Ethics in Pandemics: The Lawyer for the (Crisis) Situation

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Abstract

Lawyers often respond to client crises. But a client crisis is not necessarily a crisis for the lawyer when the lawyer is competent, prepared, and trained to handle that crisis. More and more, though, lawyers are asked to face novel crises that are so pervasive that those lawyers struggle to provide competent, effective, and zealous service to their clients due to those crises. In the midst of the COVID-19 pandemic, lawyers sheltered in place while their clients suffered immense hardship, for example, in prison or detention where the virus spread like wildfire, or homebound, forced to remain with an abuser. The Model Rules of Professional Conduct *provide some limited guidance to lawyers dealing with emergency situations and there has been some tinkering along the margins of the rules in response to recent crises, particularly as those rules address the unauthorized practice of law in jurisdictions where emergencies arise. To date, legal scholarship has not considered the ways in which what I call crisis lawyering may be a mode of practice many, if not all, lawyers will face throughout the course of their careers. By using the* Model Rules *as a starting point for the analysis, this Article explores the somewhat disjointed ways in which the rules that govern the practice of law offer guidance to the lawyer facing novel, pervasive crises. It also addresses the needs of lawyers operating in fields where they may confront crisis situations and seeks to recognize that crisis lawyering may be a form of practice that is, itself, trans-substantive, demonstrating distinct similarities across different areas of practice. This Article attempts to remedy the absence of scholarship addressing crisis lawyering by analyzing the extent to which the current rules governing the practice of law are or are not adequate*

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to the task of providing guidance—and accountability—to lawyers dealing with such situations. It also offers recommendations for how we may consider amendments to those rules to better reflect the needs, interests, and obligations of lawyers dealing with crisis situations so that lawyers may serve their clients better and more effectively when faced with such crises.

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INTRODUCTION

Louis Brandeis famously used the phrase "counsel for the situation" to describe how he saw his work as a lawyer.[1] For all lawyers, the "situations" in which the lawyers find themselves will often vary by the client, as will the context in which the lawyer is asked to assist that client. The situation the client faces, and for which legal representation is sought, is often a crisis for that client. Indeed, clients ask lawyers to handle client crises and those lawyers prepare to provide effective representation to their clients by dispatching their duties according to the standard of care in most settings: i.e., that they provide competent representation.[2] It is often for these reasons that clients turn to their lawyers in the first place when in crisis.[3] But not all crises are created equal and not every client crisis is a crisis for the lawyer. Whether it was the foreclosure crisis of the late 2000s,[4] or the police accountability crisis of today,[5]

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1. *See Hearings Before the Subcomm. of the S. Comm. on the Judiciary on the Nomination of Louis D. Brandeis To Be an Associate Justice of the Supreme Court of the United States*, 64th Cong. 287 (1916). Brandeis was talking about the need for lawyers to exercise independent judgment in the representation of a client or clients, but his classic phrase highlights the way unique situations can also create unique imperatives for lawyers. I will explore Brandeis's famous phrase at various times throughout this piece.

2. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2018) [hereinafter MODEL RULES] (setting forth lawyer's obligation to provide competent service).

3. *See* ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 92-364 (1992), reprinted in ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, 24, 26 (Aug. 26, 1992) (noting likelihood that client has turned to lawyer in a crisis).

4. For a description of one community's response to the foreclosure crisis following the Financial Crisis of 2008, see generally, Robin S. Golden & Sameera Fazili, *Raising the Roof: Addressing the Mortgage Foreclosure Crisis through a Collaboration between City Government and a Law School Clinic*, 2 ALB. GOV'T L. REV. 29 (2009).

5. *See generally*, Ibram X. Kendi, *The American Nightmare*, THE ATLANTIC (Jun. 1, 2020), https://www.theatlantic.com/ideas/archive/2020/06/american-nightmare/612457/. [https://perma.cc/GT5X-L8XE] (describing

lawyers are often in the middle of crisis situations. They provide guidance and assistance, advocate on behalf of their clients to help address the crisis, and attempt to steer the situation through to a desired outcome. Indeed, lawyers are often ready and able to handle crises common in their field of practice to the point that lawyers' responses to such crises may become routine, rote, formulaic, and path dependent.[6]

But sometimes the crisis is so unprecedented, unforeseen, and pervasive that it impacts the lawyer's ability to respond effectively with well-worn, familiar strategies. The novelty of the situation and the difficulty of discerning the facts of the situation may make the lawyer unsteady and unclear as to the proper course of conduct to follow.[7] The dramatic nature of the crisis may impair the way the lawyer functions in response to the crisis as the knowable facts on the ground may prove elusive, laws and precedent applicable to the situation appear non-existent, and the ability to communicate with clients is interrupted.[8] During the Cuban Missile Crisis early in the Kennedy Administration, the lawyers who provided guidance and assistance to the national leadership had never faced anything like it before and time-tested approaches were of little value when dealing with such unprecedented threats.[9] The Covid-19 Pandemic poses particularly daunting risks,[10] as do previously unseen challenges to the rule of law in the United States, like threats to refuse to honor the peaceful transfer of power in the wake of an unfavorable outcome in an election.[11] In these situations, lawyers may not always

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history of race relations in America and their relationship to the protests in late May/early June 2020). There are also other current crisis situations in which lawyers find themselves today, like the Opioid crisis. *See generally*, Abbe R. Gluck, Ashley Hall & Gregory Cuffman, *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46 J. OF LAW, MED. & ETHICS 351 (2018) (describing role of civil litigation as a response to the opioid epidemic).

6. On path-dependency in law, see Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 628 (2001) (noting likelihood that lawyers will make arguments based on existing law in order to increase chance of success); Frederick Schauer, *Legal Development and the Problem of Systemic Transition*, 13 J. CONTEMP. LEGAL ISSUES 261, 273 (2003) (describing effect of legal training on lawyers that leads to path-dependent approaches).

7. *See* Rosa Brooks, *Ticking Bombs and Catastrophes*, 8 GREEN BAG 2d 311, 317–18 (Spring 2005) (describing stated justification for the use of torture in the wake of the events of September 11th was to gather information necessary to prevent another terrorist attack).

8. For a description of some of the impacts on the practice of law due to social distancing protocols during the Covid-19 pandemic, see Lisa Helm, *In Washington, Big Law Partners Bring a Spirit of Resilience to the New Normal*, NAT'L L.J. (Mar. 30, 2020), https://www.law.com/nationallawjournal/2020/03/30/in-wathingson-big-law-partners-bring-a-spirit-of-resilience-to-the-new-normal [https://perma.cc/QY3Q-MDZZ].

9. *See* Robert F. Bauer, *The National Security Lawyer, in Crisis: When the "Best View" of the Law May Not Be the Best View*, 31 GEO. J. LEG. ETHICS 175, 182-200 (2018)(describing role of lawyers in dealing with the Cuban Missile Crisis).

10. *See, e.g.,* Roy Strom, *Lawyering through COVID-19: What We've Heard from the Practices,* BLOOMBERG LAW (May 28, 2020), https://news.bloomberglaw.com/business-and-practice/lawyering-through-covid-19-what-weve-heard-from-the-practices. [https://perma.cc/FB4Y-UAC4] (describing some of the impacts of Covid-19 pandemic on the practice of law).

11. *See, e.g.,* Michael Crowley, *Trump Won't Commit to 'Peaceful' Post-Election Transfer of Power*, N.Y. TIMES (Sept. 23, 2020), https://www.nytimes.com/2020/09/23/us/politics/trump-power-transfer-2020-election.html [https://perma.cc/LXA5-LNZN] (describing President Trump's lack of willingness to commit to a peaceful transfer of power if he loses the 2020 presidential election). *See also* Brad S. Karp & Gary M.

have time-tested responses at their fingertips, a clear path ahead to protect their clients' interests, an obvious means available to uphold their obligations to the legal system, or the capacity to minimize harm to the community.[12]

In the last twenty years, globalization and the spread of technology have brought the world closer together socially, politically, and economically,[13] and climate change is creating havoc with the environment.[14] Because of these forces, the legal community has had to formulate responses to a range of dramatic crises: whether it was the personal loss or economic fallout from the attacks of September 11th,[15] the civil liberties issues that arose in their wake,[16] Hurricane Katrina or Superstorm Sandy,[17] the Financial Crisis of 2008,[18] or the current Covid-19 Pandemic,[19] so-called "Black Swan" events[20] seem to occur every few years now.[21] The legal responses to these crises have been heroic in many ways.[22] In a rule-bound profession that is often guided by precedent, such unprecedented

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Wingens, *The Law Did Not Create This Crisis, but Lawyers Will Help End It*, N.Y. TIMES (June 25, 2018), https://www.nytimes.com/2018/06/25/opinion/zero-tolerance-trump-asylum-family-separation-lawyers.html. [https://perma.cc/2C6B-DMZX] (describing legal advocacy to address family separation practice of the Trump Administration).

12. *See* discussion *infra* Section I.B.

13. Since Thomas Friedman declared that the "world is flat" fifteen years ago, these forces seem only to be accelerating. *See generally* THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (Farrar, Straus & Giroux eds., 2005); YUVAL NOAH HARARI, 21 LESSONS FOR THE 21ST CENTURY (Jonathan Cape ed., 2018) (describing forces that will shape human existence for the present century and beyond).

14. *See generally* DAVID WALLACE-WELLS, THE UNINHABITABLE EARTH: LIFE AFTER WARMING (Tim Duggan Books ed., 2019) (describing current state of global climate change and what it portends).

15. *See generally* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK FUND, INC., ET AL., PUBLIC SERVICE IN A TIME OF CRISIS: A REPORT AND RETROSPECTIVE ON THE LEGAL COMMUNITY'S RESPONSE TO THE EVENTS OF SEPTEMBER 11TH, 2001 (2004) (describing volunteer legal effort to support direct and indirect victims of the September 11th attacks), https://www.citybarjusticecenter.org/wp-content/uploads/2016/10/public-service-time-crisis.pdf [https://perma.cc/P9RY-ZFH3] [hereinafter NYC Bar Report].

16. *See, e.g.*, DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 162–207 (2007) (describing legal ethics issues surrounding legal justifications offered for the use of torture on detainees in U.S. custody after September 11th) [hereinafter LUBAN, HUMAN DIGNITY].

17. For a description of the impacts of Hurricane Katrina on the court system and legal practice in New Orleans, see Juan Carlos Rodriguez, *10 Years After Katrina, Legal Fallout Continues*, LAW360 (Aug. 27, 2015), https://www.law360.com/articles/695563/10-years-after-katrina-legal-fallout-continues [https://perma.cc/AFV4-A74T].

18. *See* Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. REG. 91, 109 (2012) (describing legal reform instituted in the wake of the Financial Crisis of 2008 as a "comprehensive response to the regulatory gaps and weaknesses that led to" that crisis).

19. *See* Helm, *supra* note 8 (describing impact of virus on law practice).

20. NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE xviii (Random House 2007) (describing black swan events as exhibiting characteristics of rarity, extreme impact, and retrospective predictability).

21. *See, e.g.*, WALLACE-WELLS, *supra* note 14, at 16 (describing "thousand-year flood" that occurred twice in the same community in Maryland in the span of two years); *see also* Jessica Ludy & G. Matt Kondolf, *Flood Risk Perception in Lands "Protected" by 100-Year Levees*, 61 NATURAL HAZARDS 829 (2012) (describing increased risk to catastrophic flooding due to climate change and increased urbanization).

22. *See, e.g.*, NYC Bar Report, *supra* note 15, at 23–41 (describing extensive volunteer attorney effort, involving thousands of attorneys, who supported the victims of the September 11th attacks).

events have called for innovation and creativity, two terms not often associated with the legal community.[23] At the same time, the rules that govern the practice of law, designed to provide somewhat flexible guidance to lawyers in a trans-substantive way, are still historically slow to evolve[24] and may not incorporate the range of needs that lawyers have when they are dealing with the types of crisis situations I describe here: i.e., those that are novel and pervasive.[25] Indeed, it is time to recognize that dramatic, unprecedented crisis situations may call for new and flexible guidance that allows lawyers to meet the challenges that such widespread crises pose.[26]

Admittedly, the rules[27] as they currently exist do provide some limited guidance to lawyers dealing with emergency situations.[28] Rule-writing bodies have tinkered along the margins of the rules in response to recent crises, mostly focusing on the ways the rules address the unauthorized practice of law in jurisdictions where emergencies arise.[29] Some scholarship addresses how lawyers have dealt with crises in discrete subject-matter areas,[30] with a great deal of attention paid to

23. *See, e.g.*, Samantha A. Moppetta, *Lawyering Outside the Box: Confronting the Creativity Crisis*, 37 S. ILL. U. L.J. 253, 294 (2013) (arguing that "by and large law schools and the legal profession suppress rather than support the development of creative potential").

24. *See*, Michael G. Daigneault, *Legal Ethics in a New Era*, 42 FED. LAW. 6, 7 (Jan. 1995) (describing legal ethics as "an area of the law that is notoriously conservative and often slow to react" to change).

25. *See*, *infra*, notes 51–54 and accompanying text.

26. Similarly, scholars have noted that in other, somewhat more substantive areas of law, doctrine may require flexibility to respond to crisis situations. *See, e.g.*, Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607, 1644–59 (2010) (describing the necessity of a more flexible approach to traditional notions of property law than was deployed in the aftermath of the Financial Crisis of 2008).

27. I use the term "rules" loosely here, as I will draw not only from the ABA's formal *Model Rules*; some state variations to those rules; THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) [hereinafter Restatement (Third)]; ethics opinions; decisional law addressing legal ethics issues; and scholarship on the topic of legal ethics more broadly. Collectively, these represent the broad community's collective wisdom of what the "rules" that govern the legal profession are. When speaking of "the rules," however, it usually means the ABA's *Model Rules*.

28. *See, e.g.,* MODEL RULES R. 1.1 cmt. 3 (describing degree of competence required in emergency situations.

29. *See*, Section II.A, *infra* (describing reducing barriers to unauthorized practice of law rules in light of recent disasters).

30. Recently, I served as a co-editor of a volume collecting mostly first-person accounts of lawyers serving clients in crisis situations, including, *inter alia*, handling hostage negotiations; suing over the Trump Administration's ban on individuals travelling from predominantly Muslim countries; addressing the police-community relations crisis in Ferguson, MO; and representing detainees held in the U.S. naval base on Guantánamo Bay, Cuba. *See, e.g.,* CRISIS LAWYERING: EFFECTIVE LEGAL ADVOCACY IN EMERGENCY SITUATIONS (Ray Brescia & Eric Stern eds., 2021) (hereinafter, BRESCIA & STERN). *See, also*, Stephen Ellmann, *To Live Outside the Law You Must be Honest: Bram Fischer and the Meaning of Integrity*, 26 N.C. J. INT'L L. & COM. REG. 767, 768–73 (2001) (discussing challenges lawyers faced while serving under Apartheid in South Africa); Martha Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 739–50 (1991) (discussing tensions around adherence to the law that arise in social change lawyering contexts).

the national security context in particular.[31] To date, however, legal scholarship regarding the rules governing the practice of law rarely addresses the fact that, more and more, clients must turn to their lawyers in the midst of novel and widespread crises—nor does it examine the ways in which such crises can impact the practice of law itself.[32] Since novel and pervasive crisis situations often pose unique challenges that strain existing rules governing the legal profession, those rules may not always provide appropriate guidance and accountability to lawyers operating in such situations. This Article is an attempt to explore this tension. It also offers suggestions as to how to revise the rules to accommodate the needs of this type of lawyering.

This analysis begins with the American Bar Association's *Model Rules of Professional Conduct* (*Model Rules*).[33] One purpose of these *Model Rules* includes providing guidance to lawyers,[34] but the rules also serve to ensure there is some degree of lawyer accountability to clients, adversaries, the legal system, and the general public.[35] By using the *Model Rules* as a starting point for the

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31. *See, e.g.*, Bauer, *supra* note 9, at 182–228 (2018) (describing role of lawyers in dealing with the Cuban Missile Crisis and the Roosevelt Administration's assistance to Great Britain on the eve of the American involvement in World War II); Jack Goldsmith, *Executive Branch Crisis Lawyering and the Best View*, 31 GEO. J. LEGAL ETHICS 261, 272 (2018) (describing crisis lawyering from within the Executive Branch of the U.S. government); Peter Margulies, *Legal Dilemmas Facing White House Counsel in the Trump Administration: The Costs of Public Disclosure of FISA Requests*, 87 FORDHAM L. REV. 1913, 1929–35 (2019) (describing crisis situations related to legal requirements of disclosure of FISA applications) (hereinafter Margulies, *Legal Dilemmas*); Peter Margulies, *Reforming Lawyers into Irrelevance?: Reconciling Crisis and Constraint at the Office of Legal Counsel*, 39 PEPP. L. REV. 809, 855–858 (2012) (describing lawyer decision making around drone strikes in Pakistan) (hereinafter Margulies, *Reforming Lawyers*); Keith A. Petty, *Professional Responsibility Compliance and National Security Attorneys: Adopting the Normative Framework of Internalized Legal Ethics*, 2011 UTAH L. REV. 1563, 1605–12 (2011) (providing case study of ethics involved with promulgation of memorandum regarding enhanced interrogation techniques). Ellen Yaroshefsky, *Miltary Lawyering at the Edge of the Rule of Law at Guantanamo: Should Lawyers Be Permitted to Violate the Law?* 36 HOFSTRA L. REV. 563, 568–580 (2007) (describing role of military lawyers defending detainees held the U.S prison at Guantánamo Bay, Cuba, in the midst of the so-called War on Terror).

32. *See* discussion *infra* Section II.D.

33. *See* MODEL RULES, *supra* note 2.

34. *See* MODEL RULES scope at ¶ 20 (A.B.A. 2019) (explaining that the rules are designed to provide guidance to lawyers and establish standards of conduct). *See also* Katherine R. Kruse, *Professional Role and Professional Judgment: Theory and Practice in Legal Ethics*, 9 U. ST. THOMAS L.J. 250, 259 (noting rules and principles underlying them can serve "as a guide to ethical decision making"); Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PROF. 209, 210 (2011) (discussing that the *ABA Model Rules of Professional Conduct* "serve as the conduct guidelines for attorney behavior"); Jeffrey A. Maine, *Importance of Ethics and Morality in Today's Legal World*, 29 STETSON L. REV. 1073, 1076 (2000) (arguing that the ABA has formulated ethical codes to guide lawyer conduct and regulate behavior.); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 223–34 (1993) ("The recent adoption of the ABA's Model Rules has been followed with a series of further proposals designed to control specific lawyer conduct.").

35. *See*, *e.g.*, MODEL RULES scope at ¶ 12 (discussing the autonomy of the legal field and its self-governance, the need for regulations that are conceived for the public interest and the integrity of the profession, and the adherence of such regulations by lawyers). *See also* MODEL RULES R. 8.3 cmt. 1 (the field is self-regulatory and requires attorney compliance with the rules, including reporting other attorney and judicial misconduct);

analysis, this Article explores the somewhat disjointed ways in which the rules that govern the practice of law offer guidance to the lawyer facing novel, pervasive crises, what I will refer to as NPCs.[36] It also highlights the apparent lack of scholarship that explicitly addresses the needs of lawyers operating in fields where they may confront these sorts of crisis situations and describes how "crisis lawyering" may be a form of practice that is, itself, trans-substantive: i.e., demonstrating distinct similarities across different areas of practice.[37] Not surprisingly, legal ethics scholars often discuss issues that arise in crisis situations because they offer fodder for ethicists to debate the proper conduct within them.[38] Legal scholarship to date, however, has not identified crisis lawyering as a potential field of study in and of itself.

This Article attempts to step into this apparent breach to identify crisis lawyering as a mode of practice worthy of separate and distinct treatment in legal scholarship. It analyzes the extent to which the current rules governing the practice of law are or are not adequate to the task of providing guidance—and accountability—to lawyers dealing with crisis situations.[39] In an effort to fill this apparent gap in both scholarly and practical treatment, Part I articulates the difference between a typical crisis situation a lawyer may face, which traditional rules are often

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Sachi Barreiro, *Reporting a Lawyer for Ethical Violations*, LAWYERS.COM, https://www.lawyers.com/legal-info/research/legal-malpractice/reporting-lawyer-for-ethics-violations.html [https://perma.cc/L9XF-HW2G] (last visited Mar. 31, 2020) (describing the ABA *Model Rules of Professional Conduct* as providing standards and best practices for lawyers, for the protection of the public, and the integrity of the legal profession.). *See also* Nell Moley, *Confronting the Challenges of Ethical Accountability in International Human Rights Lawyering*, 50 STAN. J. INT'L L. 359, 364–65 (2014) (discussing the ethical challenges that lawyers, specifically human rights lawyers, face in ensuring the well-being of the communities they work in and the need for ethics regimes to help them address such issues). Geoffrey Hazard called the fact that the rules of ethics have become "a code of public law enforced by formal adjudicative disciplinary process" the "legalization" of the legal profession. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L. J. 1239, 1241–42 (1991). For a description of the process through which legal ethics became "legalized," see generally Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II the Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 222–27 (2002). In some ways, perhaps, this legalization of ethics has led to calculative conduct on the part of lawyers. *See generally*, James Moliterno & John Keyser, *Why Lawyers Do What They Do (When Behaving Ethically)*, 4 ST. MARY'S LEGAL MALPRACTICE & ETHICS 2 (2014) (describing results of survey of lawyers that showed greater concern among lawyers for abiding by disciplinary rules in areas where there is greater enforcement than in those areas where enforcement is more lax and uncommon).

36. *See infra* Part II.

37. The term crisis lawyering is infrequently used in scholarship on lawyering in crisis situations, *see, e.g.*, BRESCIA & STERN, *supra* note 29 (using term "crisis lawyering"); Lindsay M. Harris, *Learning in "Baby Jail": Learning from Law Student Engagement in Family Detention Centers*, 25 CLIN. L. REV. 155, 159 (2018) (describing crisis lawyering as lawyering in "emergent situations, whether man-made or natural disasters, that require a rapid and large-scale response by lawyers"). To the extent the term is used, its definition is rarely articulated. *See*, Goldsmith, *supra*, note 29 (using term "crisis lawyering" in the title of the article but not defining it).

38. *See, e.g.*, Luban, Human Dignity, *supra* note 15, at 162–207 (describing ethical implications of actions to justify torture in the aftermath of September 11th).

39. What is more, to the extent all lawyers may find themselves in NPCs (as most do today in the current Covid-19 pandemic), it is hard to argue that crisis lawyering, as I have defined it, is a kind of specialty area of practice.

designed to address, and NPCs, which may call for different treatment under the rules. Such a discussion will set the stage for Part II in which I discuss several critical areas in the practice of law that are implicated when a lawyer is asked to address an NPC. Also in Part II, I assess the extent to which the rules of the profession as they currently exist are sufficient to provide advice, guidance, and a degree of accountability to lawyers who must face such crises. Part III contains a normative account of ways in which specific changes to the *Model Rules*, which could be promulgated by the ABA and adopted by the states, might provide better guidance to lawyers who may face NPCs in their work.

I. DEFINING A "TRUE" LAWYER CRISIS

A. A CLIENT CRISIS IS NOT ALWAYS A CRISIS FOR THE LAWYER

There is a growing body of scholarship from across disciplines outside of the law that recognizes crisis response itself as a field of study worthy of analysis.[40] In this scholarship, a crisis is often described as a situation in which an individual, entity, or community faces threats to values or safety; the facts surrounding the situation are uncertain; the nature and scope of the threatened risks are unclear; and decision making to respond to the situation must occur within an extremely abbreviated time frame.[41] In the practice of law, lawyers are asked to address what seem like crises, under this definition, to clients all the time.[42] The very nature of the crisis the client faces might mean that it is not a crisis for the lawyer, however, because the lawyer handles this type of emergency situation regularly, prepares adequately for it, and has developed a suite of typical responses to such crises. Indeed, lawyers may feel little of the types of pressures clients must confront because lawyers understand the risks and can take appropriate action regardless of the time pressure. The lawyer deploys these responses according to the client's need in a competent, timely, and effective fashion.[43] An eviction, a mortgage foreclosure, bankruptcy, or deportation is certainly a crisis for the client.[44] Yet the lawyer may handle this type of crisis in a routine fashion. The lawyer may even have emergency papers prepared and ready to file for an Order to Show Cause to prevent the eviction or foreclosure if the client has come to the lawyer for assistance at the eleventh hour. The lawyer may generate such papers

40. *See generally* LIZA IRENI SABAN, INTERNATIONAL DISASTER MANAGEMENT ETHICS (2016) (developing an ethics for disaster management professionals); Per Sandin, *Approaches to Ethics in Corporate Crisis Management*, 87 J. OF BUS. ETHICS 109 (2009) (assessing ethics in corporate crisis situations).

41. *See* ARJEN BOIN ET AL., THE POLITICS OF CRISIS MANAGEMENT: PUBLIC LEADERSHIP UNDER PRESSURE 5–6 (2d ed., 2016).

42. *See* Stanley S. Clawar & Brynne Valerie Rivlin, *Are Your Clients Getting the Most Out of You?* 56 WIS. B. BULL. 17, 18 (1983) (noting clients often come to lawyers when they are in a crisis).

43. *See e.g.*, Jane K. Stoever, *Transforming Domestic Violence Representation*, 101 KY. L.J. 483, 494–522 (describing broad efforts to prepare law students to represent domestic violence victims in crisis).

44. See generally MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2015) for an account of the hardships associated with evictions.

using document assembly tools or basic word processing techniques in a couple of minutes and whisk them to court soon thereafter.[45]

The client crisis is not necessarily a crisis for the lawyer as defined above when the situation is not novel; the facts are known and knowable; and although acting under an accelerated time-frame, the lawyer is prepared to respond to the crisis in an effective and efficient manner. In other words, the lawyer knows what to do, when to do it, can generate a rapid response, and understands the contours of the client's rights and the available remedies. This is because the lawyer has trained to handle such a crisis, has experience in doing so, and is aware of the appropriate legal responses to deploy to respond to it.[46]

In such settings, the lawyer can typically satisfy the general degree of care required of the lawyer—i.e., to provide competent service—and this should be adequate to protect the client's rights in these situations.[47] If a lawyer represents clients in certain types of matters and not others, and a retained client has a new legal problem the lawyer is not competent to handle at the outset, that lawyer should either refer the client to a lawyer with the appropriate expertise to represent the client in the matter; associate with a lawyer who can provide guidance in addressing the matter; or attempt to develop competence, if possible, in a timely fashion.[48] Each of these responses to the client crisis is appropriate under the rules

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45. *See e.g.*, Robert C. Blitt & Reece Brassler, *Experiencing Experiential Education: A Faculty-Student Perspective on the University of Tennessee College of Law's Adventure in Access to Justice Author*, 50 J. MARSHALL L. REV. 11, 37–40 (2016) (describing several document-assembly tools used in law practice to expand access to justice).

46. Other examples of client crises that are not lawyer crises abound. For example, a client may be the victim of intimate partner violence and turns to a lawyer for assistance securing an order of protection. *See e.g.*, Gary Brown, Karin A. Judy Perry Martinez & Rachelle DesVaux Bedke, *Item of Interest: Prose: Gary Brown, Karin A. Call to Action for Domestic Violence Victims*, 36 ARIZ. ATT'Y 18, 18 (2000) (noting that "[l]awyers who work with domestic abuse victims are usually trained to deal with clients as they face crisis situations"); Gary Brown, Karin A. Keitel & Sandra E. Lundy., *Starting a TRO Project: Student Representation of Battered Women*, 96 YALE L.J. 1985, 1992–96 (1987) (describing components of protective orders in cases involving intimate partner violence). An inventor who has worked for years to develop what might turn out to be a highly marketable device learns that someone claims to hold the patent on the device and seeks compensation for its subsequent use, or a songwriter learns that a new, smash musical hit was based on an original creation. In both instances, an intellectual property lawyer has the tools to address such client crises. For a description of aggressive actors—often called patent "trolls"—that seek to capitalize on and claim interests in the inventions of others, at great expense and great cost to those other inventors, see David G. Barker, *Troll or No Troll? Policing Patent Usage with an Open Post-Grant Review*, 4 DUKE L. & TECH. REV. 1 (2005). *See also* Williams v. Gaye, 895 F.3d 1106, 1138 (9th Cir. 2018) (affirming in part and reversing in part jury verdict over song "Blurred Lines").

47. *See* MODEL RULES R. 1.1 (requiring "competent" representation). While these examples describe crises for individual clients, crisis situations involving organizational clients, examples of which are discussed throughout this Article, are also common. *See also* Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 139–44 (2001) (describing crisis situations that can arise in the representation of corporations and unincorporated organizations).

48. *See* MODEL RULES R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

that govern the practice of law.[49] The polestar of representation in these matters is competence and if the lawyer can achieve it through one of these approaches, the client crisis is not also a lawyer crisis.[50]

B. NOVEL, PERVASIVE CRISES

More and more, lawyers are finding themselves in situations that are not just client crises but also crises for those lawyers. The situations pose risks to the values and safety of the lawyers who must address them, the facts surrounding the situations are unclear to them, and they must take immediate action when the appropriate course of conduct is not certain.[51] When David McCraw joined the legal team at the *New York Times* as Deputy General Counsel, he did not expect that he would become the media outlet's chief hostage negotiator, as journalists affiliated with the paper of record appear to find themselves in trouble with some degree of regularity in war-torn and dangerous places throughout the world.[52] When Hurricane Katrina hit New Orleans in 2005, people lost their homes, a legal system was literally deluged, and lawyers had to help the community navigate uncharted waters.[53] The Covid-19 Pandemic has challenged everyone to develop crisis-response protocols, especially lawyers, who are not immune from the wide-ranging effects of the crisis. Indeed, lawyers had to shift to remote work whether they were ready to or not. They also faced closed courthouses and ongoing and rolling client crises, both related and unrelated to the pandemic.[54]

It is these lawyer crises on which I will focus in this Article: those that stretch the lawyer's capacity to rely on prior training, precedent, and path-dependent approaches that are commonplace in—and in fact might generally define—the practice of law. These crises may test the rules that are intended to provide guidance to and accountability for lawyers and are otherwise designed to apply trans-

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49. *See* MODEL RULES R. 1.1 at cmts. 1–2 (describing process of associating with lawyer with sufficient competence or pursuit of training and preparation necessary to obtain competence in a field or area).

50. *See* MODEL RULES R. 1.1 cmts. 1, 2, 4–7 (providing that a lawyer can possess capacity to deliver competent service, may associate with another lawyer with such competence, or can obtain such competence through preparation); *see also* Restatement (Third), *supra* note 27, at cmt. d ("The lawyer must be competent to handle the matter, having the appropriate knowledge, skills, time, and professional qualifications.").

51. *See* BOIN ET AL., *supra* note 40, at 5–6.

52. David McCraw, *When Crisis Comes to the Newsroom: The Media Lawyer in a Time of Global Unrest*, in BRESCIA & STERN, *supra* note 30, at 108–26. For an overview of McCraw's work at the *New York Times*, see generally DAVID MCCRAW, TRUTH IN OUR TIMES: INSIDE THE FIGHT FOR PRESS FREEDOM IN THE AGE OF ALTERNATIVE FACTS (2019).

53. For a description of the impact of Katrina on the justice system in New Orleans, see Sarah S. Vance, *Justice After Disaster–What Hurricane Katrina Did to the Justice System in New Orleans*, 51 HOW. L.J. 621, 627–634 (2008).

54. For a preliminary assessment of the impact of Covid-19 on the impact of law, see Jordan Ostroff, *How COVID-19 Impacts Law Firms*, NAT'L L. REV. (Apr. 13, 2010), https://www.natlawreview.com/article/how-covid-19-impacts-law-firms [https://perma.cc/J44F-GTE3], and for a discussion of the potential that impacts on the court system could lead to malpractice claims against attorneys serving clients during the pandemic, see Cara Bayles, *Expect More Malpractice Claims After COVID-Fueled Slump*, LAW360 (Apr. 10, 2020), https://www.natlawreview.com/article/how-covid-19-impacts-law-firms [https://perma.cc/622Y-ECX5].

substantively—across the full range of different practice settings.[55] Because these NPCs might strain the ability of the traditional and trans-substantive rules to govern and guide the practice of law, it is appropriate to assess whether such rules are up to the task of serving their primary functions in these types of crisis settings: to provide guidance and promote accountability.[56]

Given their novelty, these types of crises will likely present somewhat different challenges and the extent, reach, and potential impact of the crisis will likely vary by degree. For example, how pervasive, harmful, and debilitating is the crisis and what are the risks it poses? To what extent does it impact a community, a region, a nation, or the entire world? To what extent are legal claims that arise within it easily analogous to other situations where the law is more settled? No NPC is exactly the same as any other, but as the following discussion shows,[57] there are some critical themes and issues that often arise within them that pose particular challenges to the lawyer trying to navigate through them. As mentioned above,[58] in one setting, authoritative bodies have considered and adopted new rules that loosen unauthorized practice of law prohibitions in emergency settings. After describing the evolution of this approach, which I will do next, I will then examine the ways in which legal ethics scholarship has historically addressed lawyering in crisis settings.

C. BENDING THE RULES: CRISES AND THE UNAUTHORIZED PRACTICE OF LAW

In Hurricane Katrina's wake, the legal community faced a series of unprecedented challenges. The hurricane displaced thousands, with many losing their homes and all of their possessions.[59] In order to access emergency benefits due to property damage, many victims found themselves unable to prove their eligibility for such benefits, either because of less-formal title systems in existence or the destruction of property records in government offices.[60] The storm also had

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55. *See* Peter A. Joy & Kevin C. McMunigal, *Different Rules for Prosecutors?*, 31 CRIM. J . 48, 48 (2016) (describing *Model Rules* and state corollaries as "trans-substantive").

56. *See supra* note 35 and accompanying text. While true NPCs as I have defined them will also include an element of time sensitivity to them, the "C" in NPC also reflects the fact that decisions must be made within an abbreviated time frame. The time-sensitive nature of the crisis, coupled with its novelty, is partly what makes it a crisis for the lawyer. So even though there is no "T" in NPC to reflect the fact that NPCs require the lawyer to act quickly, time sensitivity is still an element that is inherent in the situation and I treat it as such.

57. *See infra* Part II.

58. *See supra* note 53 and accompanying text.

59. *See* Sandie McCarthy-Brown & Susan L. Waysdorf, *Katrina Disaster Family Law: The Impact of Hurricane Katrina on Families and Family Law*, 42 IND. L. REV. 721, 740–42 (2009).

60. *Id*. For a discussion of the symbolic notions property ownership exposed in the Lower Ninth Ward in New Orleans after Hurricane Katrina, see generally Rachel A. Van Cleave, *Property Lessons in August Wilson's* The Piano Lesson *and the Wake of Hurricane Katrina*, 43 CAL. W. L. REV. 97 (2006-07). For a discussion of the impact of the Covid-19 Pandemic on the courts, see Jed S. Rakoff, *COVID & the Courts*, N.Y. REV. OF BOOKS (May 28, 2020), https://www.nybooks.com/articles/2020/05/28/covid-19-and-the-courts/ [https://perma.cc/U7S2-9CYN].

dramatic effects on the criminal court system, destroying law enforcement records and forcing the courts to close, meaning criminal detainees faced long-term detention without the opportunity for release pending trial.[61] These legal crises overwhelmed the court system and practicing bar, partly because they not only displaced lawyers from their homes and offices,[62] but they also created too many legal problems for the practicing bar in New Orleans and the surrounding community to address.[63]

Volunteer lawyers and law students descended upon the area to provide legal assistance with these issues,[64] but few of the lawyers were licensed to practice law in Louisiana, which still follows the Napoleonic Code in its legal system, an approach unfamiliar to many practicing lawyers in other jurisdictions.[65] In addition, the responsibilities many lawyers and legal services organizations owed to their existing clients rendered them unable to provide adequate supervision to many of the law students eager to volunteer.[66]

In response to this situation, and out of fear that such a crisis would arise in other jurisdictions in the future, the ABA developed guidance around unauthorized practice of law rules in emergency situations.[67] The law governing the unauthorized practice of law varies by state.[68] In addition, the ABA has not attempted to define what the "practice of law" is under its *Model Rules*.[69] Unauthorized practice of law rules generally make it illegal (even criminal in many jurisdictions) to practice law

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61. *See generally* Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L. J. 127, 127–28 (2006) (providing an in-depth narrative concerning the post-Katrina collapse of the greater New Orleans area criminal justice system).

62. *Id*. at 146.

63. *Id*. at 146–48.

64. *See generally* SARA DEBUS & SERI IRAZOLA, DELIVERING LEGAL AID AFTER KATRINA: THE EQUAL JUSTICE WORKS KATRINA LEGAL INITIATIVE (Aug. 2009), https://www.urban.org/sites/default/files/publication/30591/411946-Delivering-Legal-Aid-after-Katrina.PDF [https://perma.cc/L6RV-69R8] (describing efforts to coordinate thousands of volunteer lawyers and law students after Hurricanes Katrina and Rita); *see also* William P. Quigley, *A Letter to Social Justice Advocates: Thirteen Lessons Learned by Katrina Social Justice Advocates Looking Back Ten Years Later*, 61 LOY. L. REV. 623, 670–88 (2015) (describing role and experiences of law students from across the United States who volunteered in New Orleans in wake of Hurricane Katrina).

65. *See* Thomas R. Tinder, *The Tinder Box: Disaster Relief*, W. VA. LAW. 48, 48 (Dec. 2005) (noting need to recruit volunteer lawyers in the wake of Katrina familiar with the Napoleonic Code).

66. *See* Davida Finger et al., *Engaging the Legal Academy in Disaster Response*, 10 SEATTLE J. FOR SOC. JUST. 211, 223–32 (2011) (describing challenge of finding supervision for law students volunteering in the wake of Hurricane Katrina).

67. *See* ABA House of Delegates, Tr. of Proceedings, Feb. 12, 2007, at 1–13, https://www.americanbar.org/content/dam/aba/images/probono_public_service/ts/hundredfour.pdf [hereinafter ABA Katrina Rule].

68. *See, e.g.*, Anthony J. Luppion, *Multidisciplinary Business Planning Firms: Expanding the Regulatory Tent Without Creating a Circus*, 35 SETON HALL L. REV. 109, 139–40 (2004) ("Leaving aside the evolving issue of whether the ABA . . . [is] correct in promoting a state-by-state approach to defining the practice of law, rather than a more uniform national standard, it is clear that anyone striving to craft a truly balanced and functional definition of the practice of law (with its corresponding UPL regime) faces a formidable task.").

69. *See* MODEL RULES R. 5.5 cmt. 2 (noting that "[t]he "definition of the practice of law is established by law and varies from one jurisdiction to another" without providing a definition under the rules themselves).

where one is not admitted to do so by state authorities.[70] Because of such rules in Louisiana after Katrina, lawyers volunteering their time to assist in the legal crisis faced charges that they were violating local unauthorized practice of law rules.[71] In order to ameliorate this type of situation in the future, the ABA passed what has come to be known as the Katrina Rule, or the "Major Disaster Rule,"[72] to address unauthorized-practice problems caused in emergency settings where the crisis might call for volunteer lawyers to fill in the gaps within the legal system and assist individuals affected by the emergency.[73] It also allows lawyers who are themselves displaced by the situation to practice law in other jurisdictions.[74] In order to qualify for the relaxed rules under the unauthorized practice guidelines in the affected jurisdiction, attorneys unlicensed in the jurisdiction may provide services in that community on a limited, volunteer basis when assigned to clients through an established pro bono program, bar association, or not-for-profit.[75] Also under the Katrina Rule, if lawyers are also displaced by the disaster, they may seek to practice temporarily in another jurisdiction if such practice arises out of or is related to their practice in the disaster-affected jurisdiction.[76]

Since the ABA promulgated the Katrina Rule, many states have adopted something like it.[77] In August of 2017, following Hurricane Harvey, the Texas Supreme Court issued an order similar to the Katrina Rule that temporarily allowed lawyers unlicensed in the state to practice there.[78] According to one recent count, nineteen states have adopted the ABA's Model Court Rule, nine states have rejected it, and fourteen states were still considering its adoption.[79]

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70. *See* COMM'N ON NONLAWYER PRACTICE, AM. BAR ASS'N, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS 119 (1995) (describing penalties for unauthorized practice of law across jurisdictions). For an empirical analysis of Unauthorized Practice of Law enforcement practices, see generally Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

71. *See* Sheryl B. Shapiro, *American Bar Association's Response to Unauthorized Practice Problems Following Hurricane Katrina: Optimal or Merely Adequate?,* 20 GEO. J. LEGAL ETHICS 905, 917–19 (2007) (describing barrier unauthorized practice of law rules posed to volunteer lawyers serving communities in the wake of Katrina).

72. The official title of the rule is the "Model Court Rule on Provision of Legal Services Following Determination of Major Disaster." *See* ABA Katrina Rule, *supra* note 67, at 1.

73. *Id.*

74. *Id*. at 2.

75. *Id.*

76. For a description of the components of the Katrina Rule, see, e.g., Shapiro, *supra* note 71, at 919–23.

77. *See* STANDING COMM. ON PUBLIC PROTECTION IN THE PROVISION OF LEGAL SERVICES, STATE IMPLEMENTATION OF ABA MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER (201720192017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/katrina_chart.pdf [https://perma.cc/2B4P-SM4V] [hereinafter ABA STATE IMPLEMENTATION].

78. Emergency Order After Hurricane Harvey Permitting Out-of-State Lawyers to Practice in Texas Temporarily, Misc. Dkt No. 17-9099, at 1 (Tex. 2017), https://www.txcourts.gov/media/1438805/179099.pdf [https://perma.cc/Q2Z9-FUGY].

79. *See* ABA STATE IMPLEMENTATION, *supra* note 73.

What the development of the Katrina Rule and its adoption in many states reveals is that the ABA and many jurisdictions recognize that emergency situations call for some relaxing of the rules when it comes to prohibitions on the unauthorized practice of law. This represents an express admission that emergency settings deserve a response by the legal community appropriate to the situation. But are there other areas where the existing rules cannot provide adequate guidance and a degree of accountability to the legal community in NPCs? In addition, to what extent does legal scholarship, to date, address crisis situations more generally and in a trans-substantive fashion? As the following discussion shows, legal ethics scholarship often addresses lawyers dealing with crisis situations, but the notion that crisis lawyering is its own field of study that warrants a broader set of special rules tailored to such situations has not yet appeared in this scholarship.

D. HOW LEGAL ETHICS SCHOLARSHIP ADDRESSES LAWYERING IN CRISIS SITUATIONS

Legal ethics scholarship often addresses, in effect, crisis situations. Much of this scholarship discusses the plight of lawyers who are faced with difficult questions in their practice because the easy cases rarely attract much attention. Indeed, existing rules seem appropriate to address most tasks lawyers must accomplish in serving their clients.[80] But it is the hard cases that lead legal ethicists to consider whether the ethical rules are adequate to provide guidance to the lawyer dealing with such cases, or whether those rules require reconsideration, amendment, or repeal.[81] Whether it is considering the ethics of providing legal justification for torturing suspects in government detention[82] or considering the obligations of lawyers in post-Katrina New Orleans,[83] legal scholarship often seeks to understand the difficult choices lawyers must make in these situations. It often asks whether the rules justify what some might consider inappropriate behavior in such settings, and if they do, is there something wrong with the rules themselves.[84] The point here is that legal ethics scholarship often discusses crisis

80. This notion turns Holmes's famous maxim that hard cases make bad law on its head: easy cases rarely make any law. *See* Nat'l Sec. Co. v. United States, 193 U.S. 197, 362–64 (1904) (Holmes, J., dissenting) ("Great cases, like hard cases, make bad law.").

81. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 14, 22 (1977) (arguing hard cases are determined by principles not black-letter provisions in the rules).

82. *See, e.g.*, Julie Angell, *Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 GEO. J. LEGAL ETHICS 557, 560–68 (2005) (discussing ethical implications of attorneys' work in the U.S. Government endorsing enhanced interrogation techniques).

83. *See, e.g.*, Shapiro, *supra* note 71, at 908–19 (describing some of the implications for legal ethics from Hurricane Katrina).

84. *See, e.g.*, Joshua Nimmo, *Ethical Regulation for Financial Lawyers: Negative Certification as a Response to the Financial Crisis*, 28 GEO. J. LEGAL ETHICS 745, 745 (2015) (arguing "as the financial crisis of 2007-2008 showed, the regulatory system–shaped through legislation and the *Model Rules of Professional Conduct* . . . was and continues to be inadequate to discourage and punish unacceptable behavior. It should be broadened and strengthened").

situations without labeling them as such and fails to identify crisis lawyering as perhaps a subfield within the law itself.

But examples of "crisis talk" in legal scholarship are evident not just in discrete areas of law or discussions of legal ethics but also in broader discussions related to the practice of law more generally.[85] It is not uncommon for scholars to have considered, at various points in time, that the legal profession was, itself, in "crisis,"[86] either because the profession appeared to have lost its soul,[87] or was (or is) facing its end.[88] In modern times, cries that the practice of law is in crisis often emerge from high-profile events that usually have lawyers at their center: whether it is the Watergate scandal,[89] the Savings & Loan crisis,[90] the Monica Lewinsky scandal that led to the impeachment and suspension from the practice of law of President Clinton,[91] the Enron scandal,[92] the events of September 11th and its aftermath,[93] the

85. *See* David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 31–37 (1995) (identifying the "self-perceived crisis of professionalism" within the legal profession) (citations omitted); Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism with Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 549–57 (1998) (describing what is called a "tri-partite crisis" in the legal profession that includes issues of a lack of professionalism, poor public opinion towards lawyers, and lawyer dissatisfaction with the profession).

86. Hazard, *supra* note 35, at 1239 (describing crisis in legal profession and legal ethics as an ever-present "chronic grievance" associated with dissatisfaction with lawyers);) Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 601, 606–612 (2016) (describing "crisis in professionalism").

87. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 1 (1993); *see also* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 1 (1998) (expressing concern that law school and law practice undermine aspiring lawyers' desire to contribute to society); DEBORAH RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 11–13 (2000) (noting concerns about the loss of professionalism in the legal profession are practically as old as the profession itself).

88. *See generally* RICHARD SUSSKIND, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES (2009) (describing coming transformation of the legal profession).

89. *See* JAMES MOLITERNO, THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE 98 (2013) (describing role of lawyers in Watergate scandal) [hereinafter MOLITERNO].

90. *See, e.g.*, Lincoln Savings & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990) (asking "where were the lawyers" in events that contributed to the Savings & Loan Crisis); *see also* William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 280–82 (1998) (discussing the role of lawyers in the Savings & Loan Crisis of the late 1980s); Robert G. Day, *Administrative Watchdogs or Zealous Advocates? Implications for Legal Ethics in the Face of Expanded Attorney Liability*, 45 STAN. L. REV. 645, 649–59 (1993) (describing laws put in place after the Savings & Loan crisis and their potential effects on legal ethics).

91. *See* President Clinton's Statement on Conclusion of Whitewater Investigation (Jan. 19, 2001) (noting acceptance of suspension of President Clinton's law license).

92. *See, e.g.*, Andrew A. Lundgren, *Sarbanes-Oxley, Then Disney: The Post-Scandal Corporate-Governance Plot Thickens*, 8 DEL. L. REV. 195, 197–204 (2006) (discussing legal reforms after Enron scandal). *See also* Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1204 (2003) (exploring the role of lawyers in several corporate scandals). *See also* William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57, 65–67 (2003) (describing conflicts that can arise in corporate entity representation).

93. *See, e.g.*, Jesselyn A. Radack, *United States Citizens Detained as "Enemy Combatants": The Right to Counsel as a Matter of Ethics*, 12 WM. & MARY BILL RTS. J. 221, 224–27 (2003) (describing legal ethics surrounding detention of enemy combatants during the so-called War on Terror).

lead up to the Iraq War,[94] the events that caused the Great Recession of 2008 and its aftermath,[95] the tactical use of unmanned drones for military purposes by the Obama Administration,[96] and many of the legal ethics scandals surrounding the lawyers operating within and around the administration of President Trump.[97] In all of these events and their aftermath, there are often calls for introspection and reform of legal ethics.[98]

In another area often described as a crisis,[99] the access-to-justice crisis, millions of Americans and individuals from around the world face their legal problems without a lawyer.[100] Many argue that in order to improve access to justice, we need to consider changes to state ethics rules and even their criminal codes that will loosen unauthorized practice of law prohibitions and allow non-lawyers to provide legal services in certain areas of practice.[101] The discussion of the special disaster rules in the wake of Hurricane Katrina made the link between emergency situations and access-to-justice issues that center around unauthorized practice rules explicit.[102] In other words, the chronic access-to-justice crisis facing everyday Americans is clearly made worse in an NPC where there are more

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94. *See* Jules Lobel, *The Preventive Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407, 1413–35 (2007) (discussing "paradigm shift" in legal justifications for preemptive war in the lead-up to the Iraq War).

95. *See* Raymond H. Brescia, *Leverage: State Enforcement Actions in the Wake of the Robo-Sign Scandal*, 64 MAINE L. REV. 17, 19–27 (2011) (describing deceptive practices that came to be known as robo-signing in foreclosure actions in the wake of the Great Recession).

96. *See* Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law, in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346, 346–47 (Benjamin Wittes ed., 2009) (describing use of unmanned drones in Afghanistan and Pakistan).

97. *See generally* Brian Sheppard, *The Ethics Resistance*, 32 GEO. J. LEGAL ETHICS 235 (2019) (describing ethics complaints filed against lawyers within the Trump Administration that arose from a range of scandals).

98. *See, e.g.*, Moliterno, *supra* note 8985, at 101–03 (describing calls for legal ethics courses in law schools in wake of Watergate scandal); *see also* Michael Ariens, *Lost and Found: David Hoffman and the History of American Legal Ethics*, 67 ARK. L. REV. 571, 593–604 (2014) (describing David Hoffman's likely update to his early legal ethics "resolutions" in the wake of riots in Baltimore, MD, in the 1830s where lawyers' activities may have helped bring about the precipitating events of the riots); Nimmo, *supra* note 8480, at 746–768 (2015) (describing reforms after the Savings & Loan, Enron and WorldCom scandals and calling for legal ethics reform in wake of the economic crisis of 2008).

99. *See, e.g.*, COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES: FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (April 1990), *reprinted in* 19 HOFSTRA L. REV. 755, 771–79 (1991) (studying the problem of access to justice in New York's courts and describing the "crisis in unmet legal needs" there) [hereinafter Marrero Report].

100. *See e.g.,* LEGAL SERVICES CORPORATION, THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (June 2017) https://www.lsc.gov/sites/default/files/images/TheJustice Gap-FullReport.pdf [https://perma.cc/FW8X-5ZLZ] (showing that eighty-six percent of low-income Americans with a legal need received no or inadequate assistance addressing that need); *see also* Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 531 (2013) (stating that it is "estimated that more than four-fifths of the individual legal needs of the poor and a majority of the needs of middle-income Americans remain unmet . . .").

101. *See, e.g.*, Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. LAW & SOC. CHANGE 701, 707–14 (1996) (discussing potential risks and benefits associated with non-lawyer provision of legal assistance).

102. *See supra* Section I.C.

individuals in need and the legal community is constrained by the practical barriers to the delivery of services like closed offices and courthouses, limited access to files and sources of proof, and broken chains of communication.[103]

Moreover, when lawyers talk about themselves, they often focus on the big, complex cases and crisis situations they confronted as lawyers. Indeed, when prominent lawyers have written autobiographies of their professional activities, or when biographies have been written about them, such works often focus a great deal on the interesting and dramatic cases these lawyers have handled: in other words, the times when these lawyers faced crises.[104] And books written in the "non-fiction-legal-thriller" genre generally involve accounts of lawyers responding to novel, unprecedented crisis situations, otherwise such narratives would not exactly excite their readers or qualify as "page-turners."[105]

Law schools, not immune from crisis talk, have gone through cycles of introspection, review, and analysis designed to address what is often described as a crisis in the legal profession in general and the legal academy in particular.[106] Recommendations for reform often highlight the skills lawyers need to provide the most value to society in the future as a way of ensuring legal education is meeting the needs of the legal profession and the broader community, and such

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103. *See* NYC Bar Report, *supra* note 1514, at 9–22 (describing legal response to community needs in the wake of the September 11th attacks).

104. *See, e.g.*, ARTHUR KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER 129–76 (1976) (describing author's experience as a lawyer defending individuals accused of being Communist sympathizers during the McCarthy Era, protesters involved in the Montgomery Bus Boycott, and other individuals in crisis situations); ARTHUR LIMAN, LAWYER: A LIFE OF COUNSEL AND CONTROVERSY 175–94 (1998) (describing author's involvement in the investigation of the Attica Prison Riot); CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW 102–202 (1999) (describing her work in a series of landmark decisions as an attorney with the NAACP Legal Defense Fund); *see* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 197–266 (1994) (describing role of lawyers in the Civil Rights Movement); *see generally* KENNETH R. FEINBERG, WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (2006) (recounting management of the 9/11 victim compensation fund); BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014) (describing author's work on death penalty cases). Similarly, biographies of prominent lawyers often focus on the crisis-intervention work of those lawyers. *See, e.g.*, JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 167-227 (1998) (describing Thurgood Marshall's activities in the lead up to decision in *Brown v. Board of Education*). Non-fiction works that cover legal issues often address high-profile lawsuits, *see* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 543–616 (1975) (describing litigation that culminated in the landmark decision that held racial segregation in education unconstitutional).

105. *See* JONATHAN HARR, A CIVIL ACTION 291–376 (1995) (describing the trial in one of the nation's first "toxic tort" cases); BRANDT GOLDSTEIN, STORMING THE COURT: HOW A BAND OF YALE STUDENTS SUED THE PRESIDENT—AND WON 247–80 (2005) (describing the trial in litigation to obtain release of Haitian immigrants detained at the U.S. Naval Base at Guantánamo Bay, Cuba).

106. A sample of scholarship discussing the "crisis" in legal education and possible avenues for reform. *See, e.g.*, BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012); William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461 (2013); James E. Moliterno, *And Now a Crisis in Legal Education*, 44 SETON HALL L. REV. 1069 (2014); *see also* Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CALIF. L. REV. 201 (2016) (offering a progressive critique of the most prominent theorists on law school reform).

skills often center around the exercise of professional judgment, creativity, and effective problem-solving skills:[107] i.e., the skills, as I will explore throughout this Article, that are most often utilized in crisis-management settings.[108]

For the most part, however, despite all of this "crisis talk," legal ethics scholarship has yet to consider whether there is a particular type of lawyering in crisis situations that might differ from that in which most lawyers engage in their daily practice, nor does it recognize that lawyers may begin to face crises in the future more often than they have in the past.[109] And if that is the case, are the rules that govern that quotidian practice appropriate for crisis situations where pre-existing approaches and training around such approaches might or might not prepare the lawyer to handle these crises with competence, care, and zeal?

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True crisis situations demand our attention, not just in scholarship about legal ethics, but also in the very rules that govern the profession. While the ABA and some jurisdictions have made unauthorized practice of law requirements less onerous in instances where a community is impacted by a disaster, are other modifications to the rules needed beyond those that address this issue alone? The following Parts explore this question.

II. LEGAL ETHICS AND LAWYERING IN NOVEL, PERVASIVE CRISIS SITUATIONS

Crisis situations generally do not, on their own, entail threats to existing ethical paradigms, especially when the crisis is one lawyers are trained and competent to handle and that crisis does not present unforeseeable problems to address.[110] On

107. *See, e.g.*, Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 124–44 (2001) (describing "legal creativity" and the role of law schools in teaching it)*; see also* Mark J. Osiel, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2009, 2054 (1990) (stressing importance of good judgment in the practice of law).

108. Indeed, Professors Marjorie Shultz and Sheldon Zedeck at the University of California, Berkeley have identified twenty-six skills contemporary lawyers need in order to be effective, some of which are crucial for lawyers to possess in any context, including the ability to conduct analysis and engage in legal reasoning, to research the law, to write, and to engage in negotiations. MARJORIE M. SHULTZ & SHELDON ZEDECK, IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING, 26–27 (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1442118 [https://perma.cc/XGR6-RCX7]. Still others are particularly salient in the crisis context, including "fact finding," "questioning and interviewing," "practical judgment," "problem solving," "creativity/innovation," "strategic planning," "organizing and managing one's own work," "organizing and managing others," "passion and engagement," "diligence," and "community involvement and service." *Id.*

109. *See, e.g.*, Petty, *supra* note 31, at 1583 (noting the "fluid nature" of normative principles in crisis situations "requires a paradigmatic shift in the way we approach the legal ethics of government attorneys" in such situations).

110. While the level of attention and care may increase due to what is at stake in the representation, the lawyer is expected to calibrate preparation and the development of expertise to match those stakes. *See*, e.g., MODEL RULES R. 1.1 cmt. 1 (noting level of competency required in a situation may depend, in part, on "the relative complexity and specialized nature of the matter"). *See also* MODEL RULES R. 5.1 cmt. 3 (noting that in

the other hand, NPCs present unique challenges, and even the most skilled and most prepared lawyers will not typically have the capacity, at the outset, to address the crisis in a competent and effective way simply by virtue of the nature of the crisis: the novelty of the situation alone means that the lawyers are unable to rely upon a pre-existing base of knowledge and resort to the typical tactical responses they might deploy.[111] What is more, the pervasiveness of the crisis may even impinge upon lawyers' abilities to provide services to their clients due to the fact that they, too, may be affected by the crisis because their abilities to communicate with clients may be compromised, they may not have access to files, and they may find it difficult to collaborate with colleagues and other professionals.[112] In short, in an NPC, the tools lawyers might otherwise have at their disposal to provide competent service or to develop competency may be unavailable and unavailing.[113] Thus, the novelty and the pervasiveness of the crisis may strain the lawyer's ability to serve the client with zeal, precisely at a time—given the nature of the crisis, what is at stake, and the risks involved—when the lawyer's skills should be at their apex in order to meet the breadth and depth of the challenge.

Complicating matters further, the nature of the NPC in which clients find themselves might test lawyers' abilities to provide competent service for an additional reason. Perhaps the client caused the emergency situation itself and the potential harm to the community that may flow from the client's action or inaction poses great risks to health and safety.[114] Because of this, lawyers might feel some

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practice areas where "difficult ethical problems frequently arise, more elaborate" supervisory measures might be necessary to ensure competent practice by subordinate lawyers). For the importance of law schools to ensure their graduates are competent to engage in problem solving with clients, see ROY STUCKEY, ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 43–48 (2007). *See, e.g.*, William J. Dunn, *Going Forward: Improving the Legal Advice of National Security Lawyers*, 32 B.C. INT'L & COMP. L. REV. 241, 265–67 (2009) (describing need for national security lawyers to prepare for crisis situations in their practice). At the same time, lawyers, particularly activist lawyers who may confront client crises, can fall into the trap, as noted by Gerald López, of confusing what those lawyers do best or most often "with what would most help the community." GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 3 (1992).

111. When Baher Azmy found himself litigating for the rights of detainees on Guantánamo Bay, the U.S. government considered the detention facility that held his clients a lawless place that the justice system could not reach, meaning pre-existing legal strategies and tactics seemed unlikely to succeed, at least at first. *See* Baher Azmy, *Crisis Lawyering in a Lawless Space: Reflections on Nearly Two Decades of Representing Guantánamo Detainees*, in BRESCIA & STERN, *supra* note 30, at 32–62.

112. *See, e.g.*, Matthew Paul Crouch, *In the Aftermath: Responsibility and Professionalism in the Wake of Disaster*, 65 SOUTH CAROLINA L. REV. 465, 465–66 (describing ways in which a series of disasters that have hit the United States in recent decades have impacted the ability of law offices to function). *See also id.* (describing disasters' impacts on law offices functions); *see also infra* Section II.D.2. (describing need for lawyers to consult with other professionals in crisis situations).

113. In an NPC, the usual methods for teaching lawyers and law students good judgment are typically ineffective given the novelty of the situation and the constraints imposed on the lawyer's ability to reflect on the best course of action. *See*, Luban & Millemann, *supra* note 85, at 64 (describing methods through which legal judgment can be taught requiring "ongoing synthesis of experience and reflection").

114. *See* Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1673–75 (2002) (discussing exceptions to confidentiality to prevent death).

conflict regarding the services the client has asked them to provide and might also feel the traditional adversarial approach to the situation is inappropriate.[115] As a result, lawyers might hesitate to offer the type of guidance they might otherwise provide the client in a more traditional setting.[116] Thus, the lawyer might seek to consider and communicate a wider range of advice to the client given the nature of the client-made crisis.[117] At the same time, given their concerns for community safety in light of the client-made NPC, lawyers might feel like they are in less of a position to provide service with the zeal with which they are accustomed when advocating on behalf of clients generally.[118]

An additional way in which a NPC is often different from "normal" client crises is that, in a typical crisis, lawyers tend to have sufficient sources of information from which to draw to develop situational awareness that would enable them to appreciate the risks involved to the client and the broader community.[119] Lawyers have likely developed an expertise in the general area in which they practice to understand those aspects of the work that might require non-legal expertise, like a personal injury lawyer who develops a basic understanding of the types of medical problems that can arise as a result of a particular type of injury,[120] or an immigration lawyer who handles asylum applications from a particular area of the world who has researched and understands the political situation in the countries in the region from which clients have fled.[121]

Even where the lawyer may not have developed a particular body of expertise in an area of practice, the time constraints that may emerge—even in a client crisis—are such that the lawyer has time to consult with experts in other fields and the client will generally provide consent to the lawyer to do so. For example,

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115. Returning to Brandeis's description of the counsel for the situation, a lawyer might try to bring about the best result among a mix of competing and conflicting claims and claimants, regardless of the specific client. *See* David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 721 n. 18 (discussing Brandeis's formulation); John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILLINOIS L. REV. 741, 742–743 (1992) (same).

116. See discussion *infra* Section II.E., involving the scope of guidance a lawyer may impart generally to clients.

117. *Id.*

118. *See, e.g.*, Alexis Anderson, Lynn Barenberg & Paul R. Tremblay, *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 CLINICAL L. REV. 659, 668 (2007) (describing zeal as a hallmark of the attorney-client relationship). *Cf.* William H. Simon, *Reply: Further Reflections on Libertarian Criminal Defense*, 91 MICH. L. REV. 1767, 1772 (1993) (noting deceptive practices in criminal defense settings to advance a client's interests may imperil the lawyer's own sense of morality).

119. *See also* Leary Davis, *Competence as Situationally Appropriate Conduct: An Overarching Concept for Lawyering, Leadership, and Professionalism*, 52 SANTA CLARA L. REV. 725, 762 (2012) (defining situational awareness as "knowledge of relevant environments" when it comes to a lawyer's decision making and considering this one of three core competency characteristics of lawyers generally).

120. *See, e.g.*, Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d. 686, 693–94 (Minn. 1980) (describing standard of care in legal practice action regarding underlying medical malpractice claims).

121. *See* Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 460–64 (2016) (describing nature of evidence necessary in presenting asylum claims).

as a housing lawyer representing squatters who had entered otherwise abandoned buildings in an effort to secure safe housing, I would often consult with a structural engineer to ensure the safety of the buildings the tenants occupied. Depending on the nature of the practice and the situation, the lawyer may wish to consult with experts from a variety of fields: e.g., a forensic accountant or someone versed in strategies for addressing childhood asthma. Those experts may understand the effects of trauma or the risks associated with certain medical practices or devices. The client and the lawyer can confer on which experts to consult and the client can support the lawyer's efforts to develop a more complete picture of the situation in order to provide competent and effective service to the client. Lawyers can also be careful about what they share with these experts about the client's situation and the normal protocols in place to protect client confidences generally work effectively. In an NPC, few of these traditional features of the attorney-client relationship exist.

Another critical area where professional duties may become more challenging when the lawyer handles a NPC as opposed to a more traditional client matter relates to the maintenance of client confidences, especially regarding the development of situational awareness.[122] In an NPC, both the lawyer and the client are likely in the dark about some basic factual issues, particularly with respect to the risks associated with actions or inaction on the part of the client in the face of the crisis, as well as the likely conduct of third parties not under the client's control.[123] For a risk to public health associated with the crisis, the lawyer (and the client) may not know the full extent of the dangers that may unfold in the crisis.[124] The client may not have time (or might be otherwise disinclined), to give consent to the lawyer to communicate with other professionals about such risks.[125] Making matters worse, in an NPC, the lawyer's systems for preserving client confidences may be compromised. The lawyer may have to work remotely, may be

122. *See* Michael P. Mills, *Josephine (A Slave) v. The State of Mississippi*, 86 MISS. L. J. 291–94 (2017) (describing importance of lawyers developing situational awareness).

123. Lawyers are sometimes asked to make a judgment about the risks associated with dangers the client may face and such information can come from diverse sources. *See, e.g.*, Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L. J. 217, 258–62 (2003) (describing duty of lawyers representing survivors of intimate partner violence to advise clients of risks of recidivism on the part of their abusers, and that risk assessment is often informed by information from client as well as an understanding of social science related to the likelihood of repeat offense in this area).

124. *See, e.g.*, Restatement (Third), *supra* note 27, at § 67 cmt. h (noting that with financial harms a lawyer may try to prevent or mitigate, future probabilities and a client's subjective state of mind may be difficult to assess).

125. For a discussion of confidentiality and other issues related to lawyers working with third-party professionals, see Spencer Rand, *Hearing Stories Already Told: Successfully Incorporating Third Party Professionals into the Attorney-Client Relationship*, 80 TENN. L. REV. 1 (2012); Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 429–36 (2001). *See also* Susan R. Martyn, *Accidental Clients*, 33 HOFSTRA L. REV. 913, 942–46 (2005) (arguing when client consents to communications with third-party professionals, those professionals become agents of the lawyer, which extends the attorney-client privilege to communications between the lawyer and those other professionals).

unable to secure confidential documents and information, and may not have access to files in the normal course of business. These phenomena can stress the lawyer's ability to provide competent and effective service to the client in an NPC.[126]

Given the characteristics of NPCs as described above, they pose particular risks to the lawyer who is asked to address them on behalf of a client. They threaten the lawyer's ability to provide competent service, test the limits of the type of service the lawyer can and should provide, pose critical access-to-justice questions,[127] create potential conflicts of interest that make it difficult for the lawyer to advocate on behalf of clients with zeal, and place stress upon the normal protections lawyers afford their clients' confidences. Given these types of issues that arise for lawyers handling NPCs, what type of guidance can a lawyer find in existing ethical rules for handling such crises and are they adequate to provide both that guidance and the accountability the legal community desires from its rules? The remainder of this Part attempts to address these questions.

A. COMPETENCE IN CRISIS

1. THE STANDARD OF CARE IN CRISIS SITUATIONS

The first rule of legal ethics is that a lawyer must provide "competent" service to the client, which requires the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[128] But what competence means in a particular setting will vary with that setting, depending on "what is at stake."[129] While the rules provide that the level of care required is that of a "general practitioner,"[130] those rules also demand that the lawyer must have the requisite degree of skill, preparation, and training that matches the complexity of the matter the client has asked the lawyer to handle.[131] Comment 1 to Rule 1.1 provides in relevant part that, in order to determine whether the lawyer is "employ[ing] the

126. *See, e.g.*, Jack T. Camp, *Thoughts on Professionalism in the Twenty-First Century*, 81 TUL. L. REV. 1377, 1381 (2007) (arguing that "lawyers often view the duty to represent the client zealously as the paramount objective of the legal profession."). *Cf.*, William H. Simon, *supra* note 118, at 1772 (1993) (noting deceptive practices in criminal defense settings to advance a client's interests may imperil the lawyer's own sense of morality).

127. *See* discussion *supra* Section I.C.

128. MODEL RULES R. 1.1. Similarly, the Restatement provides that a lawyer must "in matters within the scope of the representation . . . act with reasonable competence and diligence." Restatement (Third), *supra note 27*, at §16(2). *See also* Douglas R. Richmond, *Why Legal Ethics Rules are Relevant to Lawyer Liability*, 38 ST. MARY'S L.J. 929, 935–45 (2007) (describing relationship between disciplinary rules and the standard of care requires).

129. MODEL RULES R. 1.1 cmt. 5.

130. *Id*. at cmt. 1.

131. *Id*. at cmt. 5. While the Restatement does require that in order to "handle [a] matter," the lawyer must "hav[e] the appropriate knowledge, skills, time, and professional qualifications" to do so, it does not set forth any particular criteria that would suggest the degree of care changes given the complexity of that matter, although it is safe to assume that is implied because, presumably, the standard of care as the needs of the "matter" that must be "handled" changes. Restatement (Third), *supra* note 27, at §16 cmts. d, f.

requisite knowledge and skill in a particular matter,"[132] we should take into account the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.[133] While the required proficiency of the lawyer "in many instances" is "that of a general practitioner," nevertheless, "[e]xpertise in a particular field of law may be required in some circumstances."[134]

NPCs are, by their nature, highly complex, present situations of high risk, and likely require specialized knowledge to manage them with competence.[135] Indeed, because of this complexity and the risks involved, a lawyer must engage in preparation and training specifically designed to develop the competence to handle the novel nature of the matter.[136] But given the novelty and time constraints of these situations, and the fact that they might be unanticipated, the lawyer would likely face great difficulty trying to develop the expertise to address the specific crisis. Such constraints might also make it difficult to refer the matter to or associate or consult with someone who has the specialized expertise; in fact, given the novelty of the matter, the lawyer might find it impossible to find someone who has such "established competence" to handle the matter.[137] When Richard Pinner was working in New York City in the 1980s to develop legal claims designed to combat the homelessness crisis gripping the city at the time, there were no other experts in the nation, or even the world, who had explored bringing actions to address such crises. As a result, he could not turn to others who had faced similar situations and brought successful litigation to address them.[138]

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132. MODEL RULES R. 1.1. cmt. 1.

133. *Id.*

134. *Id.* One area mostly beyond the scope of this Article is the extent to which the tort of legal malpractice may impact a lawyer's practice in an NPC. This area of law is traditionally a function of state common law but the standard of care is set through decisional law, often with reference to the relevant rules. *See, e.g.,* Benjamin P. Cooper, *Taking Rules Seriously: The Rise of Lawyer Rules as Substantive Law and the Public Policy Exception in Contract Law*, 35 CARDOZO L. REV. 267, 303 (2013) (noting "the clear majority view in legal malpractice cases is that while a rule violation itself is not a basis for malpractice liability, the rules may be considered in determining whether a lawyer has breached his standard of care"). For this reason, this discussion of the rules that govern lawyer competence can also apply, to a certain extent, in settings where a lawyer is charged with malpractice.

135. *See, e.g.*, David P. McCaffrey, *Review of the Policy Debate over Short Sale Regulation During the Market Crisis*, 73 ALB. L. REV. 483, 512–13 (2010) (noting need for regulatory expertise in financial crises).

136. *See*, Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1606–08 (2009) (arguing for specialized training and preparation in the national security setting which is likely to face crisis situations).

137. *See*, Alexis Anderson, Arlene Kanter & Cindy Slane, *Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom*, 10 CLINICAL L. REV. 473, 545–48 (2004) (discussing MODEL RULES R. 1.1 and the duty to consult with an attorney of established competence when handling a novel area of law for the attorney).

138. *See* Richard Pinner, *Litigation for the Homeless in the 1980s: A Look Back* in BRESCIA & STERN, *supra* note 30, at 207–28.

Thus, the guidance the rules provide when it comes to meeting the standard of care in an NPC might appear somewhat contradictory and impossible to satisfy. On the one hand, the complexity and the stakes of NPC settings make specialized knowledge that is developed through training and preparation essential to effective crisis management. On the other, it is likely difficult to acquire such training and expertise, or even to consult with someone with such training and expertise, precisely because of the novel and time-sensitive nature of the crisis.[139] There is an apparent contradiction in the rules: they may require specialized expertise in NPC settings, and yet, given the nature of such settings, that specialized expertise may be difficult to acquire. Nevertheless, the rules do offer some guidance when it comes to what they describe as "emergency" situations, but that guidance may offer little in terms of accountability in such settings.[140]

In emergency situations, a lawyer is permitted to "give advice or assistance" even where the lawyer does not have the skill or competence to handle the matter and does not have time to consult with separate counsel who does.[141] In such situations, the "assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest."[142] In an NPC, as described above, a lawyer may not have the opportunity to consult with another legal professional competent to handle the matter. Also, it might not even be possible to contact the client, who may be locked in a jail cell or held on a military base incommunicado.[143] In such settings, the rules appear to allow the lawyer to provide advice and assistance without the requisite level of care required in non-emergency situations. While the relevant Rule states that the assistance provided must be "limited to that

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139. When even the experienced lawyers representing Haitian detainees held on Guantánamo Bay, Cuba, in the early 1990s won an injunction to halt repatriation of the Haitian refugees while the case was pending, they were unsure what to do next because none of them had ever secured such a sweeping order in their prior work. Goldstein, *supra* note 105, at 88–89.

140. MODEL RULES R. 1.1. cmt. 3.

141. *Id.*; *see, e.g.*, Harrington v. Synergy Law, LLC (In re Abel), 2019 Bankr. LEXIS 3128, at *24–25 (Bankr. D. Vt. Sep. 27, 2019) (citing to cmt. 3 of Vermont's version of MODEL RULES R. 1.1. and noting attorney complied with requirements of the rule in efforts to withdraw and counsel client to obtain other counsel). *See also* Barbara A. Glesner, *The Ethics of Emergency Lawyering*, 5 GEO. J. LEGAL ETHICS 317, 341 (1991) (noting lack of reported decisions or opinions on the meaning of reasonably necessary actions in emergency situations). This is true, also, when a lawyer is charged with malpractice in an emergency situation; there, few reported decisions exist articulating a standard of care in such situations. *See id.* at 343–47 (referencing the small number of cases in which malpractice charges have been filed against lawyers in emergency situations). At times, the nature of the situation, and whether it is a seen as a true emergency, is factored into the analysis of whether to discipline an attorney. *See* David Cole, *They Did Authorize Torture, But. . .*, NY REV. OF BOOKS (March 10, 2010) (discussing decision not to refer John Yoo for professional discipline when he was employed at the U.S. Department of Justice's Office of Legal Counsel and wrote the so-called "torture memos").

142. *Id.*

143. In litigation over Haitian refugees held on the U.S. Naval Base on Guantánamo Bay, Cuba, in the early 1990s, attorney-client communications were particularly challenging, especially at the outset of the representation; in that setting, individuals providing humanitarian and translation assistance to the refugees shared communications between the lawyers representing the detainees and their clients. Goldstein, *supra* note 105, at 50.

reasonably necessary in the circumstances," little further guidance is provided to help shape the lawyer's behavior in such settings.[144] The commentary to the Rule would seem to provide the lawyer with a great deal of leeway to act, and there are few, if any, reported cases, other guidance documents, or scholarly articles that might afford some sense of the bounds of a lawyer's discretion in such settings.[145] More rigid requirements might create a degree of decision-making paralysis and, as a result, the lawyer might feel constrained and reluctant to give the client any guidance (and thus that client would have to act without the benefit of some degree of legal assistance). But the lack of any guardrails might create moral hazard, where the lawyer feels free to dispense advice in an emergency without feeling compelled to satisfy any particular standard of care.[146] In the subsequent section and Part III, *infra*, I explore ways in which we might consider amendments to the commentary to Rule 1.1 that might provide a greater degree of guidance to the lawyer providing assistance in an NPC.

2. PREPARING FOR THE UNEXPECTED

As described above, the delivery of competent service to a client will often hinge on the degree of training and experience expected of the lawyer to handle a matter, particularly as the complexity and specialized nature of the matter grows.[147] Achieving the requisite skill to deliver competent service depends, in part, on "the preparation and study the lawyer is able to give the matter."[148] When viewing these requirements together with the discretion provided the lawyer in emergency situations, this suggests, once again, a bit of tension in the rules when it comes to dealing with NPCs. When faced with an emergency situation, the relevant rule affords the lawyer more discretion in the type of guidance to provide to the client. At the same time, the more the situation is one the lawyer might anticipate and develop the expertise to handle, the less discretion we give the lawyer to navigate through it.

Moreover, given the frequency of so-called Black Swan events, and the likelihood that lawyers will, more and more, be asked to step in to help clients with

144. At the same time, poorly and hastily prepared legal documents can provide grounds for the imposition of sanctions, even they are generated under apparent time constraints. See, Matter of Wallace, 104 N.J. 589, 590–94 (1986) (upholding sanction for lawyer's failure to prepare appropriate promissory note due to lack of preparation and knowledge about such a document's requirements, regardless of the time constraints imposed on the provision of the service).

145. Such limited guidance includes commentary in the Restatement that provides that a lawyer's behavior should generally be "reasonable under the circumstances" Restatement (Third), *supra note 30*, at § 20, cmt. c, and certain situations might not afford the lawyer time to consult with a client, in which case a decision might properly lie with the lawyer *Id.* at § 21, cmt. e. Nevertheless, the lawyer is also empowered to "take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives as defined by the client. . ." *Id.* (citations omitted).

146. *See*, Luban & Millemann, *supra* note 85, at 57 (describing ways in which "broadly permissive rules" create a problem of . . . "moral hazard").

147. MODEL RULES R. 1.1 cmt. 1.

148. *Id.*

crisis situations, can lawyers attempt to prepare for NPCs? Remember, the Restatement requires lawyers to have the appropriate "knowledge, skills, time, and professional qualifications" to "handle the matter."[149] If lawyers were better prepared to handle NPCs, it would necessarily raise the standard of care in emergency situations and give the lawyer less leeway within them.

Regardless, the profession should take a forward-thinking approach to preparing for crises to ensure that lawyers have considered and anticipated the types of crises that might arise in their field of practice and those that might befall their clients and the community.[150] In light of the ability to a certain extent to anticipate such crisis situations, even simply to recognize that these sorts of crises are likely to occur, if they are not inevitable, lawyers should then attempt to prepare for such crises accordingly and to the best of their ability. In Part III, *infra*., I will suggest amendments to the commentary to the *Model Rules* that might take into account these sorts of considerations and adapt such commentary to recognize the fact that crisis situations are becoming more commonplace and as a result, lawyers should incorporate crisis preparation into their training including developing skills to address such crises, and to the extent possible, expertise.

3. COMPETENCE AND CREATIVITY

The lawyer's rules of ethics include standards regarding meritorious claims that track those in rules of procedure, like Rule 11 of the Federal Rules of Civil Procedure.[151] In an NPC, the lawyer is typically thrust in a situation that is, quite literally, unprecedented. Since the practice of law is one that is based to a great extent on notions of *stare decisis*, and the legal profession and the legal system tend to privilege a degree of path dependency (the notion that we must identify corollaries and analogies from past patterns and practices to detect and realize the correct course of action in the present),[152] the lawyer facing an NPC is often left with few channel markers to navigate a course through uncharted seas. Nevertheless, the rules, predominantly Rule 3.1, do not make exceptions for lawyers handling such crisis situations that would provide them a wider degree of latitude to develop creative responses appropriate to the novelty of the situation. The very novelty of the situation is precisely what should engender creative and novel solutions, yet it is just these sorts of solutions that the practice of law and

149. Restatement (Third), *supra note 26*, at §16, Cmt c.

150. At some point, the frequency of crisis situations should create an obligation that the lawyer take affirmative steps to prepare to handle them in the lawyer's field, and may not take a "head-in-the-sand" approach to obvious risks. *See* Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 GEO. J. LEGAL ETHICS 187, 198–99 (2011) (discussing tension around notions of willful ignorance in the rules).

151. Fed. R. Civ. P. 11. *See also* Ted Schneyer, *The ALI's Restatement and the ABA's Model Rules: Rivals or Complements?,* 46 OKLA. L. REV. 25, 44–49 (1993) (discussing interplay between prohibitions on frivolous claims in procedural law and those found in rules and norms of legal ethics).

152. *See, e.g*., RONALD DWORKIN, LAW'S EMPIRE 217–229 (1986) (discussing judicial role as promoting "integrity" with prior precedent when adjudicating disputes and determining the nature of the legal principle that governs a particular situation).

the legal system might generally discourage. For the lawyer dealing with a crisis situation, the law should be more forgiving, not less; as I argue in this sub-part, I hope to make the case for greater discretion and leeway, while also offering a means to ensure some degree of accountability to counteract the dangers of a lawyer acting with impunity in these unfamiliar situations. In this section, I will discuss the ways in which the rules of ethics and procedure deal with the bases upon which lawyers may make legal claims and assert factual contentions. I will show that the current approaches related to claims as opposed to factual contentions diverge: the guidance the rules provide make creative claims harder to raise while, at the same time, they offer greater flexibility with regard to factual assertions. I would like to harmonize these approaches in NPCs, providing a more consistent approach to both legal claims and factual assertions. The discussion starts with how the rules treat legal claims.

Rule 3.1, with its corollary in Rule 11 of the Federal Rules of Civil Procedure,[153] provides that a lawyer shall not "bring or defend a proceeding, or assert or controvert an issue therein," without "a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[154] The crux of Rule 3.1 is the notion that the lawyer must only assert "good faith" claims. Apart from the litigation context, to which Rule 3.1 applies, the Rules also admonish lawyers to not knowingly "make a false statement of material fact or law to a third person,"[155] and not "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client," unless the lawyer is prohibited from revealing this information under confidentiality protections.[156] These latter provisions have been recognized as covering even settlement negotiations.[157]

What the novel situation presents, however, is one in which existing, path-dependent approaches and the legal claims that are developed through them are less available to the lawyer. This means there is less guidance to the lawyer as to what is, in fact, a "good faith" claim. For Sarah Rogerson, who dealt with an unprecedented crisis when she helped immigrant detainees, including unaccompanied minors, obtain freedom from detention while their immigration cases were pending, such a novel situation required creative and inspired choices and the marshalling of resources and forging unlikely alliances that are not normally available to the lawyer representing immigrants.[158] While it is common to refer to Plato's phrase that necessity is the mother of invention,[159] for the lawyer dealing

153. Fed. R. Civ. P. 11.

154. MODEL RULES R. 3.1.

155. MODEL RULES R. 4.1(a).

156. MODEL RULES R. 4.1(b).

157. Virzi v. Grand Trunk Warehouse & Cold Storage, 571 F. Supp. 507, 509–13 (E.D. Mich. 1983).

158. *See* Sarah Rogerson, *Preparation, Crisis, Struggle, Ideas: The Birth of the Detention Outreach Project*, in BRESCIA & STERN, *supra* note 30, at 146–66.

159. PLATO, THE REPUBLIC 40 (Joslyn T. Pine ed., Benjamin Jowett trans., 2000).

with novel situations, the need might exceed even the experienced lawyer's grasp, and existing legal precedents might offer little recourse to the lawyer seeking a legal response to the crisis.[160] In such settings—depending on the time constraints, the novelty of the crisis, and the nature of the emergency—existing rules regarding the merit of claims might impinge upon the lawyer's ability to address the crisis with creativity and vigor.[161] When lawyers face uphill battles to protect their clients' interests, a careful, methodical approach to building the case for those interests often has a greater likelihood of success. But such an approach is rarely feasible in an NPC. One historical example from the civil rights movement can help illuminate the importance of care, diligence, planning and incrementalism, which are typically not available to the lawyer dealing with an NPC.

In the early days of what we might consider the "modern" civil rights movement, as the lawyers at the NAACP Legal Defense & Education Fund (LDF) developed arguments against the existing precedent of *Plessy v. Ferguson* that had established separate but equal facilities as consistent with the Constitution,[162] they did not attempt—at least at first—to file a broad challenge to that seemingly impregnable precedent. They did not take on the separate-but-equal regime in one massive, direct assault. Instead, they began to test its holding at the margins, starting with graduate schools. There, in cases like *Sweatt v. Painter*,[163] they challenged the failure of the University of Texas to admit African-American students into its law school. While the litigation was pending, the state established a parallel law school that would admit African Americans, but it could not compare to the state university system's flagship law school.[164] The LDF lawyers sensed that the judges who would hear their challenge to the state's separate law school would appreciate that a law school was so much more than a building. The strength of a law school depends on the faculty, the alumni and student networks it fosters and the opportunities such networks open up for its students.[165] A new

160. *See* Peter Margulies, *The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347, 348–49 (2009) (describing "crossover advocacy" entailing a broad range of advocacy tactics in the representation of Guantánamo detainees driven by necessity of the situation).

161. Judges can also face similar challenges and they might become more engaged in resolving crises than they would in a more run-of-the-mill case. *See, e.g.*, PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 163 (1986) (discussing active role of judge in resolving Agent Orange litigation). For a discussion of so-called "managerial judging," see generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). In progressive lawyering scholarship, Scott Cummings has argued that the challenges faced by clients, particularly in the low-wage worker setting, require creativity, tactical pluralism, and flexibility. Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1, 4–5 (2009) (citations omitted).

162. Plessy v. Ferguson, 163 U.S. 537 (1896). For a description of the legal campaign to challenge Jim Crow which would ultimately lead to the decision in *Plessy*, see CHARLES A. LOFGREN, THE *PLESSY* CASE: A LEGAL HISTORICAL INTERPRETATION 28–60 (1987).

163. Sweatt v. Painter, 339 U.S. 629, 636 (1950).

164. *Id*. at 634.

165. On the legal strategy to challenge segregation in graduate and professional schools, see MOTLEY, *supra* note 104, at 61–64, and Greenberg, *supra* note 104, at 69–78.

law school that did not have the same robust networks as an older, more established one could not truly be "equal," even though "separate" from the university's law school for whites. The LDF certainly challenged the doctrine of separate but equal in its briefing in *Sweatt*.[166] The main challenge to the dual system of law schools that the state university had established, however, was that such a system violated the principle of separate but equal. The Supreme Court would agree, in an opinion issued just a few years before the landmark decision in *Brown v. Board of Education*.[167] Thus, in the legal effort in *Sweatt*, the lawyers moved incrementally and carefully, slowly building the case against *Plessy*, but they did so in painstaking fashion, challenging the University of Texas's approach as violating the very precedent the LDF wanted to overturn.[168]

The LDF lawyers thus faced a crisis and moved incrementally and carefully to help dismantle the Jim Crow system. They could do so by filing novel claims, but only those for which they had a good-faith basis for interposing. First, they would argue that in cases like *Sweatt*, the system violated *Plessy*. Later, they would argue that *Plessy* itself was unconstitutional, asserting that the separate-but-equal document had a powerful, stigmatizing effect, using social science to support their claims, and articulating a vision of the Equal Protection clause that was based in equal dignity, not just some abstract principle of equality.[169] While it would take decades to dismantle the de jure system of separate but equal—indeed, *Plessy* was itself a test case, brought by creative lawyers seeking to challenge the Jim Crow system[170]—and decades more for the NAACP and its intrepid lawyers to help foster greater legal equality (a struggle that continues), the lawyers of the LDF and other institutions crafted creative arguments that provided courts with the means by which to dismantle the Jim Crow system.

But such an effort truly took decades, and it is possible that, if thrust into making emergency arguments before they had painstakingly built the case against *Plessy*, the LDF lawyers might have faced challenges that their own arguments were not raised in good faith, as violating the requirements of Rule 11 and other, similar provisions.[171] While many would say the crisis of Jim Crow presented a

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166. See Brief for Petitioner at 52–62, *Sweatt v. Painter*, 339 U.S. 629 (1950) (No. 44), 1950 WL 78681 (U.S.). At the same time, the amicus brief submitted on behalf of the U.S. Department of Justice made prominent its argument that *Plessy* should be overturned outright. Memorandum for the United States as Amicus Curiae at 9-14, *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950) (No. 34) & *Sweatt v. Painter*, 339 U.S. 629 (1950) (No. 44).

167. Brown v. Board of Education, 347 U.S. 483, 494–96 (1954).

168. For a further discussion of the legal strategy in *Sweatt*, see Raymond H. Brescia, *Creative Lawyering for Social Change*, 35 GA. ST. U. L. REV. 529, 567–72 (2019).

169. On the legal strategy in *Brown*, see Kluger, *supra* note 104, at 263.

170. *See* Lofgren, *supra* note 162, at 28–60 (describing test-case strategy that led to *Plessy*).

171. It is important to note that advocates' fears that they might face sanctions for bringing creative claims, especially in particular classes of cases, are not unfounded or baseless. As a series of empirical studies showed, to a varying degree, a disproportionate number of sanctions after the 1983 Amendments to Rule 11 were issued against litigants raising civil rights claims. *See* Melissa L. Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L. J. 1313, 1327 (1986)

pervasive one (though not novel), and the Rev. Martin Luther King, Jr., would famously speak of the "fierce urgency of now,"[172] the lawyers still had to build a case incrementally, understanding that broad and premature challenges that were unsuccessful would likely set the larger Civil Rights Movement back.[173]

In stark contrast, lawyers dealing with an NPC acts under extreme time pressure and thus is often unable to craft a carefully constructed argument that might satisfy the meritorious-claims requirement every step of the way, at least as such an argument might be judged by adversaries and the courts. Unlike in the effort to dismantle the Jim Crow system which evolved over decades, in an NPC, the ability to wield fully vetted and strongly supported arguments is a luxury the lawyer does not always enjoy.[174] While some would argue that the rules, by allowing "good faith" arguments, provide some comfort to the lawyer in novel crisis situations, such a standard may not afford the lawyer much guidance, and the lawyer might be reticent to assert creative claims in the face of unprecedented situations. Cases in which litigants asked courts to consider the application of sanctions in

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(citations omitted); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200–02 (1988); Lawrence Marshall, Herbert M. Kritzer, & Frances Kahn Zemans, *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 965-75 (1992); Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study*, 75 MARQ. L. REV. 313, 337–45 (1992); FEDERAL JUDICIAL CENTER, RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, §1C (1991); STEPHEN R. BURBANK, AMERICAN JUDICATURE SOCIETY, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 68–70 (1989). While some of the examples used throughout this Article refer to claims brought by lawyers advocating for civil rights generally and what many would call progressive causes, I do not wish to suggest that lawyers pursuing such claims are the only ones to face the sorts of challenges that NPCs cause nor do I believe such lawyers are likely to flout ethical rules in pursuit of their clients' claims. As Ann Southworth has shown, conservative movement lawyers have also proven eager to use the courts to advocate their clients' positions, sometimes to counteract victories won by their ideological opponents. ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 35 (2008). There is nothing inherently unethical about such efforts, which can originate from any point across the political spectrum, and I do not mean to suggest otherwise.

172. Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), reprinted in LENWOOD G. DAVIS, I HAVE A DREAM: THE LIFE AND TIMES OF MARTIN LUTHER KING, JR. 261 (1969). Perhaps it's appropriate to think in terms of "acute" as opposed to "chronic" crises when talking about the effort to dismantle Jim Crow. There might have been situations of immediate crisis that required immediate attention—like addressing the need to confront rampant, state-sponsored violence in a particular community—while there was still a longer-term and simultaneous effort to overturn the entire segregationist system. Christy Lopez has drawn the distinction between what she calls the "chronic" crisis of policing in the United States and an "acute" policing crisis: i.e., the difference between the long-term issues around policing in communities of color generally that are often unearthed by a particular, high-profile incident of police misconduct. *See generally* Christy E. Lopez, *Responding to the Dual Policing Crisis in Ferguson*, in Brescia & Stern, supra note 29, at 63–107.

173. The same fears gripped the campaign for marriage equality, where many worried that premature litigation could lead to legal setbacks in the effort. *See* NATHANIEL FRANK, AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA 227–29 (describing fears of advocates regarding the correct timing of any legal challenge to laws barring same-sex marriage).

174. When the Trump Administration issued its travel ban on individuals from predominantly Muslim countries, the legal team sprang into action and filed for, and obtained, a nationwide injunction within roughly 24 hours of the announcement of the ban. *See* Muneer Ahmad & Michael J. Wishnie, *Call Air Traffic Control!: Confronting Crisis as Lawyers and Teachers*, in BRESCIA & STERN, *supra* note 30, 311–39.

crisis situations per se are not numerous,[175] and thus there is little further guidance on this question of whether the same standard applies to claims in NPCs. At the same time, the Supreme Court would appear to recognize the difference between a "normal" setting and the obligations imposed on the lawyer under Rule 11, and those that are emergencies, where the lawyer is pressed for time: "An inquiry that is unreasonable when an attorney has months to prepare a complaint may be reasonable when he has only a few days before the statute of limitations runs."[176]

At the same time that the lawyer facing an NPC might need to assert creative legal claims to protect a client's interest in the face of the risk that those claims may expose the lawyer to a charge that they are frivolous, the rules offer some greater flexibility when it comes to raising factual assertions with less than complete knowledge to support them. While it is sometimes difficult to assess the line between legal and factual assertions, in crisis and non-crisis situations alike,[177] this distinction between these two types of assertions is important because it appears that there is a different standard to apply to legal claims and factual assertions generally. Rule 11 of the Federal Rules of Civil Procedure seems to give some leeway to the lawyer handling a crisis situation who does not know all of the facts that might affect the client's claim, even though the lawyer might still need to make some factual assertions in light of exigent circumstances that demand some action by the lawyer. Rule 11(b)(3) provides that a lawyer, by filing documents covered by the Rule that contain factual "contentions," certifies that such contentions "have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."[178] This provision offers lawyers dealing with an emergency situation some degree of latitude to make factual contentions they believe describe the situation accurately, to the best of their ability and the limits their knowledge. Courts assessing this requirement have found that such contentions, if identified as being unsupported at the time of the filing, still may be articulated and alleged only if the lawyer has a good faith basis for making them.[179] Apart from lawyers' beliefs that they are likely to establish the accuracy of the allegations, they still need to have some basis for alleging such facts in the first place.[180]

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175. *See, e.g.,* Autotech Corp. v. NSD Corp., 125 F.R.D. 464, 470 (N.D. Ill. 1989) (noting degree of inquiry required of the lawyer prior to asserting a claim may depend upon a limited time frame within which the lawyer may have to take action).

176. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401–02 (1990). *See also*, Glesner, *supra* note 141, at 346 (discussing role of time-pressure in sanctions and attorney malpractice cases).

177. Cooter & Gell, 496 U.S. at 401 (1990) (citations omitted) (noting importance of assessing reasonableness of inquiry and difficulty of distinguishing legal from factual contentions).

178. Fed. R. Civ. P. 11(b)(3).

179. *See, e.g.*, Vespa v. Singler-Ernster Inc., 2016 WL 6637710, at *2 (N.D. Cal. Nov. 8, 2016) (noting lawyer must have good faith basis for making factual assertions that lawyer believes will ultimately have evidentiary support).

180. *See, e.g.*, Frantz v. U.S. Powerlifting Fed'n, 836 F.2d 1063, 1068 (7th Cir. 1987) (noting that Rule 11 requires that a filing is "'well grounded in fact,' not that all the facts are contained in" the filing).

Seemingly tailor-made for a relaxed approach in NPCs, time-pressure, a need to rely solely on a client for information given such time pressure, and the complexity of the situation, all can potentially relieve the lawyer of the duty to conduct a more thorough investigation when the exigencies of the circumstances will not allow one.[181] At the same time, when a lawyer can take simple measures, like making a phone call to verify certain critical information, and the lawyer chooses not to, that lawyer cannot avoid the obligations to interpose only non-frivolous claims and contentions.[182]

This provision with respect to factual contentions offers the crisis lawyer an opportunity to make assertions based on a set of facts that the lawyer has not had the opportunity to assess fully due to the nature of the situation and the time constraints under which the lawyer is operating. As a result, it affords the crisis lawyer a degree of latitude to address a crisis situation without a full grasp of the facts underlying the situation, allowing contentions based on those facts in order to address the crisis situation with zeal, even when the lawyer does not fully appreciate the factual contours of that situation. It thus affords the lawyer the chance to advocate for the client with imperfect information in a crisis situation, even with the apparent requirement that any factual contentions still must be made in good faith. It still leaves the question of whether the lawyer can assert legal claims that he or she has not fully developed, but I will address that issue again in Part III, *infra*. While the rules and guidance around factual assertions would seem to give the lawyer some leeway in crisis-lawyering settings, at the same time, as I describe next, the rules also restrict the degree to which the lawyer is allowed to present the facts of the client's case to the court in one discrete setting, a setting that is common in crisis lawyering scenarios.

Even though the rules appear to afford the lawyer some capacity for advocacy of the client's interests in the face of imperfect knowledge, the exigencies of a situation that might encourage a lawyer to seek emergency relief could require an ex parte application before the court—by definition, one in which counsel for the opposition is absent.[183] Because this type of situation would appear anathema to the adversarial system—at least the idealized one in which able counsel representing adversaries square off in a search for the truth[184]—the "normal" rules of

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181. *See, e.g.*, Brown v. Fed'n of State Med. Bds. of the United States, 830 F.2d 1429, 1435 (7th Cir.1987) (describing factors courts should take into account regarding lawyer obligations under emergency situations).

182. *See* Autotech Corp. v. NSD Corp., 125 F.R.D. 464, 470–71 (N.D. Ill. 1989) (holding sanctions warranted where a simple phone call by counsel would have uncovered facts that would have undermined central legal claims of complaint). *See also* Walker by Walker v. Norwest Corp., 108 F.3d 158, 162 (8th Cir. 1997) (noting failure of plaintiff to carry burden of investigating facts that would establish federal subject matter jurisdiction warrants imposition of Rule 11 sanctions).

183. *See, e.g.*, BLACK'S LAW DICTIONARY 616 (8th ed., 2004) (defining ex parte communication as a communication "[d]one or made at the insistent and for the benefit of one party only, and without notice to, or argument by, any person adversely interested").

184. *See, e.g.*, DAVID W. PECK, THE COMPLEMENT OF COURT AND COUNSEL 8–10 (1954) (13th Annual Benjamin N. Cardozo Lecture)(describing the fundamental contours of the adversarial system).

the adversary system tend not to apply.[185] Since this is the type of situation in which crisis lawyers might find themselves, the rules that apply in such settings might have a disproportionate—and deleterious—effect on the crisis lawyer's practice.[186]

The rules in these types of proceedings provide that the lawyer must take the role as an officer of the court seriously,[187] and must present all facts necessary for the court to make its decision, even those unfavorable to the client. Model Rule 3.3(d) provides that, in such ex parte proceedings, the lawyer "shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."[188] Lawyers dealing with crisis situations are those most likely to make ex parte applications—such procedural maneuvers are largely reserved for exigent circumstances, when lawyers need immediate relief from the courts in the face of irreparable or irreversible harm without court intervention.[189] While the rules appear to allow some latitude with respect to factual contentions, as described above, still, should the lawyer make an ex parte application to the court to deal with the type of emergency that often arises in NPCs, the lawyer must assume a role that is contrary to that which is typically expected in the adversarial system: the lawyer will need to divulge those known facts, even if they are unfavorable to the client, when to do so is necessary for the court to make its ruling on the emergency application.[190] While the lawyer in a more traditional adversarial context, facing off against opposing

185. *See* Restatement (Third), *supra* note 27, at §112, Commentary to comment b ("An ex parte proceeding is an exception to the customary methods of bilateral presentation in the adversary system. A potential for abuse is inherent in applying to a tribunal in absence of an adversary. That potential is partially redressed by special obligations on a lawyer presenting a matter ex parte.").

186. Another area where crisis lawyers disproportionately find themselves is having to litigate emergency motions, like applications for preliminary injunctions. In *Winter v. NRDC, Inc*., the Supreme Court attempted to clarify the standard for a preliminary injunction, identifying the factors courts must weigh in ruling on whether such emergency relief is warranted. 555 U.S. 7, 20–22 (2008). Despite this ruling, some lower courts continue to consider the factors along what is sometimes called a "sliding scale," that is, a stronger showing of irreparable harm might allow for a lesser showing on the party's likelihood of success on the merits. *See, e.g*. All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (holding "a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits"). This would suggest that NPCs, where there might be a serious threat of irreparable injury in the absence of an injunction, might warrant a lesser showing on such elements as the merits of the movant's claims. Thus, it seems that some courts appear willing to apply a different standard, one that is tailored to the crisis situation and flexible, at least more flexible than the Court laid out in *Winter*. For a discussion of the use of the sliding-scale approach in several circuits, see generally Taylor Payne, *Now is the* Winter *of Ginsburg's Dissent: Unifying the Circuit Split as to Preliminary Injunctions and Establishing a Sliding Scale Test*, 13 TENN. J. L. & POL'Y 15, 50–53 (2018)

187. *See, e.g*., L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 39 EMORY L.J. 909, 912–14 (1980) (describing role of lawyer as an officer of the court); Stephen E. Kalish, *David Hoffman's Essay on Professional Deportment and the Current Legal Ethics Debate*, 61 NEB. L. REV. 54, 58–59 (1982) (same).

188. MODEL RULES R. 3.3(d).

189. *See*, Mission Power Eng'g Co. v. Cont'l Cas. Co., 883 F. Supp. 488, 491–92 (C.D. Cal. 1995) (describing function of ex parte proceedings).

190. On the justifications for and origins of the Rule 3.3(d) requirements, see, e.g., Note, *The Model Rules and the Search for the Truth: The Origins and Applications of Model Rule 3.3.(d)*, 8 GEO. J. LEGAL ETHICS 157, 167–174 (1994).

counsel, may choose not to disclose unfavorable facts provided the lawyer is not making any affirmative misrepresentations or substantive omissions, in an ex parte setting, the lawyer must divulge all of the facts the court needs to make an informed decision in the context of the emergency.

Thus, the rules governing the interposition of claims and factual contentions in emergency situations offer somewhat conflicting guidance to the lawyer faced with an NPC. These conflicts demonstrate that existing rules are insufficient to provide appropriate or consistent guidance to lawyers faced with such situations. What is more, they fail to offer sufficient leeway to the lawyer in the face of novel—that is, unprecedented—crises to encourage them to assert creative claims in the face of such crises so that the lawyer's creativity can rise to meet the challenge the situation poses. These conclusions help to answer the larger question that animates this Article: Should the crisis lawyer operate under a different set of rules in NPCs? I will return to this question in Part III, *infra*.

4. MANAGING THE LAW OFFICE IN CRISIS TO MAINTAIN COMPETENCE

Another more pedestrian question involving competence in NPCs centers around when the lawyer is affected by the crisis situation in daily practice such that the lawyer's ability to provide competent services is compromised. For example, when the planes struck the twin towers in New York City, many lawyers were displaced from their offices in lower Manhattan.[191] At the time, remote access to an office data base of files was limited, and the courts, located just blocks from the former site of the towers, were also in lockdown.[192] In NPCs, it is not uncommon for the events that precipitated the situation to impair the lawyer's functioning, whether it is a natural disaster or some other event, like the Covid-19 Pandemic. In such settings, a failure to prepare for and create systems that are resilient and able to function in the face of a crisis and in light of the impediments to practice that arise as a result of it may compromise the lawyer's ability to provide competent service to clients. Thus, since September 11th, the law office of today has moved many of its functions to computer databases and cloud storage systems, and remote access to such systems is fairly routine, though not universal.[193]

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191. *See, e.g.*, Dominic Bencivenga, *Rising from the Rubble*, ABA JOURNAL (Sept. 1, 2007) (describing impact of the events of September 11th on one law firm that had its offices in the World Trade Center).

192. *See* THOMAS A. BIRKLAND, CENTER FOR COURT INNOVATION, EMERGENCY PLANNING AND THE JUDICIARY LESSONS FROM SEPTEMBER 11 1–4 (2004) (describing impact of the September 11th attacks on law offices and the judiciary in Lower Manhattan), https://www.courtinnovation.org/sites/default/files/emergency planning.pdf [https://perma.cc/N434-ADX3normal.

193. *See*, ABA COMMISSION ON ETHICS 20/20, HOUSE OF DELEGATES FILINGS: RESOLUTION AND REPORT: TECHNOLOGY & CONFIDENTIALITY 1–2 (Aug. 2012) (noting use by law offices of and risks to confidentiality associated with contemporary technologies), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.pdf [https://perma.cc/839M-AB7B].

In other situations, the NPC may impede the lawyer's ability to observe filing deadlines and statutes of limitations when those have not been suspended due to the crisis or maintain contact with courts and administrative agencies as necessary to preserve the client's interests and apprise clients of developments in their cases.[194] Since the types of crises that create these impediments to competent practice appear to occur with greater and greater frequency, and the law office of the 21st century is often dependent upon technology to preserve files, allow lawyers to meet all filing and other deadlines, and remain in contact with clients and adversaries, such systems can assist lawyers when they are unable to physically access analog files. Such digital systems can also pose risks, however, when they fail, or the lawyer has not prepared effective means by which those systems can remain functioning in the face of a crisis. I will explore the ways in which lawyers can prepare their systems for continuity of care in the face of a crisis as well as the ways the rules can impose a duty on lawyers in such crises in Part III, *infra*.

B. THE ACCESS-TO-JUSTICE CRISIS IN CRISIS SITUATIONS

There is already an access-to-justice crisis in the United States,[195] and this crisis is made only worse in NPCs. Eighty percent of low-income Americans and roughly half of middle-income Americans face their legal problems without the benefit of legal representation.[196] The difference between the need for legal assistance and the extent to which that need is being met is considered the "justice gap."[197] Even in non-crisis situations (although for low-income people, lack of access to lawyers when they are facing an eviction or foreclosure, the loss of a job, or the termination of utilities, are all crisis situations in their own right),

194. The *Model Rules* impose a range of obligations on the functioning of law offices, including, among other things: the duty to operate the office to preserve confidentiality of client information, MODEL RULES R. 1.6(c), and the duty to supervise subordinate lawyers and non-lawyers (MODEL RULES R. 5.1 and R. 5.3). On the importance of teaching effective law office management in law schools as a critical part of every lawyer's education, see Debra Moss Curtis, *Teaching Law Office Management: Why Law Students Need to Know the Business of Being a Lawyer*, 71 ALB. L. REV. 201, 211–13 (2008).

195. In the fallout from the economic crisis of 2008 that had effects on the legal profession, one commenter described the situation as a "'twin crisis'" of "underserved clients and underemployed lawyers." Brett G. Scharffs, *The Way Forward: Underserved Clients, Underemployed Lawyers—What Can Law Schools Do?* 2014 UTAH L. REV. 79, 81 (2014). In the midst of the last recession, I argued that law schools should advocate for expanded access to justice for low- and moderate-income individuals as a way to improve their students' post-graduate opportunities and thus attract more incoming students. Raymond H. Brescia, *When Interests Converge: An Access-to-Justice Mission for Law Schools*, 24 GEO. J. POVERTY L. & POL'Y 205, 224 (2017). In the wake of the current pandemic, it is likely that law schools will be able to make similar arguments.

196. *See, e.g.,* LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW-INCOME AMERICANS 13 (Sept. 2009), https://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf [https://perma.cc/9385-G7HN] (synthesizing latest studies to show that twenty percent of low-income Americans faced their legal problems without a lawyer) [hereinafter LSC, Documenting the Justice Gap]; Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 531 (2013) (stating that it is "estimated that more than four-fifths of the individual legal needs of the poor and a majority of the needs of middle-income Americans remain unmet . . .").

197. LSC, Documenting the Justice Gap, *supra* note 196, at 1 (defining term "justice gap").

individuals and families with legal needs face those needs without a lawyer for a range of reasons, as a study led by Rebecca Sandefur conducted of the residents of one representative U.S. city showed: e.g., they might not be able to afford one, do not know a lawyer to whom they can turn, or do not even know they have a legal problem.[198]

In crisis situations, the need clients have for navigating the crisis situation and its aftermath is acute, and the reasons they might not be able to access a lawyer magnified. Thus, the access-to-justice problem the situation presents is even more dramatic for several reasons. In the aftermath of the attacks of September 11th, for example, there was a considerable need for crisis-intervention services for things like emergency financial relief to displaced workers, assistance securing insurance benefits for those who lost loved ones, help navigating bureaucracies such as unemployment insurance and workers compensations systems, and representation to fight off evictions and foreclosures.[199] In the wake of the September 11th attacks, the legal community learned that legal needs often increase, and the access-to-justice crisis becomes even more acute, in NPCs.[200]

As described in Section I.C, *supra*., some jurisdictions have followed the lead of the *Model Rules* in the institution of the so-called Katrina Rule to help expand access to justice in response to crisis situations. Are there other innovations that can help close the justice gap in crisis situations? I explore this question further in Part III, *infra*.

C. CONFLICTS IN CRISIS SETTINGS

Lawyers practicing within NPCs will face a high degree of risk to values and safety. They must address these settings with limited information. And inside such crises, they must make decisions within a limited amount of time. As a result, lawyers might feel acute tensions and conflicts in these situations on a number of dimensions. There are, of course, conflicts that can arise in any legal setting, and lawyers must often weigh competing values and interests in their law practice generally.[201] As the pro bono lawyers who assisted victims after the attacks of September 11th found, sometimes they faced cases where their pro bono clients might have had claims against their corporate clients, such as airlines.[202] While those conflicts can certainly arise in crisis settings, such issues are not unique to NPCs, and lawyers are required to have sufficient guidance and

198. *See* REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 11-14 (2014).

199. NYC Bar Report, *supra* note 15, at 20 (describing nature of victims' legal needs).

200. *Id*. at 27–41 (describing wide-spread legal needs in the wake of the attacks of September 11th, 2001).

201. *See e.g*., Kruse, *supra* note 34, at 268 (arguing for a pragmatic approach to legal ethics that recognizes that lawyers must often resolve the conflicting values of "loyalty to clients, confidentiality, access to justice, respect for the rule of law, and respect for legal process"). *See also* Hazard, *supra* note 35, at 1246 (identifying the three "core values" of ethics rules as the duties of loyalty, confidentiality, and candor to the court).

202. NYC Bar Report, *supra* note 15, at 15.

processes to identify such conflicts and avoid them.[203] Moreover, when handling clients on a volunteer basis—while operating under a limited-service retainer, or through a pro bono program—some leeway is given to lawyers to provide a degree of service even in light of such conflicts,[204] and the type of program set up after September 11th qualified for these types of looser restrictions on conflicted representation.[205] Here, I wish to focus on those types of conflicts that are unique to NPC settings, those in which the lawyer might feel personally conflicted due to the nature of the crisis, the client's role in causing or exacerbating the crisis itself, and the harm likely to befall victims in such settings.

A lawyer in an NPC setting is not always in a position to assist victims of the crisis. Sometimes, the lawyer represents an entity or government that has caused the crisis, or whose action or inaction might make the crisis worse.[206] Think of a lawyer representing a company that is responsible for an environmental catastrophe, like Deepwater Horizon.[207] Lawyers in such situations might feel deeply conflicted over the service they must provide the client if the goal of the representation is to mitigate the risk to the client of liability.[208] While the lawyer is generally considered responsible for designing the tactical response to any legal situation, the client is supposed to control the ends, or goals, of the representation.[209] As Model Rule 1.2 provides, "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued."[210]

While lawyers are given some degree of distance from their client's objectives by virtue of subpart b to Rule 1.2, which provides that "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or

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203. MODEL RULES R. 5.1 cmt. 2 (noting obligations on supervisory lawyers to have adequate conflict-checking system). *See also* MODEL RULES R. 1.6 cmt. 18 (noting obligation of lawyer to act competently to preserve client confidences).

204. *See, e.g.*, MODEL RULES R. 6.5 (imposing lighter restrictions on practice due to conflicts of interest in several volunteer settings).

205. NYC Bar Report, *supra* note 15, at 59 (discussing conflicts issues in September 11th legal services delivery).

206. For example, several authors have outlined best practices for the lawyer representing those responsible for a catastrophic building collapse. *See generally* Reeder R. Fox & Steven J. Strawbridge, *Catastrophic Building Failures: Formulating Initial Strategy and Organization*, 69 DEF. COUNS. J. 493 (2002).

207. *See* NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEPWATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 167–68 (2011), https://www.govinfo.gov/ontent/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf [https://perma.cc/4SAA-X3Z2] (describing impacts of Deepwater Horizon disaster).

208. For a description of the legal response to the Deepwater Horizon catastrophe, see generally John Wyeth Griggs, *BP Gulf of Mexico Oil Spill*, 32 ENERGY L. J. 57 (2011).

209. *See* Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147, 185 (2000) (noting MODEL RULES R. 1.2 "gives clients the power to make decisions concerning the 'objectives' of representation and requires attorneys to consult with clients about the 'means' by which those objectives will be reached") (footnote omitted).

210. MODEL RULES R. 1.2(a).

activities,"[211] that is cold comfort for the lawyer who might feel internally conflicted when providing representation to a client in a setting where to provide zealous advocacy in the pursuit of the client's objectives might result in some degree of harm to the community or free the client from responsibility for its actions.[212] While these tensions likely arise in many practice settings, in NPCs, they are particularly acute given the risks to values and safety inherent in the setting; they are further compounded when the lawyer's client is at least partly responsible for the NPC itself. The legal profession has historically embraced the "hired gun" mentality to a degree, by adopting what is sometimes understood as "role morality,"[213] while also recognizing that some lawyers might feel pangs of conscience in NPCs, and scholars have suggested a different approach to them, one in which the lawyer strives to "promote justice."[214]

Influenced by these different approaches, existing ethics rules permit the lawyer to avoid representation of clients, or to withdraw from the representation, when such representation will cause the lawyer to violate professional obligations,[215] or when the lawyer and the client have a fundamental disagreement that inhibits the lawyer's ability to represent the client with zeal.[216] Indeed, a central component of the lawyer's ethical responsibilities is to avoid conflicts of interest that arise from representing different parties with conflicting interests or where the lawyer feels conflicted over the representation.[217] Once again, the former type of conflict is not unique to NPCs; the latter is more likely to arise in such

211. MODEL RULES R. 1.2(b).

212. American history is replete with examples of lawyers taking on unpopular clients, starting with John Adams's representation of British soldiers charged with participating in the Boston Massacre, see DAVID MCCULLOUGH, JOHN ADAMS 65–68 (2001).

213. *See* David Luban, *The Adversary System Excuse*, in LEGAL ETHICS AND HUMAN DIGNITY 9–13 (2007) (discussing dominant view of the lawyer's sometimes amoral role in the adversary system). *See also* Hazard, *supra* note 35, at 1244–45 (discussing what the author calls the "narrative" of the legal profession as offering moral vindication to the advocate's role). *See generally* Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 45–56 (2005) (discussing different views of lawyer's role).

214. *See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 9 (1998) (arguing that the role of the lawyer should be to promote justice). Reviewing Brandeis's "counsel for the situation" idea described at the introduction to this Article, Tony Kronman has called this the "Republican" view of lawyering, in which lawyers do not simply "advance their clients' self-interest," and "mechanically execute their orders no matter how confused or inattentive to the needs of others these orders may be," but instead, should "help their clients toward a better understanding of what their interest includes and in particular to see that it includes an other-regarding moral component whose presence is essential to the clients' own happiness and fulfillment as members of their community." Anthony T. Kronman, *The Fault in Legal Ethics*, 122 DICK. L. REV. 281, 289 (2017).

215. MODEL RULES R. 1.16(a)(1); MODEL RULES R. 1.16(b)(2) & (3).

216. MODEL RULES R. 1.16(b)(4).

217. MODEL RULES R. 1.7. *See also* Restatement (Third), *supra note 26*, at §16(3) (noting one of the core obligations of the lawyer towards the client is to "avoid impermissible conflicts of interest"). Derrick Bell famously outlined some of the tensions in school desegregation litigation where the interests of those clients with access to the lawyers directing the litigation might have differed from those of the larger group of community members the lawyers' advocacy might affect. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,* 85 YALE L. J. 470, 489–93 (1976).

situations, particularly where, as described above, the lawyer's client is the one that caused the crisis to begin with, there might be some ongoing harm that occurs from the client's action or inaction, or the lawyer is asked to minimize the legal exposure of the client. The lawyer will likely feel ethically torn.

Presumably, the lawyer feels an obligation to provide zealous advocacy, but also might want to minimize the harm caused in the community or believes the client should face some degree of legal reckoning. In fact, the lawyer might feel it is in the client's long-term interests to face such a reckoning and assume responsibility for its actions.[218]

There are certainly situations where a lawyer's personal moral compass and the clients' desires align.[219] The lawyer can counsel the client on the value of taking responsibility for its actions, compensating victims, minimizing and mitigating harm, and accepting some degree of punishment. And the client may accept the lawyer's recommendations regarding the best approach moving forward. Even when there is a degree of disagreement and "slippage" between what the lawyer believes is the right course of action and the decisions the client ultimately makes with respect to these issues, this will not create such a fundamental disagreement that the lawyer feels unable to serve as a zealous advocate for the client. The greatest problem for the crisis lawyer arises in a third potential situation: where the lawyer holds such strong beliefs about the correct course of action, beliefs that go beyond simple tactical matters, and the goals of the client and the lawyer are in such misalignment that the lawyer feels unable to represent the client.[220]

It is in this third scenario where the rules offer the lawyer dealing with such tensions some degree of guidance, but there are also some ways in which an NPC creates new challenges and barriers to the lawyer seeking to withdraw from representation as that crisis unfolds.[221] As described above, the rules provide that a lawyer may withdraw from representation when the client insists that the lawyer adopt a course of conduct that would violate the lawyer's ethical obligations or about which the lawyer and client fundamentally disagree.[222] The rules also state that the lawyer may withdraw when to do so will have no adverse effects on the

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218. *See* Kenneth R. Feinberg, *Lawyering in Mass Torts*, 97 COLUM. L. REV. 2177, 2181 n. 20 (1997) (noting potentially conflicting obligations of lawyer to individual clients and community in the mass tort setting).

219. *See* Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101, 1144–45 (1996) (suggesting one way lawyers may avoid conflicts of interest is by serving clients whose interests are aligned with the lawyers' goals).

220. In such situations, the lawyer's interests are so "inconsistent with those of a client," that they might "significantly limit the lawyer's ability to pursue the client's interest." Restatement (Third), *supra* note *27*, at § 125, cmt. b.

221. For a discussion of the different approaches to withdrawal under MODEL RULES R. 1.16, see Susan G. Kupfer, *Authentic Legal Practices*, 10 GEO. J. LEGAL ETHICS 33, 54 n. 67 (1996).

222. MODEL RULES R. 1.16(b)(2)–(3).

client.[223] But the lawyer in the NPC, even where a conflict exists, may feel unable to simply withdraw from the representation in the midst of the crisis. Out of loyalty to the client, out of a desire to provide some guidance to the client in an effort to shape the client's actions in some way so as to minimize harm to the client or the community, out of fear that substitute counsel will not have any ethical qualms with respect to the client's planned course of action, or simply because the lawyer does not believe the client will be able to obtain separate counsel in a timely or meaningful fashion in the midst of the crisis, the lawyer may feel that withdrawal at a critical juncture in the representation will not further the goals the lawyer has for withdrawing in the first place, one of which may be to minimize harm to the community.[224] In addition, when the lawyer's representation of the client involves an appearance before a tribunal, the lawyer may need the permission of that tribunal to withdraw from the representation and the lawyer may be forced to continue the representation even in the face of these sorts of fundamental conflicts.[225]

While the rules may offer the lawyer a vehicle through which to withdraw from situations where to do so will not place the client at a disadvantage, they do not contemplate that the nature of the situation may be such that the lawyer's withdrawal itself will put the client at a disadvantage, which is likely to occur where withdrawal in the midst of an NPC might mean the client may be unable to retain new counsel in a manner that is likely to provide meaningful representation in the face of the crisis. The rules enumerate the situations in which the lawyer may withdraw, and one of those is in situations where the withdrawal will not have an adverse effect on the client.[226] The other situations listed in the rule do not have any protection for the client, however, and the lawyer is permitted to withdraw even where it will harm the client's interests.[227]

In NPCs, a lawyer's decision to withdraw could actually cause greater harm to the client and the community. The lawyer who withdraws will no longer have an opportunity to counsel the client so as to mitigate any harm the client might cause by its course of conduct. Although it is possible substitute counsel could step in to take over the case and provide expert guidance in an emergency situation,

223. MODEL RULES R. 1.16(b)(1); *see also* William T. Barker, *The "Hot Potato" Doctrine and the Model Rules of Professional Conduct: the Limits of a Lawyer's Duty of Loyalty*, 32 GEO. J. LEGAL ETHICS 327, 332–33 (2019) (discussing withdrawal without adverse effect on the client).

224. *See, e.g.*, Margulies, *Legal Dilemmas*, *supra* note 31, at 1929–35 (describing efforts of White House counsel to participate in representing the Trump Administration out of a desire to help shape the Administration's policies).

225. MODEL RULES R. 1.16(c); *see also In re* Disciplinary Proceeding Against Pfefer, 182 Wash. 2d 716, 729–30 (2015) (en banc) (interpreting Washington State's corollary to MODEL RULES R. 1.16(c) and upholding sanction of lawyer who withdrew from representation without seeking permission of the tribunal).

226. MODEL RULES R. 1.16(b)(1).

227. Unlike the insertion of subsection 1.16(c), which acknowledges the authority of a tribunal to permit or reject an attorney's application for withdrawal when the rules of the tribunal confer such authority on the tribunal, the "permissive withdrawal" provisions of 1.16 (that is, subsection "b"), do not make withdrawal under the other provisions of that subsection conditioned on the withdrawal having no adverse effect on the client.

given the very nature of the NPC, it is likely difficult to secure such guidance in a timely and meaningful way. Where such substitute counsel is available, the lawyer may feel less conflicted over withdrawal, and rightly so. But unless the client can secure such substitute counsel in a way that allows that counsel to provide effective assistance in the face of the crisis, the original lawyer is in a professional and personal bind. Should the lawyer want to avoid advancing the client's interests as they have been identified by the client, the lawyer will want to withdraw. To terminate the representation, however, as the lawyer is permitted to do, will not accomplish the ends that form the basis for withdrawing in the first place. In fact, it is entirely possible that the lawyer's withdrawal will make matters worse. That is, should the lawyer withdraw in a situation where to do so will increase the potential harm to the community, possibly increase the client's legal exposure, or even make it more likely the client will escape responsibility and liability for its actions, such withdrawal will undermine the very reasons for doing so.[228]

Thus, given the nature of NPCs, the permission structure created by the rules that would allow withdrawal in situations where the lawyer has a fundamental disagreement with the client or the lawyer is operating under a personal conflict that prevents zealous advocacy on behalf of a client is not well-suited to crisis lawyering. Continuing the representation will likely cause moral strain on the lawyer; ending the representation is unlikely to mitigate the harms the lawyer is seeking to avoid by withdrawing.[229] I will discuss how we might address this tension in Part III, *infra*.

D. CONFIDENTIALITY

In NPCs, the contours of the situation might strain the duty to preserve client confidences for several reasons. The duty of confidentiality requires that lawyers preserve the confidential information of the client unless expressly authorized to share such confidences, an exception exists that would permit the lawyer to do so, or the lawyer has the implied authorization to reveal such confidences by the nature of the representation.[230] When the client gives informed consent to the lawyer to share client confidences, there is obviously no violation of the rules when

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228. Looking to another provision in the rules for some analogous guidance on this issue, provisions in the rules governing the release of confidential information contain explicit direction that, to the extent an exception exists that would authorize a lawyer to reveal a client confidence, such disclosure must be limited to achieve the ends of the exception. *See* MODEL RULES R. 1.6 cmt. 16 ("Paragraph (b) [to Model Rule1.6] permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified."). As I will argue in Part III *infra*, the *Model Rule*s could incorporate this notion in the context of withdrawal: that withdrawal is appropriate where the purposes of the withdrawal will not be undermined by the lawyer's actions to withdraw. For example, if the lawyer seeks to withdraw out of a desire to minimize harm to the community, when withdrawal would not accomplish that goal, the lawyer should reconsider whether withdrawal is appropriate, even when grounds exist to do so.

229. In some ways, this situation also offers a new kind of access-to-justice problem: the termination of the representation will leave a client without representation.

230. MODEL RULES R. 1.6(a)–(b).

the lawyer does so. In other situations, the rules impose limits on lawyers that may constrain them from disclosing information, and generally do not compel them to do so.[231] Moreover, when it comes to implied authorization, the rules do not offer much guidance on when such authorization is truly implied.[232] In an NPC, lawyers may find themselves in two scenarios—where disclosure is permitted under certain narrow circumstances and where permission to disclose information is implied by the nature of the representation.[233] I will discuss each of these scenarios below.[234] I will also address the duty to preserve confidential information when the lawyer must work remotely, a common practice when an NPC hits.

1. DISCLOSURE PERMITTED UNDER THE RULES IN LIMITED CIRCUMSTANCES

The *Model Rules* identify several exceptions to the confidentiality rule in which disclosure of client confidences is permitted, but not required.[235] For our purposes, the lawyer dealing with a crisis situation is most likely to invoke one of the first three exceptions described under the rules. The first of those is that a lawyer may reveal confidential information in order to prevent "reasonably certain death or substantial bodily harm." Under the second and third exceptions, the lawyer may reveal confidential information when the client's conduct has led or will lead to substantial financial injury to a third party and the lawyer's services were used in furtherance of the acts that would cause such injury.[236] Here, I will direct my comments to the first of these exceptions, which is the most serious: the exception that relates to disclosure to prevent imminent death or substantial bodily harm.[237]

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231. MODEL RULES R. 1.6(b) provides circumstances in which a lawyer "may" reveal confidential information, but such disclosure is not required. The only instance in the *Model Rules* where the lawyer is obligated to reveal information that might be confidential is when a client or witness has committed perjury and the lawyer knows of such perjury. MODEL RULES R. 3.3(a). The *Model Rules* expressly state that this obligation supersedes the obligation to preserve client's confidences. *See* MODEL RULES R. 3.3(c) (providing that the duty of candor applies "even if compliance requires disclosure of information otherwise protected by" the duty of confidentiality under Model Rule 1.6).

232. *See, e.g.*, Dean R. Dietrich, *Ethics: "Impliedly Authorized" Disclosure of Client Information*, 83 WIS. LAWYER (Oct. 7, 2010) (discussing implied authorization) [https://perma.cc/NS24-JCX2].

233. *Compare* MODEL RULES R. 1.6(a) *with* MODEL RULES R. 1.6(b).

234. If the client gives informed consent to disclosure there are no problems for the lawyer, in an NPC or in a more traditional setting, so I will not discuss that here.

235. *See* Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1150–59 (1985) (discussing adoption of current version of MODEL RULES R. 1.6 and approach to disclosure of confidential information found therein).

236. MODEL RULES R. 1.6(b)(2)–(3).

237. I choose to deal with the first of these exceptions mostly because this situation generally presents the most serious dilemma for the lawyer. Moreover, in many jurisdictions, the authority to disclose client confidences related to financial injuries typically requires that the lawyer's services must have been used in the furtherance of the acts that caused those injuries (MODEL RULES R. 1.6(b)(2)–(3)), a situation, I would hope, most lawyers would strive to avoid. That is not to say that financial harms cannot be serious, and that they do not harm individuals in dramatic ways, as the Bernie Madoff scandal, in addition to many other financial scandals,

In NPCs, lawyers must sometimes consider whether they should disclose confidential information, particularly that which relates to potential harm to the community that might arise from their clients' conduct.[238] Here, states' rules vary, with some states making the duty to reveal confidences mandatory if death or substantial bodily injury is imminent should the lawyer not reveal the client's confidences.[239] At the same time, most states adopt the permissive language, even in the face of certain death,[240] and some states even have provisions that make it clear that the lawyer's decision *not* to disclose is not subject to review.[241] Indeed, this protection is embedded in the comments to Rule 1.6, specifically Comment 17, which provides simply that "[a] lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule."[242]

No similar provision protects the lawyer who does disclose, and should the lawyer disclose based on an incorrect assessment of the reasonable certainty that the death or substantial bodily injury will occur, the lawyer may be charged with a breach of fiduciary duty for sharing client confidences when not authorized to do so.[243] At the same time, the Restatement does place the discretion the lawyer enjoys *to disclose or not to disclose* beyond review,[244] and provides that the lawyer "must reasonably believe that the measures [taken to disclose client confidences] are appropriate and that they will entail no more adverse consequences to the

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show. *See* Katie Benner, *Victims of Bernie Madoff's Ponzi Scheme to Receive Millions More*, N.Y. TIMES (Apr. 12, 2018), https://www.nytimes.com/2018/04/12/business/madoff-ponzi-scheme-compensation.html [https://perma.cc/S5EH-PY7Z] (estimating losses from the Madoff scandal exceeding $80 billion); *see also* Renae Merle, *A guide to the financial crisis – 10 years later*, WASH. POST (Sept. 10, 2018), https://www.washingtonpost.com/business/economy/a-guide-to-the-financial-crisis–10-years-later/2018/09/10/114b76ba-af10-11e8-a20b-5f4f84429666_story.html [https://perma.cc/W4PV-E5WX] (noting American households lost nearly $10 trillion in household wealth as a result of the Financial Crisis of 2008).

238. *See, e.g.*, David F. Partlett & Russell L. Weaver, *BP Oil Spill: Compensation, Agency Costs, and Restitution*, 68 WASH. & LEE L. REV. 1341, 1355–58 (2011) (describing some confidentiality issues in distribution of proceeds from settlement fund in Deepwater Horizon disaster); Carliss N. Chatman, *Myth of the Attorney Whistleblower*, 72 SMU L. REV. 669, 689–98 (2019) (describing role of confidentiality in lawyer behavior in range of corporate scandals).

239. *See* Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877, 904 n.199 (2006) (discussing state variations in the duties under Rule 1.6).

240. 240. It is important to note that a minority of states make it mandatory that the lawyer must disclose information necessary to prevent reasonably certain death or substantial bodily harm. *See, e.g.*, VA. RULES OF PROF'L CONDUCT, R. 1.6(c)(1) (2020); NEW JERSEY RULES OF PROF'L CONDUCT, R. 1.6(b) (2019).

241. *See, e.g.*, N.Y. RULES OF PROF'L CONDUCT, R. 1.6 cmt. 13, 15 (providing that decision not to disclose confidential information to prevent reasonably certain death or substantial bodily harm is not subject to review).

242. MODEL RULES R. 1.6 cmt. 17 (emphasis added).

243. *See, e.g.*, Dennis J. Ventry, Jr., *Stitches for Snitches: Lawyers as Whistleblowers*, 50 U.C. DAVIS L. REV. 1455, 1510–44 (2017) (discussing role of confidentiality obligations in attorney whistleblower settings).

244. *See* Restatement (Third), *supra* note 27, at § 66, cmt. g ("A lawyer's decision to take action to disclose or not to disclose under this Section is discretionary with the lawyer"); *id.* ("[A] lawyer who takes action or decides not to take action . . . is not, by reason of such action or inaction alone, liable for professional discipline or liable for damages to the client or any third person injured by the client's action.").

client than necessary."[245] Given the nature of NPCs, the lawyer faced with the dilemma of whether to reveal client confidence may be unable to make an accurate assessment of the nature or likelihood of injury, straining the ability to invoke this exception. Indeed, in NPCs, a lack of situational awareness, often about the risks involved in the situation, hampers the lawyer who must often make decisions within an accelerated timeline.[246] Given these two essential features of such situations, lawyers may feel unable to decide whether to disclose simply because they may not have sufficient information to conclude that harm is imminent or serious enough that it will lead to death or substantial bodily injury. If the permission structure of the rule is such that it allows the lawyer discretion to choose not to disclose, and such a decision is essentially unreviewable, then a decision *to disclose* is likely to carry the entirety of the risk in this situation.[247] Given that the lawyer who chooses not to disclose is free from liability for whatever occurs, and the lawyer who does disclose may be accountable if it turns out the lawyer's fears were unfounded, it is safe to say that the incentives in place in this situation weigh heavily toward the lawyer choosing not to disclose, even when the lawyer is certain death will occur, and despite pangs of conscience the lawyer may feel.[248] As the next section discusses, given the complex, uncertain nature of NPCs, the lawyer should have greater leeway to disclose confidential information, at least at the outset, and to a limited extent, to develop the necessary situational awareness that

245. *See id.* at § 66 cmt. f. The Restatement also provides that "[s]ubsequent re-examination of the reasonableness of a lawyer's action in the light of later developments would be unwarranted; reasonableness of the lawyer's belief at the time and in the circumstances in which the lawyer acts is alone controlling." *Id.* at § 66, cmt. g.

246. The Restatement would seem to understand the nature of the crisis lawyers face when they must decide whether to disclose confidential information to prevent death or serious bodily injury, and this aligns well with the description of NPCs generally. It notes that when an attorney faces such a dilemma, "Critical facts may be unclear, emotions may be high, and little time may be available in which the lawyer must decide on an appropriate course of action." *Id.* at cmt. g.

247. *But cf.*, Conner, *supra* note 239, at 903 (noting amendments to the *Model Rules* may have raised the risk of liability to the lawyer who discloses, arguing "the Scope of the Revised *Model Rules* no longer cautions against the reexamination of the attorney's decision not to disclose under Rule 1.6") (footnote omitted). The Restatement notes, moreover, that the decision to disclose is likely to undermine the attorney-client relationship, warranting withdrawal at that point: "When a lawyer has taken action [to disclose confidential information] . . . in all but extraordinary cases the relationship between lawyer and client would have so far deteriorated as to make the lawyer's effective representation of the client impossible." Restatement (Third) of the Law Governing Lawyers § 66 cmt. f (Am. L. Inst. 2000).

248. *See* Kevin M. Ryan, *Reforming Model Rule 1.6: A Brief Essay from the Crossroads of Ethics and Conscience*, 64 FORDHAM L. REV. 2065, 2069 (1996) (noting choice for lawyer to disclose under MODEL RULES R. 1.6 is one often between professional amorality and personal conscience). Irma Russell has identified another, similar incentive structure in Model Rule 1.13, which deals with reporting violations of law when a lawyer represents an entity client like a corporation. She suggests that the rule can create a situation where the lawyer may choose not to learn of certain information related to the representation in order to avoid triggering any reporting obligations and creating "plausible deniability." Irma S. Russell, *Wait, Wait, Don't Tell Me: Accountability, Plausible Deniability, Model Rule 1.13, and the Role of Corporate Counsel in an Age of Enhanced Monitoring*, 7 GEO. WASH. J. ENERGY & ENV'T L. 67, 75–76 (2016).

will yield the information the lawyer needs to make the critical decisions that can help avoid greater risks to the community.

2. WORKING WITH OTHER PROFESSIONALS TO UNEARTH FACTS RELATED TO RISK

Ironically, what may help the lawyer determine the extent and nature of the risks involved in the course of a crisis situation may involve the lawyer sharing confidential information.[249] This phenomenon is particularly salient in NPCs because the lawyer often must rely on professionals from other disciplines to assess both the facts and the risks inherent in the situation.[250] There is a growing awareness and body of scholarship around best practices when lawyers work with individuals from other professional disciplines.[251] Such professionals can help lawyers develop the knowledge and draw from the expertise they need to make an accurate assessment of the situation. But if lawyers cannot obtain the consent of their clients to discuss confidential information with such other professionals, they will generally be constrained from doing so, which would hamper their ability, at a minimum, to correctly gauge the imminence of death or substantial bodily injury involved in the situation. Such lack of knowledge also impedes the lawyer's capacity to provide competent service to the client in light of the risks inherent in the situation. But a permission structure latent within the rules appears to offer the lawyer some latitude to share confidential information with such third parties in situations where professionals from other disciplines may hold information and expertise that can assist the lawyer, and I have discussed one of these avenues through which a lawyer may disclose such information briefly already.[252] A lawyer may release confidential information as necessary to "secure legal advice about the lawyer's compliance" with the rules.[253] While this provision

249. *See, e.g.*, Stacy L. Brustin, *Legal Services Provision through Multidisciplinary Practice—Encouraging Holistic Advocacy While Protecting Ethical Interests*, 73 U. COLO. L. REV. 787, 799–815 (2002) (describing ethical tensions in multi-disciplinary practice, including those surrounding release of confidential information); Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS 1259, 1294–96 (2009) (describing work of corporate counsel working with public relations professionals to formulate strategies to address crisis situations).

250. *See, e.g.*, Bauer, *supra* note 9, at 249 (noting likelihood that lawyer will turn to other professionals to obtain information critical to a proper assessment of the situation); Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123, 2126 (1999) (noting value of lawyer-social worker collaboration for purposes of crisis intervention); Brustin, *supra* note 249, at 794 (same).

251. *See generally* Randye Retkin, Gary L. Stein & Barbara Hermie Draimin, *Attorneys and Social Workers Collaborating in HIV Care: Breaking New Ground*, 24 FORDHAM URB. L.J. 533 (1997) (discussing how attorneys and social workers must have a plan for sharing client information so as to avoid confidentiality and attorney-client privilege issues, especially in situations where the social worker may represent a couple or family and the attorney may only represent one person in that group).

252. In order for these other avenues to provide assistance to the lawyer in NPCs, some amendments to the rules are likely in order, but what those amendments might be is a subject I will discuss in Part III, *infra*.

253. MODEL RULES R. 1.6(b)(4). The general argument given for protecting the duty of confidentiality itself is that it encourages unfiltered communication between lawyers and clients so that lawyers have the information necessary to discharge their duties competently. *See, e.g.,* Sharon Dolovich, *Ethical Lawyering and the*

generally applies to allow a lawyer to seek guidance from another lawyer, typically an expert in professional ethics, it would seem ironic that a lawyer could not invoke this provision to seek information that is factual in nature and based on the opinion or knowledge of an expert in another field that would also enable the lawyer to reach a conclusion regarding whether to release confidential information to help avoid death or substantial bodily injury, or even simply to provide appropriate and competent service to the client.[254] The informational fog that accompanies NPCs often means the lawyer may not even have sufficient factual information to satisfy the duty of care to the client, and thus a tension arises between the duty of confidentiality and the constraints it imposes on the lawyer's ability to gather the information needed to assess the situation and provide appropriate advice and guidance to the client.[255] This clash of duties—confidentiality on the one hand and competence on the other—creates a need to consider the extent to which the lawyer can share confidential information with third-party professionals—whether they are lawyers or some other professional—in order to secure information "about the lawyer's compliance with" the rules.[256] Such information sharing is often necessary in NPC settings for the lawyer to discharge the duty of care, but also might arise where the lawyer needs to make an assessment of the risks inherent in the situation and the likelihood that they may include death or substantial bodily injury. Accordingly, it would seem appropriate to consider whether some amendment to the rules is in order to authorize explicitly the limited disclosure to third-party professionals from other disciplines when such disclosure is necessary to enable the lawyer to follow the rules.

A second approach that might free the lawyer to share information with third-party professionals would require some creative, analogous thinking, and would also likely require some amendments to the rules. In situations where a lawyer serves what the rules describe as an individual with "diminished capacity," that lawyer may share confidential information related to the representation: "[w]hen the lawyer reasonably believes that the client . . . is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective

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Possibility of Integrity, 70 FORDHAM L. REV. 1629, 1635 (2002) (noting relationship of candor and trust between lawyers and clients flows from the duty of confidentiality which facilitates the effective sharing of information between lawyers and clients that is necessary for lawyers to perform their duties) (citation omitted).

254. *See* Paula Schaefer, *Behavioral Legal Ethics Lessons for Corporate Counsel*, 69 CASE WESTERN RES. U. L. REV. 975, 995–1005 (2018) (discussing ways in which behavioral science can inform lawyer's decision to disclose information necessary to conform with lawyer's professional obligations).

255. In addition, client knowledge that the lawyer may want to consult with other experts may chill the client's willingness to divulge information to the lawyer in the first place. Amy L. Weiss, *In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege*, 11 GEO. J. LEGAL ETHICS 393, 400 (1998) ("Clients who fear disclosure of information may be reluctant to reveal facts freely to their attorneys, and, in turn, attorneys cannot render legal advice effectively without knowledge of all relevant facts.").

256. MODEL RULES R. 1.6(b)(4).

action,"[257] which includes consulting with those who can assist the client.[258] What is more, when the lawyer does reveal such information in the pursuit of measures to protect the client's interests, the commentary to the Rule provides examples of such protective measures, including "consulting with support groups, *professional services*, adult-protective agencies or other relevant individuals or entities that have the ability to protect the client."[259]

In order to permit these types of actions and disclosures, the Rule goes further to provide almost an ex post facto justification or authorization for the release of confidential information: the lawyer is deemed to have implied authorization to make disclosures designed to achieve the goals set forth in the rule. Indeed, subpart (c) to the Rule provides that although "[i]nformation relating to the representation of a client with diminished capacity is protected by Rule 1.6," when lawyers make disclosures pursuant to subpart (b) they are "impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."[260]

To justify the use of this Rule in relation to a client in the midst of an NPC, that client's "capacity to make adequately considered decisions in connection with a representation" would have to be "diminished, whether because of minority, mental impairment or for some other reason,"[261] and the lawyer would have to reasonably believe that due to that diminished capacity, the client "is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest."[262] While it is possible that the pressure and stress caused by the NPC itself may diminish the capacity of the client such that the lawyer may invoke Rule 1.14, that is likely to arise in only the narrowest of circumstances. Nevertheless, the nature of NPCs is such that the capacity of the client—as well as the lawyer—to act effectively in the crisis is diminished due to the risks involved, the lack of situational awareness, and the time pressures associated with decision making within them. For these reasons, lawyers should possess the authority to release confidential information when to do so would strengthen their capacity to act effectively in the face of crisis situations.[263] I will explore how to accomplish this goal further in Part III, *infra*.

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257. MODEL RULES R. 1.14(b).

258. 258. *Id.* The commentary to the rule also authorizes the lawyer to provide emergency legal assistance to a client with diminished capacity and may reveal confidences related to the matter "only to the extent necessary to accomplish the intended protective action." *See* MODEL RULES R. 1.14 cmts. 9, 10.

259. MODEL RULES R. 1.14 cmt. 5 (emphasis added).

260. MODEL RULES R. 1.14(c).

261. MODEL RULES R. 1.14(a).

262. MODEL RULES R. 1.14(b).

263. The Restatement provides that, when serving a client with diminished capacity, the lawyer "must . . . pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions." RESTATEMENT (THIRD) § 24(2) (AM. L. INST. 2000).

3. PRESERVING CONFIDENTIALITY IN A NOVEL, PERVASIVE CRISIS

A final issue related to confidentiality in NPC settings arises from the fact that the NPC may compromise the practice of law itself: in the wake of Hurricane Katrina, after the attacks on 9/11, and now in the midst of the Covid-19 Pandemic, lawyers have been forced to close their offices and work remotely. This creates many issues related to the preservation of client confidences, mostly having to do with the integrity of remote communications. The lawyer must "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[264] Furthermore, comment 8 to Model Rule 1.1 provides that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[265] When a law office must close for some crisis-related event, many lawyers have deployed technology that has enabled them to work remotely, to have remote access to files stored on the cloud or on some accessible server. Such an approach also presents additional challenges when it comes to ensuring the integrity of the systems lawyers are using to maintain client confidences, protect against hacking and other forms of intrusion, and ensure cyber-security. The rules do not make specific mention of the duty to preserve confidences in such NPC settings, and they may not have to, but I will explore some potential amendments to the rules that might strengthen and increase the requirements for lawyers who find their work disrupted and who must work remotely in Part III, *infra*.

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The rules themselves provide that they are not designed to anticipate every possible scenario in which lawyers might find themselves, nor do they "exhaust the moral and ethical considerations that should inform a lawyer."[266] Lawyers facing NPCs, by the very nature of such crises, will undoubtedly face challenges for which they are not prepared, and in response to which they will have to make highly consequential decisions with limited knowledge and little time. Even with some degree of flexibility in the rules, however, those rules as they currently exist are not calibrated adequately to the needs of the lawyer who must face NPCs. Given the features of such crises, and the likelihood they will emerge more and more in the future, the profession should consider acknowledging the emerging field of crisis lawyering and the sometimes idiosyncratic aspects of this practice. If the rules that govern the practice of law are to serve lawyers regardless of the situation in which they find themselves, those rules should be informed by the needs of the crisis lawyer as well as those of lawyers serving in more traditional

264. MODEL RULES R. 1.6(c).
265. MODEL RULES R. 1.1 cmt. 8.
266. MODEL RULES, pmbl., § 16.

and more common settings. The following section explores what a crisis-lawyering-informed set of rules might include.

III. AREAS FOR REFORM: A LEGAL ETHICS FOR CRISIS LAWYERING

In this Part, I will attempt to chart the ways that the rules do, do not, or can with some modification, provide adequate guidance and accountability to the lawyer dealing with NPCs. While I propose some relatively modest changes to the current ethical rules that govern the practice of law as they relate to the lawyer dealing with an NPC, it is entirely possible that these recommendations do not go far enough. Instead, rule-promulgating bodes may need to consider adopting a new set of rules more tailored to the needs of the lawyer when facing an NPC. Whether such an effort is necessary I leave to another day and perhaps to others should such an endeavor seem worthwhile. For my purposes here, the somewhat modest goals of laying out some amendments to existing rules will have to suffice. These proposals address the following areas: preparing for and ensuring competence in NPCs, encouraging creativity in such situations, developing technological competence in NPC settings, addressing access-to-justice issues that often arise within them, navigating conflicts in NPCs, and dealing with the questions of confidentiality that often arise in them. I will discuss each of these areas, in turn, below.

A. PREPARING FOR CRISES AND DEVELOPING "CRISIS COMPETENCE"

As described above,[267] there is a degree of conflict within the rules in identifying the standard of care expected of the lawyer dealing with NPCs. On the one hand, the NPC is typically complex. Moreover, a great deal of risk is associated with client action or inaction in light of the guidance that client receives from the lawyer. As a result, the lawyer should engage in greater preparation and training and act with a higher degree of care.[268] On the other, the rules provide almost no standard of care for the lawyer dealing with an emergency, and case law offers no guidance on whether the lawyer's actions in such situations can be measured against *any* standard; even without the apparent contradiction just described, this is a significant shortcoming in the rules.[269] To borrow a phrase from the current political discourse, a lawyer could, conceivably, advise a client to "shoot someone in the middle of Fifth Avenue," in an emergency situation and there is little in the way of guidance in the *Model Rules* to suggest that such course of conduct would be inappropriate.[270]

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267. *See supra*, Section II.A.

268. *See, e.g.*, MODEL RULES R. 1.1 cmt. 5 (stating that level of care will depend in part on "what is at stake").

269. MODEL RULES R. 1.1 cmt. 3 (describing leeway given to lawyers in emergency situations).

270. Thomas L. Friedman, *What if Trump Did Actually Shoot Someone on Fifth Avenue?*, N.Y. TIMES (Aug. 28, 2018), https://www.nytimes.com/2018/08/28/opinion/trump-midterms-shoot-fifth-avenue.html [https://perma.cc/9HNR-798P] (describing President Trump's statement assessing the loyalty of his followers).

Although one of the hallmarks of NPCs is, of course, their novelty, the reality of the contemporary practice of law, and of the world in general, is that the pace of change is itself accelerating,[271] and crises seem to occur with greater and greater frequency. Given that fact, we can possibly cut the Gordian Knot if we can expect that lawyers should, to the best of their ability, assess the nature of their practice and try to identify the types of crises that might occur given the clients they represent and the class of crises such clients may face. Thus, could we, through heightening the training requirements of lawyers, obligate lawyers to prepare for crises to some degree? We expect lawyers to "keep abreast of changes in the law,"[272] but could we also ask them to strive to prepare for crisis situations so that they can, to the greatest extent possible, prevent a crisis from turning into an emergency for which the lawyer is ill-prepared and in response to which the lawyer can provide the requisite degree of care?

To meet these challenges, I offer three recommendations. First, we could consider an amendment to the relevant commentary that requires lawyers to keep abreast of changes in the law to provide that they must also "take reasonable measures to prepare for situations in which their clients or their practice generally must confront crisis situations . . ."[273] Second, we could amend the commentary related to emergency situations to give it, to some extent, a grounding in an objective standard. Here, I would recommend that we amend the commentary related to emergency situations as follows: "Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, *and the required proficiency in crisis situations is that of a general practitioner acting to resolve that situation in good faith* . . ." Third, a lawyer should consider creating advance directives with the client that guide the lawyer in navigating NPCs, particularly those in which communication with the client might be interrupted. Through such directives, the lawyer could discuss with the client the possibility that an NPC might arise during the course of the representation and the parties could come to some agreement as to the basic parameters that should guide the lawyer's conduct in such situations. Such conversations could also lead the lawyer to discover that the client and the lawyer do not share the same guiding principles should a crisis or an emergency strike, which might suggest—given the likelihood of such a crisis occurring—that the lawyer may not wish to represent this client. Lawyers already are permitted to obtain advance waiver of

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271. *See, e.g.*, PETER H. DIAMANDIS & STEVEN KOTLER, THE FUTURE IS FASTER THAN YOU THINK: HOW CONVERGING TECHNOLOGIES ARE TRANSFORMING BUSINESS, INDUSTRIES AND OUR LIVES 69 (2020) (arguing that in the contemporary, technologically advanced age, "[t]he only constant is change, and the pace of change is accelerating"); THOMAS L. FRIEDMAN, THANK YOU FOR BEING LATE: AN OPTIMIST'S GUIDE TO THE AGE OF ACCELERATIONS 29 (2016) (describing confluence of technological change and other forces as creating the "'age of accelerations'").

272. MODEL RULES R. 1.1 cmt. 8.

273. Such language could be added to Comment 8 to MODEL RULES R. 1.1.

conflicts;[274] they should, at a minimum, also prepare for crisis situations to arise in their practice.

B. COMPETENCE, MERITORIOUS CLAIMS, AND CREATIVITY

As described above,[275] in NPC-litigation contexts, lawyers are sometimes caught between their obligations to serve as zealous advocates for their clients and to act as officers of the court.[276] The very features of the NPC are such that the lawyer, acting under the "fog of war," where the risk of harm in the absence of action is high, and who must make decisions under tight time constraints, may also feel hesitant to take emergency action where, in light of these constraints, the lawyer cannot develop what a court, or history, might deem a good faith argument.[277]

Appropriately, the rules surrounding meritorious claims place the onus on the lawyer to develop a good faith basis for claims before doing so.[278] But it is the features of NPCs, when viewed against the backdrop of Model Rule 3.1 and Rule 11 of the Federal Rules of Civil Procedure, that might inhibit innovative responses precisely where they are needed most.[279] At the same time, we do not want lawyers using a crisis situation as license to violate law and morals,[280] or to undermine the laws that are the product of democratic processes.[281] Are there other contexts where the factual setting does not place the burden on lawyers to ensure that their own conduct is appropriate, but instead, places it on disciplinary authorities to review and assess that conduct after it occurs?

One similar setting in particular strains the traditional rules of the adversarial system because of the sometimes countervailing duty to serve as both an advocate and officer of the court within that system. That second role requires that lawyers

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274. MODEL RULES R. 1.7 cmt. 22.

275. *See supra* Part II.

276. Margulies, *Reforming Lawyers, supra* note 31, at 815 (arguing "[a]ll lawyers need to maintain a balance between serving a client and preserving the integrity of the legal system") (footnote omitted).

277. *See, e.g.*, Bauer, *supra* note 9, at 242 (describing tension government lawyers might feel when dispensing legal advice were they to consider how such advice might be viewed in the future); *see also* Petty, *supra* note 31, at 1591 (noting in government practice the potential for the influence of "desire to please the decision maker and seek professional gain" as having the potential to lead the lawyer to "deviate from ethical compliance").

278. *See, e.g.*, FED. R. CIV. P. 11(b).

279. *See, e.g.*, Bauer, *supra* note 9, at 250 (arguing that "[o]n national security matters of the highest importance, the balancing of relevant considerations, including legal issues, should allow for strong, reasonable, or even plausible legal theories to be good enough") (footnote omitted). For a response to Bauer, see Goldsmith, *supra* note 31, at 268–73 (2018). *See also* Peter Margulies, *True Believers at Law: National Security Agendas, The Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 66 (2008) (arguing in the national security context that "the lawyer should take an institutional approach," which focuses on promoting what the author calls "dialogic equipoise" between the branches of the federal government) (footnote omitted).

280. *See, e.g.*, W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 80–85 (arguing "torture memos" promulgated by government lawyers violated existing legal and public standards regarding interrogation).

281. W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 366 (2010).

must honor the duty of candor when advocating before a tribunal.[282] When the lawyer "knows" a client or witness has committed perjury before that tribunal, that lawyer is obligated to take reasonable protective measures, including, where necessary, disclosure of the fact that such perjury has occurred.[283] While it is clear this duty trumps the duty of confidentiality, it is less clear whether such a duty takes precedence over the client's 5th Amendment right to avoid self-incrimination.[284] At the same time, in light of the needs of the adversarial system, and because we want to impose this duty only in limited circumstances, it applies when the lawyer offers evidence from the client or witness that the lawyer knows is false, even when such knowledge, as defined in the Rules, can be "inferred from [the] circumstances."[285] This terminology means the onus of establishing that a lawyer has violated the rules shifts from the lawyer to disciplinary authorities or the courts. This is in contrast with Model Rule 3.1 and Federal Rule of Civil Procedure 11, where the lawyer bears the burden of showing a good faith basis for asserting the legal claims presented before the court, and the lawyer's behavior is assessed under the general standard of objective reasonableness.[286]

Could a similar shift in the burden of establishing that the lawyer had a meritorious claim serve NPCs well such that we will encourage creative lawyering in the face of such crises? Could the rules of crisis lawyering adopt language that is more forgiving, like allowing for lawyers to assert claims in such settings unless they *know* they are without merit *at the time* and the lawyers cannot advance arguments for the reversal, modification, or extension of existing law?[287] Such a subtle shift might encourage creative claims, free a lawyer from concerns that he or she is asserting impermissibly novel claims to address novel crises, and provide a degree of leeway and flexibility in light of hard cases to encourage lawyering that can rise to the challenge of such situations. With the benefit of hindsight

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282. MODEL RULES R. 3.3. *See* Robert Gilbert Johnston & Sara Lufrano, *The Adversary System as a Means of Seeking Truth and Justice*, 35 J. MARSHALL L. REV. 147, 150–152 (2002) (discussing duty of candor to the court).

283. MODEL RULES R. 3.3(a)(3). *See also* MONROE H. FREEDMAN, LAWYERS ETHICS IN AN ADVERSARY SYSTEM 27–41 (1975) (discussing the duty of candor); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 349, 351 (1952) (same).

284. On the tension between the duty of candor and the 5th Amendment right against self-incrimination, see, e.g., Brent R. Appel, *The Limited Impact of* Nix v. Whiteside *on Attorney-Client Relations*, 136 U. PA. L. REV. 1913, 1913–15 (1988).

285. MODEL RULES R. 1.0(f) (defining terms "knowingly, known or knows").

286. *See* Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1480–91 (1996) (discussing objective standard in application of Rule 11 sanctions). *See also* Smart Options, LLC v. Jump Rope, Inc., 2013 WL 500861, at *3 (N.D. Ill. Feb. 11, 2013) (noting once prima facie showing of frivolous conduct is made under Rule 11, non-movant bears the burden of showing objective reasonableness of own actions) (citations omitted).

287. Such a shift might follow the recommendation in the Restatement with respect to the type of review to be conducted that would assess the reasonableness of a lawyer's decision to disclose or not disclose confidential information that might prevent reasonably certain death or substantial bodily harm. There, the reasonableness of the lawyer's conduct is only to be assessed in light of the information available to the lawyer at the time of the decision. *See* Restatement (Third), *supra* note *27*, at § 66, cmt. g.

(and further research), it is possible that a claim might be viewed as frivolous, but we should assess the attorney's conduct in light of the information available to the lawyer at the time that the lawyer must advocate for the client's interests in the midst of the NPC.[288]

C. DEVELOPING TECHNOLOGICAL COMPETENCE TO DEAL WITH NOVEL, PERVASIVE CRISES

Another aspect of NPCs is that, in such situations, lawyers often find themselves physically displaced and relying on remote access to their files and other information related to the practice of law, like court calendars and other means of tracking tasks and obligations. Under the recently revised Comment 8 to Rule 1.1., lawyers are not only supposed to "keep abreast of changes in the law and its practice," they are also obligated to take into account "the benefits and risks associated with relevant technology."[289] In an NPC, this technology should enable the lawyer to continue to provide competent representation while also maintaining client confidences.[290] Thus, reading these obligations together, in situations where lawyers become victims of the NPC to such an extent that they must work remotely, or have their office shut down for a period of time (brief or otherwise), they not only must ensure that they have systems in place to facilitate continuity of services, but also that those systems, themselves, protect client confidences. Given that we have several recent examples of natural and other disasters impacting lawyers' ability to maintain continuity of care, like Hurricane Katrina, September 11th, and now Covid-19, which have necessitated remote access to files and other essential aspects of legal practice, the rules should require that lawyers engage in some degree of planning for crisis situations where the normal law office practice will be disrupted.

Making matters even more concerning, the COVID-19 crisis made it clear that lawyers need remote access to files as well as the ability to conduct meetings over video conferencing and through cellular communications technologies. But what happens should those systems fail? What happens when there is an internet outage or cellular service is interrupted? These are likely the challenges of the next NPC, and lawyers should be prepared to address those risks as well. Thus, it is no longer acceptable for lawyers to ignore the possibility—since it is becoming fairly commonplace—that service from and access to a physical law office may become interrupted in more ways than one. Accordingly, I would suggest further amendment to comment 8 to Model Rule 1.1. as follows (with my suggested language italicized): lawyers should "keep abreast of changes in the law and *take*

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288. This is consistent with the approach recommended by the Advisory Committee when addressing the 1983 changes to Rule 11. Advisory Committee Note, 97 F.R.D. 198, 199 (1983).

289. MODEL RULES R. 1.1 cmt. 8. *See also* Jamie J. Baker, *Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society*, 69 S.C. L. REV. 557, 558–56 (2018) (discussing duty to maintain technological competence).

290. MODEL RULES R. 1.6(c) cmt. 18.

reasonable measures to prepare for situations in which their clients or their practice generally must confront crisis situations including developing crisis management protocols and redundant communications and remote file access technologies . . ."

D. ADDRESSING THE ACCESS-TO-JUSTICE CRISIS THAT IS EXACERBATED IN CRISIS SITUATIONS

The *Model Rules* already provide that every lawyer "should aspire to render . . . pro bono public legal services," and suggest that these services should amount to at least 50 hours a year.[291] Most jurisdictions have chosen to follow the ABA's approach to make such service voluntary (i.e., lawyers should "aspire" to render such services), and few recommend a number of volunteer hours per year that exceeds fifty.[292] In NPCs, the need for lawyers to help victims and survivors address the effects of the crisis has proven particularly acute, whether it was individuals who lost loved ones in the attacks of September 11th, or those detained in extreme conditions of confinement by the U.S. government on Guantánamo Bay, Cuba, in the wake of those attacks.[293] In such settings, in addition to simply mustering the number of lawyers needed to address the acute crisis, which itself can be daunting, to the extent the lawyers might serve on a volunteer basis from their positions within private firms that might have interests related to the crisis, they might find themselves with conflicting interests in the delivery of legal services.[294] Model Rule 6.5 loosens some of the provisions for such conflicts, by, for example, restricting the application of the conflicts rules in situations—common in NPCs—where the lawyer provides limited, volunteer services in instances where the lawyer has actual knowledge that the assistance provided might give rise to a conflict of interest for the lawyer or an associate.[295] But given the dramatic harm that befalls many in NPCs, and the likelihood that legal assistance could make a tremendous difference in these victims' lives and perhaps lessen the effects of the crisis, more is needed to increase access to justice in such settings.

Without making pro bono mandatory in NPCs generally,[296] the first intervention that jurisdictions could take, with support from the federal government, is to increase the resources available to both direct legal services providers as well as other entities coordinating volunteer services. The current approach in formal

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291. MODEL RULES R. 6.1.

292. *See* STEPHEN GILLERS, ROY D. SIMON & ANDREW PERLMAN, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 286 (2019 supplement ed.) (cataloging state variations with respect to voluntary service).

293. *See* Azmy, *supra* note 111 (describing the network of an estimated 1,000 lawyers who provided pro bono assistance to detainees held on Guantánamo Bay after September 11th).

294. *See* NYC Bar Report, *supra* note 15, at 15 (outlining conflicts in 9/11 legal recovery response).

295. MODEL RULES R. 6.5.

296. *See, e.g.*, Marrero Report, *supra* note 99, at 771–98 (recommending New York State adopt a mandatory pro bono program).

Stafford Act disasters[297] authorizes the Federal Emergency Management Agency (FEMA) to provide legal assistance in such settings, and may even pay for lawyers to handle non-fee generating cases, though FEMA has largely chosen to partner with the American Bar Association's Young Lawyer's division to coordinate the provision of volunteer lawyers to address a limited number of cases that arise in formal, federally recognized disaster settings that invoke the Stafford Act.[298] Such limitations have raised fears that "the Stafford Act, by design, simply cannot provide an adequate response when disaster overwhelms the capacities of state and local governments."[299]

In an NPC, a pre-existing network already exists to deliver critical legal services to victims affected by the crisis: that made up of entities already funded by the federal Legal Services Corporation (LSC).[300] Such entities operate in every state and handle many of the cases that arise when natural and other disasters have an economic impact, as when they cause job loss or economic displacement.[301] Funders, public and private, could support such entities' full-time staff as well as those working with them on a limited basis, including through exchanges where lawyers serve on panels to take assigned cases, as is often used in the criminal law setting to handle cases where a public defender might have a conflict related to the representation.[302] Such organizations would need additional financial support to do so, and we cannot ask them to take on the additional task of coordinating the services of a large group of volunteer lawyers, assuming one materializes like that which came together in the wake of September 11th. At the same time, LSC-funded organizations operate under strict restrictions as to who they can serve, and most may not represent individuals earning more than 125%

297. Robert T. Stafford Disaster Relief and Emergency Assistance Act 42 U.S.C. §5121 (2018).

298. *See* Andrew Jack VanSingel, *The Calm After the Storm: 45 Years of the ABA Young Lawyers Division's Disaster Legal Services Program*, 35 TOURO L. REV. 1019, 1021 (2019) (describing the relationship between the Federal Emergency Management Agency and the American Bar Association's Young Lawyers Division).

299. Davida Finger, *50 Years After the "War on Poverty" : Evaluating the Justice Gap in the Post-Disaster Context*, 34 B.C. J. L. & SOC. JUST. 267, 277 (2014). *See also* Martha F. Davis, *Preparing for the Worst: Re-Envisioning Disaster Relief in the Era of Homeland Security*, 31 FORDHAM URB. L. J. 959, 969 (2004) (questioning the adequacy of Stafford Act legal interventions).

300. The Legal Services Corporation describes itself as operating "as an independent 501(c)(3) nonprofit corporation that promotes equal access to justice and provides grants for high-quality civil legal assistance to low-income Americans. LSC distributes more than 90% of its funding to 132 independent nonprofit legal aid programs with more than 800 offices." Legal Services Corporation, *About LSC*, https://www.lsc.gov/about-lsc (last visited, May 27, 2020) [https://perma.cc/95SH-9S7Z].

301. According to its 2018 annual report, the LSC "provided grants to 132 independent, nonprofit organizations that provide free civil legal services to low-income Americans from 852 offices located in every state, the District of Columbia and the territories of the United States of America." Legal Services Corporation, 2018 Annual Report 6 (2019), https://lsc-live.app.box.com/s/1qz5ws3555g0v2n70w662s3j0dktplz2 [https://lsc-live.app.box.com/s/1qz5ws3555g0v2n70w662s3j0dktplz2].

302. *See* David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L. J. 2578, 2591 (2013) (describing process of assigning counsel from a panel of private attorneys in situations where the indigent defense organization has a conflict).

of the federal poverty line.[303] Such a means test also includes assets, and many individuals facing a foreclosure due to the sudden loss of employment in the wake of a disaster will not qualify for such services due to the value of the equity in their home, or because they own some relatively small asset, like even a late-model car.[304] To the extent legal services entities currently receive LSC funds, such funding should not include the same sorts of financial restrictions on who is eligible for such assistance.

Another innovation could also build on the primary disaster-related intervention that jurisdictions have adopted: i.e., that of relaxing the rules barring the unauthorized practice of law so that lawyers from other jurisdictions could provide disaster-related services in an affected jurisdiction without being admitted to practice there. An approach similar to this could also incorporate the delivery of legal services through law students or recent graduates in discrete areas related to the disaster. In the throes of the Covid-19 Pandemic, graduating students in New York State had their life plans altered by the state's highest court when a determination was made to delay the bar examination from its usual administration in late July of 2020.[305] The students advocated for a "diploma privilege" that would allow them to practice law under the supervision of experienced attorneys for a period of up to eighteen months before they would sit for a future administration of the bar.[306] One of the reasons the students asked for such a privilege was precisely so that they could provide desperately needed assistance to victims of the pandemic.[307] These efforts have spawned similar requests across the United States.[308] As the crisis unfolded, the ABA passed a resolution encouraging states and local jurisdictions to authorize limited practice under the supervision of an experienced attorney by recent law school graduates from accredited law schools and those completing judicial clerkships who had not yet passed the bar.[309] Such innovations and others, which would allow law students, law graduates who have not yet passed the bar, and even professionals like accountants who might be able to provide essential law-related services in a crisis, are worthy of consideration in NPCs.

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303. Legal Services Corporation restrictions limit representation to families whose income does not exceed 125% of the federal poverty line. 45 C.F.R. § 1611.3 (2009).

304. 45 C.F.R. §1611.3(d)(1) (describing treatment of assets and their effect on LSC income limits).

305. Karen Sloan, *New York Postpones July Bar Exam Amid COVID-19 Pandemic*, N.Y.L.J. (Mar. 27, 2020).

306. Karen Sloan, *No Bar Exam? That's What 1,000 Law Students Want NY to Declare Amid COVID-19*, N.Y.L.J. (Mar. 26, 2020).

307. *Id.*

308. For a description of efforts in states in addition to New York, see Karen Sloan, *National Momentum Builds for Diploma Privilege as Oregon Makes Bar Exam Optional*, LAW.COM (June 30, 2020), https://www.law.com/2020/06/30/national-momentum-builds-for-diploma-privilege-as-oregon-makes-bar-exam-optional/ [https://perma.cc/XDL7-KNJ4].

309. STANDING COMM. ON BAR ACTIVITIES AND SERVICES, LAW STUDENT DIVISION, AM. BAR ASS'N, REPORT TO THE BOARD OF GOVERNORS (April 7, 2020).

E. MANAGING CONFLICTS

As described above,[310] a lawyer handling an NPC on behalf of a client may face a situation where the client is insisting on making choices inconsistent with the lawyer's professional (and personal) values and the disagreement with the client around these choices is so fundamental that the lawyer does not feel able to provide zealous representation to that client.[311] At the same time, the client may not have ready access to another lawyer who can effectively step in to substitute for the lawyer seeking to withdraw as counsel within a time-frame that is consistent with the needs of the client in the throes of a crisis. In proceedings before a tribunal that must consent to counsel's withdrawal, such consent may not be forthcoming, and the lawyer may be forced to continue the representation if it is the determination of the judicial officer or body managing the lawyer's participation in the dispute that such withdrawal would not be in the best interests of the client, would prejudice other parties in the matter, or would hinder the tribunal's ability to adjudicate the matter in a timely and effective way.[312]

In matters not involving litigation, however, there is no similar "escape valve": there is no third party overseeing the manner in which and the conditions under which the lawyer may seek to withdraw to assess the value and importance of continued representation in that setting. Even without a third-party overseer, the lawyer may feel just as conflicted about withdrawing when the client may be left to weather the crisis without adequate—or any—legal guidance due to the difficulty of obtaining substitute counsel in an emergency situation. Accordingly, one amendment to the rules regarding withdrawal as counsel would account for the fact that, in a crisis situation, even where adequate grounds to withdraw might exist under 1.16(b), the lawyer should continue the representation to mitigate harm to the interests of the client and the community until adequate substitute counsel can be obtained. However, it should not require a lawyer to continue the representation if the client does not proceed in good faith and fails to cooperate to find adequate substitute counsel in a timely way.

F. ADAPTING CONFIDENTIALITY

A lawyer certainly has some leeway under the rules to share confidential information when the release of such information can prevent reasonably certain death or substantial bodily harm, or where substantial financial injury can occur to third parties from the client's actions when the lawyer's services are being used to further such actions.[313] While these provisions seem uniquely designed to provide discretion to the lawyer to prevent such harm in NPCs, the very features of such crises may undermine the ability of the lawyer to share such information

310. *See* Section II.C, *supra*.
311. *Id.*
312. 312. MODEL RULES R. 1.16(c).
313. MODEL RULES R. 1.6(b)(1)–(3).

precisely when the need to do so is particularly acute. Moreover, because the rules essentially absolve the lawyer from any responsibility for not disclosing, and there is no parallel absolution for the decision to disclose, the incentive structure in place would certainly seem to channel decision making toward non-disclosure.

Given the features of NPCs, the lawyer may not have sufficient information to make a decision as to whether death or substantial bodily injury is, in fact, reasonably certain to occur. The lawyer may require some degree of latitude with confidential information itself in order to develop the situational awareness to make that decision. Where the client can consent to the sharing of confidential information with third parties to enable the lawyer to develop that situational awareness, there is no impediment under the rules. However, time pressure may not permit the lawyer to obtain such consent, or the client may be unwilling to provide it. Without the ability to share confidential information, the lawyer may be unable to satisfy the standard of care in such a situation. Thus, a client's intransigence might undermine the client's long-term interests as well as the lawyer's ability, generally, to provide competent services by developing a full sense of the scope of the situation.

In at least one other setting where it might be in the client's best interests for the lawyer to share confidential information with third parties, when the lawyer is representing a client under a diminished capacity, we say the lawyer has the implied authorization to share confidential information as necessary to protect the client's interests.[314] Granting lawyers similar authority in NPCs to permit them to share confidential information, particularly with experts in other disciplines, would go a long way in helping lawyers address such crises. Such authority is essential for the lawyer to develop the knowledge about the factual situation and the likely risks involved in order to provide competent, effective, zealous representation. To accomplish this, we could embed this authority in the commentary to current Rule 1.6 as follows: "In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed, to make a disclosure that facilitates a satisfactory conclusion to a matter, *or as the lawyer deems reasonably necessary in an emergency situation to develop facts about the situation that will allow the lawyer to advance the interests of the client*."[315]

CONCLUSION

Novel, pervasive crises are becoming more and more common in the world, and are demanding more and more of lawyers. The very nature of such crises tests the lawyer's common approach to problems: the reliance on precedent, the careful weighing of facts and law based on acquired knowledge and skills, and the application of professional judgment that comes from training and experience. At

314. MODEL RULES R. 1.14. *See also* discussion *supra* at Section II.D.2.

315. MODEL RULES R. 1.6, cmt. 5 (with new, proposed language emphasized).

the same time, lawyers can play a critical role in assisting clients to protect their interests and advance community well-being and justice in the face of such crises. The lawyer's professional ethics should account for those unique aspects of this type of practice that might suggest a kind of role morality that is somewhat different than that which the lawyer, acting in the more traditional setting, even in a crisis setting, embraces. This Article attempts to chart the contours of what such a role for the crisis lawyer might look like. NPCs are not going away, and the lawyer's relevance within them will continue to be critical. Our professional ethics for addressing them should reflect the needs, aspirations, tactics, and skills necessary to see clients, and the community, through them.