dire consequences for morality, justice, or other societal values.⁸⁸ The tabling of moral issues in legal education most likely translates into tabling such considerations in practice, as the practice of law is naturally quite heavily influenced by the training and habits acquired during legal education.⁸⁹ Thus, the proverbial apple is

84. *Id.*

85. *Id.*

86. *See id.* (noting that if students are not taught to incorporate morality into their legal analysis, "students have no way of learning when and how their moral concerns may be relevant to their work as lawyers").

87. *See id.* ("Being told repeatedly that [moral and ethical considerations] fall, as they do, outside the precise and orderly 'legal landscape,' students often conclude that they are secondary to what really counts for success in law school—and in legal practice.").

88. *See, e.g.,* Harrison, *supra* note 82, at 16 (acknowledging the connection between lack of ethics and the financial ruin of companies such as AIG, Citibank, Goldman Sachs, and Enron).

89. *See* Carnegie Foundation, *supra* note 81, at 6.

not likely to fall far from the tree regarding the omission of a morality component in one's legal analysis in practice after three years of omitting moral concerns in law school.

Several legal ethics scholars are even more critical than the Carnegie Foundation on the shortcomings of legal education.⁹⁰ In particular, Rudolph Gerber asserts:

One cannot but wonder at the propriety of law school and bar advocacy programs that instill in fledgling litigators a predilection for victory over truth, and in the process bestow on each pupil a bursting bag of trial tricks more like that of vaudeville actors than officers of the court. Euphemistically disguised as "techniques of cross-examination" or "the art of discovery," these programs too often emphasize not candor, careful preparation, honesty, and fair dealing, but excessive client loyalty and sleight-of-hand devices. The programs often suggest using these devices when virtue alone is not enough to win.⁹¹

In his scathing criticism of the legal educational system, Gerber emphasizes the prevalence of educators cloaking morally and ethically questionable tools for fulfilling the "zealous advocate" role with neutral and inconspicuous titles.⁹² Gerber drives home the focus of legal education on "zealous advocacy" and rationalization of morally and ethically questionable means under the Rules by stressing that "[i]n the courtroom, these tactics are defended as 'zeal.'"⁹³ Further, he quickly adds the disastrous implications that this rationalization process, enabled by the current formulation of the Rules, has on society.⁹⁴ He asserts: "Zealous advocacy has become the buzzword squeezing decency and civility out of the profession. Zealous advocacy is the modern day plague that weakens the truth-finding process and makes a mockery of the lawyer [sic] claim to be an officer of the court."⁹⁵

As Gerber points out, these "devices" and "tactics" disseminated in legal education focus exclusively on winning.⁹⁶ The danger, of course, is the cumulative effect of winning at all costs on the moral integrity of the profession and the sacrifice of societal values for a few individual triumphs. When the focus is only on the end of winning, a view which an

90. See GERBER, *supra* note 66, at 116–21 (evaluating the negative affects the role of "zealous advocate" has on the legal profession).

91. *Id.* at 117.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

exclusively "zealous advocate" model of representation promotes, the means of achieving that end receive less scrutiny, whether ethical or not.⁹⁷ The current system under the Rules, although diversified in form, is an exclusively "zealous advocate" model *in fact*.

Maintaining such a system has ruinous implications for the morality of individual practitioners as well as for societal values. Gerber encapsulated this idea in his assertion that "putting victory ahead of truth is a Pyrrhic Victory at best."⁹⁸ Gerber's allusion to the lessons of history is quite apt in the legal ethics context. Upon being congratulated after his victories over the Romans at Heraclea in 280 B.C. and Asculum in 279 B.C., King Pyrrhus of Epirus is reported as saying, "[i]f we are victorious in one more battle with the Romans, we shall be utterly ruined," referencing the devastating casualties his army sustained in those battles.⁹⁹ Thus, a Pyrrhic Victory is not a victory at all. It is a victory accompanied by enormous losses and costs which leaves the victor in as desperate shape as if he had lost.¹⁰⁰ In the practice of law, a lawyer's focus on winning at all costs could have Pyrrhic implications for her own moral integrity as well as for society's goal of achieving and preserving objective justice through the legal system.

In my own experience, I can attest that the arguments presented in this section and the findings of the Carnegie Report are the reality in legal education. I have found that professors often avoid discussions of moral issues and implications, focusing on the substantive material "in the interest of time," or other like justifications. During Convocation, one of the first things my class was taught is that we must "strive to learn the law and processes well over the next three years so that we can be 'zealous advocates' for our future clients." While some lip-service may have been paid to our role as "public citizen," the impression left in my mind was of the former role alone. This impression was reinforced just a few days later in a reading assignment from our Contracts textbook, containing Lord Brougham's famous statement to the House of Lords in representation of Queen Caroline in her divorce from King George IV.¹⁰¹ He asserted:

97. See *id.*; see also Carnegie Foundation, *supra* note 81, at 6.

98. GERBER, *supra* note 66, at 122.

99. 9 PLUTARCH, PLUTARCH'S LIVES: DEMETRIUS AND ANTONY, PYRRHUS AND CAIUS MARIUS 417 (Bernadotte Perrin trans., 1920).

100. See *id.* at 416–17 (explaining the devastating losses Pyrrhus' army had suffered and its affect on both the morality of the men and his ability to wage war in the future).

101. E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS 49–50 (6th ed. 2001).

[A]n advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world: that client and none other. . . . Nay, separating even the duties of a patriot from those of an advocate, and casting them if need be to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client's protection.¹⁰²

Lord Brougham's quote epitomizes the demands of "zealous advocacy," and his "reckless" devotion to his client's interests is exalted as the model example of legal representation for his impressionable readers.¹⁰³ The clear purpose of this inclusion is to inculcate pupils with the charge of their future profession.

The textbook chosen for our second-year Evidence course supports the truth of the foregoing assertions as well, observing that "counsel in an adversary system often are focused on winning, not on procedural values like getting at the truth."¹⁰⁴ The authors then refrain from making an evaluation of the propriety of such a circumstance, missing a golden opportunity to address this issue.¹⁰⁵ Their avoidance of judgment here provides just another common example of educators familiarizing the future lawyer with the reality of practice, without any commentary on whether such a perspective is proper.¹⁰⁶ At a minimum, it conditions law students to recognize that they need to be prepared to face these "zealous" lawyers with equal resistance or fail as effective counsel for their clients.¹⁰⁷

Basic behavioral psychology principles suggest that this lack of reinforcement concerning an attorney's "public citizen" duties, coupled with the strong incentives associated with winning and prevalent training towards that end, creates conditions not only conducive to—but nearly guaranteed to produce—a dominant focus on the much less restrictive "zealous advocate" duties as a rationale for attorney conduct. However, entirely aside from the negative impact on society, succumbing to the

102. *Id.*

103. See Lawrence J. Vilardo & Vincent E. Doyle III, *Where Did the Zeal Go?*, A.B.A. LITIG. J. (Fall 2011), available at http://www.americanbar.org/publications/litigation_journal/2011_12/fall/where_did_zeal_go.html ("In the United States, at least, Brougham's opening statement inspired the view that attorneys were duty-bound to advance their client's interests through any and all legal means—that is, to represent their clients with zeal.").

104. DAVID P. LEONARD & VICTOR J. GOLD, EVIDENCE: A STRUCTURED APPROACH 428 (2d ed. 2008).

105. See *id.* (transitioning immediately into a discussion about commonly employed objections).

106. See, e.g., *id.* (ignoring any moral or ethical issues within our adversarial system).

107. See *id.* (discussing the need to protect witnesses from zealous attorneys using objections).

pressures and temptations "to practice [law] in a way that creates short-term advantage" at the expense of one's morals and ethical values could have significant consequences for the lawyer herself.¹⁰⁸

Commentators observe that many practitioners develop career dissatisfaction over time from dealing with the numerous pressures and expectations encouraging them to advocate with moral detachment.¹⁰⁹ As Robert Vischer points out, the Rules themselves suggest that a lawyer is not morally accountable for pursuing a client's objectives.¹¹⁰ Rule 1.2(b) explicitly states that "[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."¹¹¹ However, such compartmentalization is difficult to achieve in actuality, and lawyers who have convinced themselves that they can shelve their personal morality while "zealously" asserting a particular claim often find themselves burdened with a heavy conscience afterwards. Even though the Rules support what some scholars call the "Nonaccountability Thesis,"¹¹² Vischer explains that a lawyer engaged in "amoral" advocacy cannot always escape the personal consequences of practicing law in a morally detached manner.¹¹³ He warns:

Ignoring the potential for interpersonal moral engagement in the course of an attorney's work comes at a significant professional cost. From the attorney's perspective, it can exacerbate the perceived incoherence of her life, widening the gap between her professional role and her understanding of social justice, moral truth, and the common good. The segmentation of a lawyer's personal and professional identities can be profoundly unsettling for the lawyer herself, especially if the lawyer has deeply held beliefs that do not speak only to the non-professional aspects of her existence.¹¹⁴

In reality, the Rules' disclaimer clause is not enough to absolve one's conscience. This circumstance could also explain the high incidence of substance abuse among attorneys who seek an escape from their guilt and

108. Scott, *supra* note 45, at 736.

109. See, e.g., SIMON, *supra* note 49, at 1 (describing the law as an "anxious profession" that "consistently disappoints the [moral] aspirations it encourages").

110. Robert K. Vischer, *Moral Engagement Without the "Moral Law": A Post-Canons View of Attorneys' Moral Accountability*, in LEGAL STUDIES RESEARCH PAPER SERIES, at 2 (Univ. of St. Thomas Sch. of Law Legal Studies Research Paper No. 08-01, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104477#.

111. MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2009).

112. Vischer, *supra* note 110, at 4.

113. *Id.* at 14–15.

114. *Id.* at 14.

self-disgust after years of asserting claims at odds with their moral values; the prevalence of lawyer assistance programs for substance abuse provided by the state bars of most states suggests some veracity to this latter hypothesis.¹¹⁵

The problems with the current model of legal education, as with the current Rules, are deep. These problems ultimately have a profound impact, not only on society and its common values, but also on the personal lives of the lawyers they train.¹¹⁶ Technical skills and knowledge are only part of the puzzle for practicing law in an effective and fulfilled manner.¹¹⁷ While many educators know this truism, they fail to take opportunities to impart that important message to their students, who in turn form the impression that strong technical skills and knowledge are all they need to meet their duties as lawyers to their clients and to lead fulfilling professional lives.¹¹⁸ In not addressing these important issues and equipping their students to handle such challenging scenarios, law schools fail those future lawyers at great personal and societal cost. Likewise, the Rules' failure to adequately define and explain the equally important roles, coupled with the Rules' failure to acknowledge and provide meaningful guidance for the conflicts lawyers will realistically face in their endeavor to fulfill these duties, cripples lawyers' ability to reconcile their roles and to achieve the comfort associated with certainty that one has done all that is required of her.

SECTION IV

While not exhaustive, the previous sections have outlined many of the practical problems with the Rules and contemporary legal education. Legal ethics scholars and commentators have done so before to varying degrees and by focusing on varying angles.¹¹⁹ Many go beyond identifying the

115. See, e.g., NORTH CAROLINA LAWYER'S ASSISTANCE PROGRAM, <http://www.nclap.org> (last visited Jan. 15, 2013) ("The Lawyer Assistance Program (LAP) is a service of the North Carolina State Bar which provides *confidential* assistance to North Carolina lawyers to help them identify and address problems with alcoholism, other drug addictions and mental health disorders."). Confidentiality of disclosures within the program is protected under the North Carolina Rules of Professional Conduct. N.C. RULES OF PROF'L CONDUCT R. 1.6(c).

116. Harrison, *supra* note 82, at 18.

117. See Carnegie Foundation, *supra* note 81, at 6 (noting that the practice of law requires attention to moral and ethical issues).

118. *Id.*

119. See, e.g., Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951); SIMON, *supra* note 49; Vischer, *supra* note 110.

problem and propose solutions.¹²⁰ However, none of these solutions seem entirely fulfilling. This Section briefly outlines and critiques the proposals of a handful of these commentators. Section V culls a few useful elements from their suggestions and combines them with some unique ideas in a new proposed solution.

In his "Contextual View," William Simon advances the new basic maxim that "lawyer[s] should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice."¹²¹ If implemented, this perspective would refocus the lawyer on achieving objectively just results—away from the confusing and conflicting duties as "zealous advocate" and "public citizen" under the Rules.¹²² Simon notes that justice transcends the client's self-serving interpretation of the concept and is not always furthered by a victory on her behalf.¹²³ He also points out the reality that societal justice and justice as subjectively understood by the client only overlap by coincidence.¹²⁴ Simon's model makes the administration of objective, societal justice the lawyer's highest priority.¹²⁵ His proposed solution to the disarray of the current Rules aligns the duties of the lawyer with those placed on the prosecutor.¹²⁶ Suggesting that the drafters substitute "win" for "convict" as the *lawyer's* new duty, he quotes the *Model Code's* charge to *prosecutors*: "The responsibility of a public prosecutor . . . is to seek justice, not merely to convict."¹²⁷

In a law review article entitled "The Ethics of Advocacy," Charles Curtis attempts to explain the oft-paradoxical duties and obligations attending the practice of law.¹²⁸ His article focuses on discussing the expectations lay society has for its lawyers as well as the sources of its general confusion regarding a lawyer's conflicting loyalties.¹²⁹ Using a number of didactic examples and hypotheticals, Curtis attempts to

120. See, e.g., SIMON, *supra* note 49, at 9 (proposing replacing the basic maxim of "zealous advocate" with "action[] . . . likely to promote justice"); Vischer, *supra* note 110, at 28–29 (discussing a course developed for the St. Thomas School of Law in order to introduce a more in-depth discussion of ethics in the first year of legal education).

121. SIMON, *supra* note 49, at 9.

122. See *id.* at 9–10 (explaining that abstract norms are not always subjective).

123. *Id.* at 11 ("Lawyers in this view are not simply self-seeking profit maximizers, but people who seek satisfaction and respect in the performance of a socially valuable role.").

124. *Id.* at 10.

125. *Id.* at 9.

126. *Id.* at 10–11.

127. *Id.* at 10 (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980)).

128. Curtis, *supra* note 119.

129. *Id.*

illuminate the intricate distinctions which he believes present various contradictions in a lawyer's duties.¹³⁰ Most notably, he faults the Rules' predecessor, the *ABA Canons of Professional Ethics*, which were in effect at the time he wrote his article, for the deficiencies in definition, explanation, and guidance which plague the current Rules.¹³¹ In his article, Curtis laments the need to interpret the *Canons* at all, arguing that their drafters should have been more explicit, and cites several ambiguous areas in need of clarity.¹³² He posits that many of the interpretive problems and much of the confusion which troubles the profession, as well as the general public, could have been easily avoided with clearer drafting.¹³³

Other scholars, such as Robert Vischer, emphasize the importance of changes to the priority and manner of addressing moral issues in legal education.¹³⁴ At the University of St. Thomas Law School in Minnesota, where Vischer teaches, the curriculum requires that first-year students take a course titled "Foundations of Justice."¹³⁵ Substantively, the course deviates greatly from the rule-based "professional responsibility" course students traditionally encounter in their second year, which merely helps students develop an understanding of the Model Rules of Professional Conduct sufficient to pass the Multi-State Professional Responsibility Exam and to fulfill an ABA curriculum requirement.¹³⁶ Instead of memorizing rules and Ethics Opinions, Vischer's course guides students to engage in debate and discourse concerning historical legal scenarios which raise issues that are "inescapably moral" in nature.¹³⁷ The stated goal of these discussions is "to equip students with the tools with which to discern and articulate the moral considerations in legal representation without jeopardizing its client-centered nature."¹³⁸ The course is intentionally

130. *Id.* at 6–18.

131. *Id.* at 4–6, 11.

132. *Id.* at 11. Curtis attempts to explain the ABA Committee on Professional Ethics' statements that "[a] lawyer is an officer of the court. His obligation to the public is no less significant than his obligation to his client. His oath binds him to the highest fidelity to the court as well as to his client." *Id.* He states: "The Committee should have gone on to distinguish a lawyer's loyalties. The court has priority over the client in matters of *law* and the client has a priority over the court in matters of *fact*." *Id.* (emphasis added). Thus, one can see that a short explanation here clarifies what is otherwise a blatant contradiction in duties.

133. *Id.*

134. See Vischer, *supra* note 110, at 27–33.

135. *Id.* at 28.

136. See *id.* at 28–30 (listing the various topics that "Foundations of Justice" covers).

137. *Id.* at 28–30.

138. *Id.* at 28.

placed at the beginning of the curriculum to ensure its teachings in moral engagement form part of the analytical foundation that students develop at the outset of their legal education.¹³⁹ This placement also allows professors and students to explore moral issues in later courses more easily and helps students make moral considerations a routine part of their analysis as they prepare for practice.¹⁴⁰

Although Simon, Curtis, and Vischer expose important issues with the current system of ethical duties, none provides a comprehensive solution calculated to guide an attorney through many of the most difficult and trying professional dilemmas. In the next Section, I incorporate the ideas above into a proposal which would revise the structure and content of the Rules to provide more clarity in their interpretation as well as guidance for unanticipated scenarios.

SECTION V

The multifaceted nature of the ethical debasement marring the legal profession today reflects a complexity that defies easy solution. The sheer number of problems, factors, and pressures challenging an ethical lawyer's efforts to balance the often-conflicting roles placed on lawyers by the Rules presents an especially difficult scenario to address comprehensively. Some are deeply rooted in habits and traditions of the profession.¹⁴¹ Some permeate the legal educational system.¹⁴² Some are external to the lawyer and firm; some are internal. Some are systemic—codified and perpetuated by the Rules themselves.¹⁴³ This Article is far from exhaustive. While my solution may have shortcomings, it should provide a manageable start and expose part of the agenda for discourse and reform.

Reform must start with the Rules themselves. The Rules influence the actions and philosophies of legal educators, practitioners, and the courts.¹⁴⁴ Put differently, the Rules guide and regulate the participants in the profession from the initial stages of their socialization until their retirement. Thus, the problems contained therein are particularly salient.

139. *Id.* at 30.

140. *Id.*

141. *See* Curtis, *supra* note 119, at 4 (noting the "sacred duty" owed to the client) (citation omitted).

142. *See* Carnegie Foundation, *supra* note 81, at 6.

143. *See* MODEL RULES OF PROF'L CONDUCT pmb. ¶ 2 (promoting zealous advocacy).

144. *See id.* scope ¶¶ 1–2 (describing the Rules as either "imperative" or "permissive" and explaining that the Rules "shap[e] the lawyer's role").

In addressing the issues in the Rules, I propose five main areas of reform. First, the ABA drafters should revise or abandon the term “zealous advocate” in favor of milder language. As discussed in Section I, the connotations and power of that combination may exceed the effect the drafters sought to achieve. Adopting in every case the advocacy style of Lord Brougham, who was willing to risk the guillotine for his client, would inevitably produce Pyrrhic consequences for one’s moral and ethical integrity, as well as the values of society and reputation of the profession.

As a profession, we cannot be willing to sacrifice everything to win. “Zealousness” implies blindness to—or at least disregard for—any countervailing considerations, regardless of merit. “Zealous” devotion is complete. In a calculus of the spirit, it leaves no remainder. In requiring it, the Rules leave nothing for the lawyer’s other purported duties as “public citizen” and the third role of “officer of the court.” It is implausible that the drafters intended for them to be so severely marginalized. A better explanation is that the drafters overshot their intended characterization of a lawyer as advocate. They meant to emphasize passion and devotion to one’s representations but employed a term embodying the most radical form of these concepts. To that end, the drafters should replace “zealous” with “committed.” The connotations of the new modifier are positive, and the risk of misinterpretation is greatly reduced. It conveys strength and firmness but retains room for moral and ethical reflection.¹⁴⁵

Second, the Rules should explicitly align the duties of the lawyer with those of the prosecutor. Borrowing from Simon’s suggestion outlined in Section IV,¹⁴⁶ the only substitutions would be “lawyer” for “prosecutor” and “win” for “convict.”¹⁴⁷ This modification could help emphasize the importance of a lawyer’s other duties, which currently receive lower priority than “zealous advocacy.” In addition, an explicit statement that “a lawyer bears the dual responsibility to fulfill the equal roles of public citizen and committed advocate” could provide a clear reminder that prioritization of one role at the expense of another is inappropriate. It would also dispense with any uncertainty in the Preamble that the roles are meant to be equal. Although the equality of the roles can be inferred from the structure of the Preamble, a principle of such importance should not be

145. “Committed” is merely a suggestion. My main concern is that the modifier “zealous” is replaced in the text of the Rules rather than any specific term being used to replace it.

146. See *supra* Section IV.

147. The resulting charge in the Rules would be: “The responsibility of a lawyer is to seek justice, not merely to win.”

left to inferences. Further, note the change in positional priority of "public citizen" in the proposed revision above. Although the express use of "equal" should dispel misunderstandings regarding priority of the roles, an erroneous interpretation favoring "public citizen" over "committed advocate" does not endanger societal justice and moral integrity in the same way that reversing the terms does.

Third, drawing from Curtis' suggestions, the drafters should elaborate on the explanations of the roles and their corresponding duties in the Rules.¹⁴⁸ As discussed above, the current explanations of roles and duties in the Rules are short and inadequate.¹⁴⁹ In addition to expanding these explanations, the drafters should explain the common interplay between roles and embrace a more realistic view regarding the probability of conflict between the demands of the roles, detailing the expectations and duties of an attorney under such scenarios. Such elaboration in the comments does not need to be exhaustive by any measure, but more guidance is needed and would greatly help attorneys understand their full responsibilities. Even if their current assertion that "the roles are usually harmonious" is true, the drafters still fail to guide lawyers facing difficult conflicts in their required roles when they merely suggest that lawyers should "assume that justice is being done."¹⁵⁰ That overinclusive and, therefore, faulty premise must be eliminated.

Fourth, the drafters should adopt a philosophical model in the Preamble as a gap-filler and underlying guide to the Rules. The addition of the explanations and revisions proposed above would fail to account for *every* possible conflict, question, or interpretation problem that may arise; thus, the provision of a philosophical model as an interpretive guide for ambiguous or unaddressed circumstances could assist attorneys in striking a satisfying balance between competing duties. The model would essentially function in the capacity of legislative history, providing a tangible paradigm from which the intent and spirit of the Rules could be garnered.

Currently, the overwhelming focus on "winning" in the legal profession, vis-à-vis its "zealous advocate" origin, represents the Spartan model of society.¹⁵¹ The Spartans were historically renowned for their

148. See *supra* Section IV.

149. See *supra* Section I.

150. MODEL RULES OF PROF'L CONDUCT pmb. ¶ 8 (2009).

151. See J. David Knottnerus, *Spartan Society: Structural Ritualization in an Ancient Social System*, 27 HUMBOLDT J. OF SOC. REL. 1, 7–8 (2002) (describing how Spartan institutional practices served to accustom youth to a militaristic way of life).

fearless military prowess.¹⁵² Fulfillment for men was dominance on the battlefield or a glorious death in that pursuit; fulfillment for women was giving birth to a son who was fit to be a Spartan warrior.¹⁵³ All resources and efforts in the society were directed towards achieving victory in battle.¹⁵⁴ The legal profession should not be idolizing victory in the courtroom in the same way. Although the drafters have not explicitly endorsed any philosophy as a model, the legal profession has recently adopted the Spartan model as its default to fill this need. As Robert Scott posits, “the practice of law has evolved from a ‘professional calling’ to the efficient delivery of skilled services in a competitive market.”¹⁵⁵ An unspoken implication is that “skilled services” are those which are likely to produce victory.

The express provision of a different model which emphasizes desirable values could supplant this arbitrary default. Although other philosophical models are available, I propose the Rules expressly adopt the Periclean model as articulated in Pericles’ famous *Funeral Oration*.¹⁵⁶ In his address to the Athenian people mourning the loss of many soldiers after a campaign in the Peloponnesian War, Pericles distinguished Athens from bellicose societies like Sparta, whose sole focus was on military victory.¹⁵⁷ In particular, he praised Athens for its diversity in values, skills, and professions, while noting that it still accomplished great things on the battlefield.¹⁵⁸ Each member of Athenian society, in his view, wore many hats.¹⁵⁹ This model is the ideal to which lawyers should turn as a guiding philosophy in the Rules: fulfillment of client objectives in the courtroom, but also fulfillment of “public citizen” and “officer of the court” roles. By establishing the three roles of the lawyer, the drafters have already suggested that they intended to follow the Periclean model. Now, they should align the content to match this ideal and provide an explication of the philosophy for situations where even that content would not suffice.

152. *Id.*; see also STEPHEN PETER ROSEN, SOCIETIES AND MILITARY POWER: INDIA AND ITS ARMIES 85 (1996).

153. *Spartans*, HISTORY.COM, <http://www.history.com/topics/spartans> (last visited Jan. 15, 2013).

154. See Kottnerus, *supra* note 151, at 7–8.

155. Scott, *supra* note 45, at 736.

156. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 143–51 (Rex Warner trans., Penguin Books rev. ed. 1972).

157. *Id.* at 146.

158. *Id.* at 146–48.

159. See *id.* (describing the Athenian people as unique in their governmental institutions, intellect, and love of art).

Although such an adoption would still suffer from some grey areas and interpretation problems in practice, a lawyer striving to fulfill her duties under the Rules would at least have a better sense of when she was way off course.

Finally, although a successful reform effort needs to focus on the Rules, legal education must also change. With empirical data emerging from intensive studies such as the Carnegie Report, the deficiencies of the current legal educational model in preparing young lawyers to face the moral and ethical challenges of practice are being exposed more frequently.¹⁶⁰ In recent years, this part of the reform effort seems to be well-discussed by scholars and commentators.¹⁶¹ Many of their solutions appear promising and simply need to gain support and momentum. However, law schools need to expedite a few key changes.

Although many curricula incorporate legal ethics electives and seminars beyond the required rule-based professionalism class,¹⁶² these courses need to be elevated to required, core classes. Further, they should be taught in the first semester. By emphasizing the importance of such issues and considerations in one's legal analysis from the beginning, the courses would have the greatest impact on the socialization of impressionable young lawyers into the profession. In addition, deans should require faculty to reserve time to engage in dialogue about moral and ethical issues raised in substantive classes, which have traditionally glossed over such concerns or treated them as addenda.

Overall, law schools need to develop a greater awareness and urgency around ensuring that their graduates possess more than simply the bag of tricks needed to become effective mercenaries for their clients. With a little thought and re-prioritizing of the curriculum, this broader focus can be implemented successfully in the classroom to the betterment of the student, the profession, and society.

160. See Carnegie Foundation, *supra* note 81, at 5–7 (examining the deficiencies in legal education).

161. See, e.g., Harrison, *supra* note 82, at 16 (discussing the current crisis in ethics and the place or morality in law school classrooms).

162. For instance, Campbell University's School of Law offers an elective course on Advanced Legal Ethics. *Course Catalog*, Campbell University Norman Adrian Wiggins School of Law, <http://law.campbell.edu/page.cfm?id=391&n=course-catalog> (last visited Jan. 15, 2013).

CONCLUSION

The ABA drafters may have intended for the “zealous advocate” and “public citizen” duties to be equal charges by their embodiment in the Rules. However, the lack of clarity in the Rules beyond the use of a term carrying heavy connotations, as well as the focus of legal education on learning how to win, the numerous sources of pressure to win, and other forces, severely tips the scales in favor of the attorney adhering to her “zealous advocate” duties, regardless of the resulting detriment to both personal and societal values. Arguably, each victory where these values are sacrificed for individual triumph constitutes a Pyrrhic victory—and this is certainly so in the aggregate.

By looking at the various factors at play, one can see how the deck is stacked against the fulfillment of the “public citizen” role. After all, what lawyer has time to worry about a role which the Rules cannot define when her clients demand results; when her senior partner demands results; when her creditors from her law school student loans demand payment; when she has a family to provide for; and when the very norm of the profession is “zealous advocacy,” which satisfies all these recently mentioned demands. All she must do is relax her moral grounding.

Lawyer as “public citizen” must entail more than the Rules’ explanation of merely “providing the poor with access to the legal system” or, as the recent President of the ABA described in his commencement address to the 2007 graduating class at the University of Akron School of Law, simply doing more pro bono.¹⁶³ Lawyer as “public citizen” includes the duty to ensure that the societal value of justice is achieved, that legal actions are the product of sound moral and ethical discourse, and that members of the legal profession are focused on more than just winning. As a “public citizen,” a lawyer’s services and morality are not just commodities for her clients. A “public citizen’s” duties are, after all, “public.”

163. Greco, *supra* note 46, at 345.