The Access and Justice Imperatives of the Rules of Professional Conduct

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ABSTRACT

The rules of professional conduct are the backbone of legal ethics. The primary objective of legal ethics, and thus of the rules, is protecting clients, the legal system, the public, and justice. Increasingly, however, the rules fail at protecting the public and advancing justice. The problem does not lie with a particular rule. Rather, the rules are based on antiquated assumptions, which no longer reflect some of the fundamental needs of clients and the public nor the practice realities of lawyers. To fulfill their objective, the rules must address the contemporary needs of clients and the public: they must help address the problem of insufficient access to lawyers for those who cannot afford to pay for legal services, and they must meaningfully address widespread forms of inequality, including gender and racial injustices.

The Article explains and rejects the legal profession's traditional defense of the rules pursuant to which lawyers are three-legged stools who effectively balance the interests of clients, the legal system, and the public. Instead, the Article advances the best possible defense of the rules, an account in which lawyers serve the public by serving clients and advancing the Rule of Law but shows that this account is unsustainable given contemporary practice realities. Prevalent insufficient access to lawyers, changing power dynamics between clients, lawyers, and non-lawyers, and persistent injustices mean that lawyers can no longer credibly claim to indirectly serve the public by serving paying clients. Rather, the rules should be revised to mandate that lawyers increase access to legal services and pursue justice directly. The Article concludes by developing an access and justice-driven agenda for reforming the rules.

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INTRODUCTION

Who is being served by the *Model Rules of Professional Conduct* (*Rules*) and their state counterparts?[1] The legal profession offers two types of answers to this question. The short-version, traditional answer is that clients are protected by the *Rules*.[2] This basic answer addresses an intuitive critique of the *Rules*: because they are promulgated and enforced by the legal profession, the *Rules* likely protect lawyers and promote their self-interest at the expense of clients. This basic answer, however, fails to address another critique of the *Rules*, pursuant to which they advance the interests of clients at the expense of all others, including the public and the public interest. The long-version, traditional answer offered by the profession to the query "who is served by the *Rules*?" is clients, the legal system, and the public.[3] The profession purports to support this by showing that the *Rules* limit what lawyers can do for clients, as well as impose on lawyers duties as officers of the legal system and as public citizens, which curtail clients' interests.[4]

This Article argues that both of the profession's answers are increasingly strained in the twenty-first century. The crux of the problem is that the *Rules* are based on a set of assumptions and generalizations about clients, lawyers, and law practice that no longer holds true. Regarding clients, the *Rules* assume that those with legal needs would ordinarily and naturally become paying clients. That is, they assume relative unimpeded access to legal services. Further, following traditional agency law principles, the *Rules* assume that clients-principals are vulnerable and in need of protection from their lawyers-agents. These assumptions suggest that the *Rules*' protection of clients is a desirable goal.

Contemporary practice realities have disproven these assumptions. The well-documented challenge of insufficient access to legal services establishes that many with legal needs do not become paying clients, at the same time as the emergence of new classes of powerful clients flies in the face of the assumption that all clients need protection from their lawyers. Combined, these developments problematize the profession's short-version answer.

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1. *See* MODEL RULES OF PROF'L CONDUCT (2016) [hereinafter MODEL RULES].

2. MODEL RULES pmbl. cmts. 10–12; R. 1.7 cmt. 1 ("Loyalty [is an] essential element[] in the lawyer's relationship to a client."). *See generally* W. Bradley Wendel, *Pushing the Boundaries of Informed Consent: Ethics in the Representation of Legally Sophisticated Clients,* 47 U. TOL. L. REV. 39, 40 (2015); Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 25, 29–40 (2000) (legal ethics codes, *inter alia*, protect clients); Ted Schneyer, *Moral Philosophy's Standard Misconceptions of Legal Ethics*, 1984 WIS. L. REV. 1529 (1984) (legal ethics rules protect clients from their lawyers).

3. MODEL RULES pmbl. cmt. 1 ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

4. *See generally infra* Part II.A.

The profession's long-version answer has always been undercut by the fact that the *Rules*' claim to protect the public and the public interest has been more rhetorical than substantive. Although the *Rules* do on occasion constrain the interests of clients, they mostly focus on advancing clients' interests and do little to develop the roles of lawyers as officers of the legal system and as public citizens. In defense of the *Rules* and their claim to serve the public, the Article develops an alternative account premised not on the mostly empty depiction of lawyers as three-legged stools but on the proposition that by serving clients lawyers serve the public, an account supported by the *Rules*' own assumptions about clients, lawyers, and law practice.

About lawyers, the *Rules* assume that notwithstanding increased specialization and growing differences among different types of lawyers, they continue to share core similarities, including that all lawyers are professionals who are relatively powerful vis-à-vis their clients. About the practice of law, the *Rules* assume that lawyers effectively pursue justice by practicing law. Put differently, because our laws are generally just, justice is served by lawyers who comply with and advise clients to comply with the law. These assumptions intertwine: because lawyers are powerful professionals, clients defer to their lawyers who advise compliance with our just laws, resulting in justice.

Given the *Rules*' assumptions, the best defense of *Rules*—that they serve the public by serving clients—seems plausible. These assumptions allow the profession to assert that by serving clients the *Rules* serve justice and the public interest: because most everybody can become a client, serving clients is serving the public; because lawyers are powerful professionals, they can dissuade clients from wrongdoing and help uphold the law; and because the law is just, by serving clients and upholding the law, lawyers serve justice and the public interest. That lawyers gain elevated social and cultural status and are handsomely paid along the way—in other words, that lawyers do well by doing right—is a happy coincidence, or a deserved recognition for the profession's service to the public.

As these assumptions about clients, lawyers, and law practice are increasingly disproven by contemporary practice realities, however, even this best account of the *Rules* becomes less persuasive.[5] In particular, if it is no longer true that clients defer to powerful lawyers and that our laws are just, or rather, sufficiently just to address past discrimination and its legacy, then the claim that by serving clients the *Rules* serve the public falls apart. Thus, modern law practice requires a reassessment of who is being served by the *Rules*, an investigation undertaken in this Article.

Part I explains the importance of studying the *Rules*, as well as the *Rules*' place within the law governing lawyers. Specifically, it shows why in lieu of studying the rich and complex law governing lawyers one can plausibly focus on the *Rules*, and why instead of examining the multiple constituents of the legal

5. *Infra* Part III.

profession, one can reasonably study the conduct of the American Bar Association (ABA). Part II spells out the ABA's traditional claims about and justifications for the *Rules,* identifies the core assumptions underneath the *Rules* and these claims, summarizes their critiques, establishes that the ABA's traditional claims about the *Rules* fail, and develops the best possible defense of the *Rules* given the assumptions they make. Part III shows that practice developments in the twenty-first century, including the prevalence of insufficient access to legal services among many would-be clients, the rise of new categories of powerful clients and weak lawyer-employees who are not professionals in the traditional sense, and the grim realities of injustice, pull the rug from under the *Rules*' best defense of serving the public interest. Part IV argues that in order to serve the public and the public interest, the *Rules* must make increased access to legal services and greater justice an imperative.

The inquiry yields important insights for the future of the *Rules*, the regulation of lawyers and legal providers, and the legal profession. It reveals that in order to continue to serve the public and the public interest in the twenty-first century, the *Rules* must address directly and systematically the chronic insufficient access to legal services experienced by a growing number of Americans who cannot afford to pay for them; and must tackle head-on injustice in the United States, identifying in detail a role for lawyers as public citizens with a special responsibility for the quality of justice.[6]

I. THE RULES, LEGAL ETHICS AND ETHICS: UNPACKING A TERMINOLOGICAL MESS

Ethics, legal ethics, legal profession, professionalism, professional responsibility, the law governing lawyers, professional ethics, malpractice, and the rules of professional conduct are just some of the terms of art often invoked by lawyers to describe intersecting but somewhat different phenomena and regulations.[7] Ethics, commonly understood as standards delineating good and bad,[8] is the broadest of these definitions. One way to understand professional ethics is as a subset of ethics, consisting of standards of good and bad professional conduct. Legal ethics, in turn, is a subset of professional ethics, consisting of standards, which specify what it means to be a good (and bad) lawyer.[9] In this sense, legal ethics is a sub-field of moral and political philosophy, which includes the rules of professional conduct only to the extent that the *Rules* purport to define standards of

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6. MODEL RULES pmbl. cmt. 1. *See infra* Part IV.

7. Renee Newman Knake, *The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U. L. REV. 1499, 1503 (2010) ("The term 'law of lawyering' (or lawyer ethics, legal ethics, professional responsibility, law governing lawyers—all other ways to describe a similar body of law) encompasses the legal regulations and ethical obligations governing lawyers.").

8. *See generally* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010); DAVID LUBAN, THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (1983).

9. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).

good lawyering.[10] Although conceptually plausible, this is not how most lawyers understand legal ethics. Indeed, even within legal academia, this understanding is often referred to not as legal ethics but as theoretical legal ethics.[11]

In contrast with theoretical legal ethics, legal ethics is often understood as a legalized subset of ethics, that is, legal standards of conduct, which define what lawyers can and cannot do under the law governing lawyers, as opposed to unenforceable ethical or moral standards of good and bad.[12] Here, "legal" does not restrict "ethics" by narrowing the focus from being good to being good lawyers. Rather, "legal" here means lawful and enforceable, and "legal ethics" denotes the law governing lawyers, which includes the *Rules*, case law construing agency law, contracts, torts and fiduciary duties, state and federal statutes,[13] and secondary sources such as the restatement of the law governing lawyers (Restatement)[14] and ethics opinions.[15]

Within this framework, the *Rules* play a central role in legal ethics or the law governing lawyers, constituting its core by prescribing standards of conduct for lawyers, spelling out in detail duties and responsibilities to clients, third parties, colleagues, supervisees, opposing counsel, the legal system, and the public. Unlike a specific case, statute or ethics opinion, the Rules are comprehensive; and unlike the Restatement the Rules do more than summarize current law. The Rules capture the values and core beliefs of the profession,[16] spell out its commitments, reveal and promote its interests,[17] guide lawyers' conduct,[18] and reflect, shape and inform lawyers' thinking as well as the profession's mind set and priorities. Accordingly, the Rules frame the discourse about the legal profession, its regulation, and the practice of law, as well as possible reforms to it.

Of course, the ABA *Model Rules of Professional Conduct* are, as indicated by their name, just a model. But the *Rules* become enforceable law and part of legal ethics when adopted by state supreme courts (and sometimes legislatures) as state

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10. For such accounts, see WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998); WENDEL, *supra* note 8.

11. *See* David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337 (2017).

12. Amy Salyzyn, *Positive Legal Ethics Theory and the Law Governing Lawyers: A Few Puzzles Worth Solving*, 42 HOFSTRA L. REV. 1063, 1068–76 (2014); Carl M. Selinger, *The Problematical Role of the Legal Ethics Expert*, 13 GEO. J. LEGAL ETHICS 405, 405 (2000) ("Scholars in the field of the law governing lawyers—legal ethics, to speak more traditionally and economically . . . .").

13. Daniel R. Coquillette & Judith A. McMorrow, *Zacharias's Prophecy: The Federalization of Legal Ethics Through Legislative, Court, and Agency Regulation*, 48 SAN DIEGO L. REV. 123, 124 (2011).

14. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

15. Ethics opinions are issued by the ABA, as well as by state, county, and city bar associations. ABA, *Ethics Opinions,* https://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/ [https://perma.cc/DC38-BEPC] (last visited May 1, 2022). Ethics opinions are a persuasive but not controlling source of legal ethics.

16. Alex B. Long, *Of Prosecutors and Prejudice (Or "Do Prosecutors Have An Ethical Obligation Not To Say Racist Stuff on Social Media?")*, 55 U.C. DAVIS L. REV. 1717, 1751 (2022).

17. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981).

18. MODEL RULES pmbl. cmt. 20 ("The Rules are designed to provide guidance to lawyers. . . .").

law, following a long process of committee work and public hearings, to form the basis for states' disciplinary apparatuses for lawyers.[19] Finally, while rules of professional conduct as state law are limited in application only to lawyers admitted to practice law in the jurisdiction that adopted them, since most states have adopted the *Rules* with only modest deviations, practically speaking the *Rules* govern the conduct of American lawyers.[20]

Thus, "legal ethics" means, often and for purposes of this Article, the law governing lawyers, with a heavy emphasis on the *Rules*. This terminological unpacking is not an academic exercise; rather, it enables a meaningful exploration of legal ethics. The sources of the law governing lawyers are numerous, including the ABA which promulgates the *Rules*, state supreme courts which adopt versions of the *Rules* as state law, federal and state courts which produce case law, federal and state legislators, the ABA, state, county, and city-based ethics committees which issue ethics opinions, and the American Law Institute which authors the Restatement. Because the law governing lawyers features multiple, often conflicting, authorities, agendas, and interests, it is near impossible to coherently study legal ethics and easily answer questions such as "who does legal ethics serve?" In contrast, the *Rules* are but one source, promulgated by the legal profession through its largest organized group, the ABA.[21] Thus, by substituting legal ethics with the *Rules*, studying the law governing lawyers becomes a feasible undertaking.

At the same time, studying the *Rules* as a shorthand for legal ethics is not inconsistent with acknowledging that this shortcut benefits the legal profession. Consider, for example, the ABA's longstanding battle to ensure that the regulation of the legal profession is vested in the hands of courts as opposed to legislatures.[22] Reducing legal ethics to the *Rules* helps the ABA's cause by highlighting the role of state supreme courts which adopt and enforce the *Rules* in regulating lawyers, and, at the same time, by belittling the importance and legitimacy of

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19. For an excellent exposition on how the *Rules* become state law, including the role state supreme courts play in the process, see Judith L. Maute, *Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?* PROF. LAW. 53, 58–66 (2008).

20. *See* ABA, *Jurisdictional Rules Comparison Charts*, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ [https://perma.cc/Y4UJ-PF9F] (last visited May 1, 2022).

21. Norbert C. Brockman, *The History of the American Bar Association: A Bibliographic Essay*, 6 AM. J. LEGAL HIST. 269 (1962). *See also "About the ABA"*, ABA, https://www.americanbar.org/about_the_aba/ [https://perma.cc/67V4-YFHZ] ("The ABA is the largest voluntary association of lawyers and legal professionals in the world.") (last visited May 1, 2022).

22. MODEL RULES pmbl. cmt. 10:

> The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. *This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts*.

(emphasis added). *See also* Abel, *supra* note 17.

state and federal statutes, which have no direct authority over the *Rules*. Or consider the profession's monopoly over the provision of legal services. Focusing on the *Rules*, which have long codified and justified the monopoly,[23] is likely to help sustain it. Nonetheless, treating the *Rules* as a shorthand for legal ethics facilitates important and timely inquiries, including "who is served by legal ethics?," which becomes "who is served by the *Rules*?," an inquiry one can undertake by looking to the ABA and its *Model Rules*. Moreover, scrutinizing the *Rules* while taking them seriously can become a means of holding the profession accountable: if lawyers do not live up to the values and promises made in the *Rules* then the privileges granted in them, including the monopoly over the practice of law, can be justifiably stripped away.

II. WHO IS SERVED BY THE *RULES*? THE ABA'S TRADITIONAL ANSWERS, CRITICISMS, AND THE BEST DEFENSE OF THE *RULES*

The ABA claims that the *Rules* serve and protect clients, as opposed to lawyers, and that their service to clients is balanced by commitments to the legal system and the public good. These claims are not proven. Rather, they are based on a set of assumptions about clients, lawyers and the practice of law. This Part spells out the ABA's claims about the *Rules*, explains the assumptions the claims are based on, assesses the critiques of the *Rules*, and dismisses the ABA claims as unpersuasive. It then develops the best defense of the *Rules* based on the assumptions they make, namely, that the *Rules* serve the public by serving clients.

A. THE ABA'S ANSWERS: CLIENTS, THE LEGAL SYSTEM AND THE PUBLIC

The ABA's traditional short-version answer to the question "who is served by the *Rules*?" is "clients."[24] To give but a few examples, Rule 1.1 protects clients from incompetent lawyers.[25] Rule 1.2 ensures that clients exercise autonomy in deciding the objectives of the attorney-client relationship and protects clients from lawyers who might usurp their decision-making capacity.[26] Rule 1.3 protects clients from procrastinating attorneys.[27] Rule 1.4 ensures that lawyers communicate reasonably with clients about the subject matter of the representation, protecting clients' informed participation in the representation.[28] Rule 1.5 protects clients from unreasonable fees.[29] Rule 1.6 protects clients' information relating to the representation from unauthorized disclosure by lawyers and from the

23. MODEL RULES pmbl. cmts. 10–12.
24. Schneyer, *supra* note 2.
25. MODEL RULES R. 1.1.
26. *Id*. at R. 1.2(a).
27. *Id*. at R. 1.3 cmt. 3.
28. *Id*. at R. 1.4 cmts. 1, 5.
29. *Id*. at R. 1.5(a).

prying eyes of third parties.[30] Rules 1.7–1.11 protect clients from disloyal lawyers by prohibiting representations tainted by conflicts of interest.[31]

In instances in which the *Rules* seem to advance the interests of lawyers at the expense of non-lawyers, the ABA is quick to explain that the benefit to lawyers is but a byproduct of the protection afforded to clients. Rule 1.6(a) may give lawyers a competitive edge in the marketplace over non-lawyers who cannot offer their clients similar informational protections,[32] but the *Rules* insist that confidentiality, even if beneficial to lawyers, is essential to ensure the trust which is the hallmark of the attorney-client relationship.[33] Without confidentiality, explain the *Rules*, lawyers would not be able to effectively serve clients' interests.[34] Similarly, Rules 5.4 and 5.5, which codify aspects of the legal profession's monopoly over the provision of legal services and appear to be a par excellence examples of self-serving rules to the extent that they exclude non-lawyers from the market for legal services,[35] are explained in terms of client protection, ensuring that clients receive high quality legal services from qualified providers, namely, lawyers.[36]

Indeed, even where the *Rules* appear to prefer the interests of lawyers to those of clients, the ABA insists on the client protection rationale. Rule 1.6(b)(5)'s exception to confidentiality, allowing lawyers to disclose confidential information to collect their fees from clients may seem self-serving but it is incidental to the legal services clients receive from lawyers.[37] Rule 1.6(b)(7)'s exception, permitting disclosure of conflict-checking information seemingly advancing lawyers' interest in mobility, is explained in terms of resolving conflicts of interest to the benefit of clients.[38]

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30. *Id.* at R. 1.6(a), (c).

31. *See id.* at R. 1.7–1.11.

32. *See* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 4 (1998).

33. MODEL RULES R. 1.6 cmt. 2 ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation . . . . This contributes to the trust that is the hallmark of the client-lawyer relationship.").

34. *Id.* ("The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.").

35. *See id.* at R. 5.4–5.5 & R. 5.5 cmt. 1 ("a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.").

36. *See generally* DEBORAH L. RHODE, ACCESS TO JUSTICE 79–102 (2004) (summarizing and criticizing the legal profession's justifications for its monopoly over the provision of legal services).

37. MODEL RULES R. 1.6(b)(5) cmt. 11.

38. *Id.* at R. 1.6(b)(7) cmt. 13:

> Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice.

The ABA's traditional assertion, that the *Rules* protect clients, is consistent with the social bargain theory.[39] First class citizenship in a highly regulated liberal democracy requires a nuanced understanding of the law.[40] The law, however, is complex, difficult, and specialized, and as lay people, clients cannot understand it and therefore cannot assess the quality of legal services they receive from their lawyers.[41] The people thus strike a social bargain with the legal profession: the bar, acting through the ABA and state supreme courts, promulgates and enforces rules of professional conduct designed to protect clients by guaranteeing the quality of legal services; and the public, in return, grants the bar a monopoly over the provision of legal services.[42] Thus, the *Rules* are the embodiment of the social bargain, protecting vulnerable clients from lawyers and others.

While the ABA's short-version answer addresses a concern that the *Rules* may advance the interests of lawyers at the expense of clients and non-lawyers, it does little to address a fear that the *Rules* may advance the interests of clients at the expense of all others. To address this second concern, the ABA has a long-version, more nuanced answer: although the primary beneficiaries of the *Rules* are clients, the *Rules* also purport to serve and protect other constituents. Under the *Rules*, lawyers are not only "representatives of clients" but also "officers of the legal system" and "public citizens with a special responsibility for the quality of justice."[43] For example, Rule 3.3 specifies a duty of lawyers as officers of the legal system to protect courts from false evidence.[44] Rule 5.6(b) prohibits attorneys from making agreements "in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy,"[45] even if such agreements would serve the interests of current plaintiffs-clients by inducing favorable settlement offers from defendants. The prohibition is explained in terms of protecting the public and future clients, because the agreeing lawyer "might be the very best available talent to represent these individuals."[46] Rule 6.1 specifies an aspirational duty of lawyers as public citizens to provide free legal services for

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39. *See* Eli Wald, *An Unlikely Knight in Economic Armor: Law and Economics in Defense of Professional Ideals*, 31 SETON HALL L. REV. 1042, 1075 (2001) (applying Arrow's insights to the legal profession and advocating "an implicit social contract in which the legal profession guarantees the quality of legal services, and in return . . . is granted effective self-regulation of the behavior of its members" (citation omitted)); Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941 (1963).

40. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. BAR FOUND. RES. J. 613, 617 (1986).

41. Wald, *supra* note 39, at 1075.

42. *Id.*

43. MODEL RULES pmbl. cmt. 1.

44. *Id.* at R. 3.3(a)(3) & 3.3(b).

45. *Id.* at R. 5.6(b).

46. See Ronnie Gomez, *Ethical Rules in Practice: An Analysis of Model Rule 5.6(b) and its Impact on Finality in Mass Tort Settlements*, 32 REV. LITIG. 467, 476 (2013) (analyzing rule 5.6(b) and ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 371 (1993), which applied Rule 5.6(b) to the representation of clients in mass torts.).

those who cannot afford to pay for them.[47] Thus, the *Rules* purport to strike a balance and have lawyers act not only for clients but also for the legal system and the public.

Yet, while the *Rules* describe lawyers as three-legged stools, who owe equal duties to clients, the legal system, and the public,[48] a mere cursory inspection of the *Rules* reveals that this description is mostly a rhetorical ploy. The vast majority of the *Rules* deal with the attorney-client relationship and with duties lawyers owe their clients. Only a handful of rules specify lawyers' duties as officers of the legal system and these duties only pertain to a small subset of lawyers, namely litigators and trial attorneys.[49] Even fewer rules address lawyers as public citizens, spelling out not duties but aspirational goals.[50] Thus, rhetoric notwithstanding, it is clear that the *Rules* primarily serve and protect clients and secondarily serve and guide lawyers' conduct while paying only minimal attention to serving and protecting the public.

A weaker and more credible version of the lawyers as three-legged stools account is that although the *Rules* do not impose thick duties on lawyers as officers of the legal system and as public citizens, they do serve the public by constraining what lawyers can do on behalf of clients.[51] For example, although clients get to decide the objectives of the representation,[52] the *Rules* prohibit lawyers from assisting clients to pursue criminal or fraudulent goals,[53] and mandate withdrawal when "the representation will result in violation of the rules of professional conduct or other law."[54] Moreover, the *Rules* grant lawyers discretion to reveal the client's confidential information to the extent reasonably necessary "to prevent reasonably certain death or substantial bodily harm,"[55] and "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's

47. MODEL RULES R. 6.1.

48. *Id*. at pmbl. cmt. 1. *See* Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 ST. MARY'S L.J. 909, 929 (2009).

49. Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 245–47 (2014) (arguing that the *Rules* are biased toward litigators and trial attorneys considering predominantly their ethical challenges to the exclusion of the challenges faced by other types of lawyers).

50. *See* Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323, 1323–25 (2009) (examining the "special responsibilities" of lawyers as "public citizens").

51. Notably, by "thick" professional duties I mean meaningful, detailed, spell-out duties to advance the public interest and the public good. Professor Spaulding has used the term of art "thick" professional duties differently, to criticize intense identification between lawyer and client. *See* Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 6 (2003).

52. MODEL RULES R. 1.2(a).

53. *Id*. at R. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . .").

54. *Id*. at R. 1.16(a)(1).

55. *Id*. at R. 1.6(b)(1).

commission of a crime or fraud."[56] The *Rules* also prohibit a lawyer, while representing a client, from making a false statement of material fact or law to a third person.[57] In this more modest sense, the *Rules* protect the public by limiting what lawyers can do on behalf of clients.

B. UNDERSTANDING THE ABA'S CLAIMS ABOUT THE *RULES*: THE IMPLICIT ASSUMPTIONS UNDERLYING THE *RULES*

The ABA's short-version claim that the *Rules* protect clients and its long-version claim that the *Rules* protect clients, the legal system, and the public are grounded in and supported by a set of implicit assumptions the *Rules* make about clients, lawyers, and the practice of law. To begin with, the *Rules*' focus on clients and their lawyers to the relative exclusion of other constituents is not a coincidence or an oversight. Rather, it is a function of the American context and legal culture. In America law is king,[58] and lawyers are high priests of law as a civic religion,[59] members of a governing class,[60] if not a de facto aristocracy.[61] Thus, the relative silence of the *Rules* regarding the role of lawyers as officers of the legal system and as public citizens is explained in part by the assumption and cultural expectation that in America lawyers will act as civic priests and teachers,[62] routinely going back and forth from serving clients privately to serving the public and the public interest as government lawyers, elected officials, politicians, and business non-profit leaders.[63] Moreover, even while serving clients, the *Rules* assume lawyers will regularly act as statespersons, advising clients how to pursue their interests consistent with the public interest.[64]

This assumption reflected the understanding of the elite lawyers who led the drafting of the ABA's *1908 Canons* (the *Canons*), the first national code of professional conduct. In the first half of the nineteenth century, American lawyers were brought up on William Blackstone's Commentaries on the Laws of

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56. *Id.* at R. 1.6(b)(3).

57. *Id.* at R. 4.1(a).

58. THOMAS PAINE, COMMON SENSE 29 (London 1776) (observing "that in America The Law Is King").

59. Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1879-1910*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51–74 (Gerald W. Gawalt ed., 1984).

60. *See generally* Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. ROUNDTABLE 381 (2001).

61. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 301–11 (Arthur Goldhammer trans., Library of Am. 2004) (1835) (discussing the status of lawyers as America's aristocracy).

62. Bruce A. Green & Russell G. Pearce, *"Public Service Must Begin at Home": The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1213 (2009).

63. *See* Robert W. Gordon, *The Citizen-Lawyer - A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1176 (2009) [hereinafter *Citizen-Lawyer*]; Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 235, 265–66 (1990) [hereinafter *Public Calling*]; Robert W. Gordon, *Lawyers as the "American Aristocracy": A Nineteenth-Century Ideal that May Still Be Relevant*, 20 STAN. LAW. 4–7 (1985) [hereinafter *Lawyers as the "American Aristocracy"*].

64. *See generally* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993) (exploring the role of attorneys as lawyer-statespersons).

England, in which Blackstone asserted that lawyers were gentlemen and professionals.[65] Indeed, "the development of ethical rules for the Bar in the late nineteenth and early twentieth centuries stemmed, in large part, from a desire to set the law practice at a distance from other trades and professions by limiting the business aspects of practice."[66] Instead of merely pursuing wealth, lawyers were expected to practice as gentlemen, advising clients and leading in the public interest.

This belief was inspired by the spirit of the Progressive Era, reflecting a hope that the moral standards of the population could be improved by lawyers.[67] As Professor Carle explains, "[t]his Progressive spirit blended with the longer-standing jurisprudential commitment of some elite lawyers to the development of 'legal science' based on a search for basic, internally coherent principles underlying the common law."[68] That commitment—grandiose and perhaps pompous when viewed with contemporary lenses—nonetheless prompted lawyers during the late nineteenth century to regularly take part, in addition to representing clients, in moderate reform activities to codify and advance procedural and substantive law.[69] In the early twentieth century, some members of the ABA active in drafting the *Canons* saw the undertaking as a continuation of the process of rationalizing the law in the public spirit.[70] Thus, the *Rules*' focus on the role of lawyers as representatives of clients was informed by social and cultural norms and expectations about the roles of lawyers-gentlemen as officers of the legal system and as public citizens.

Indeed, the *Rules* make specific assumptions about clients, lawyers, the practice of law, and the regulation of legal services.[71] The *Rules* focus on clients because, consistent with basic agency law premises, they assume that clients are generally vulnerable and therefore in need of protection.[72] Clients are assumed to be "triply vulnerable": to the state, "to themselves, in the sense that they frequently underestimate their need for legal services," and "to their attorneys,

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65. Michael Hoeflich, *Ethics and the "Root of All Evil" in Nineteenth Century American Law Practice*, 7 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 160, 162–63 (2017).

66. *Id*. at 163.

67. Susan D. Carle, *Lawyers' Duty To Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 7 (1999) (internal citations omitted).

68. *Id*. *See* Gordon, *supra* note 59, at 52; Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise*, *in* PROFESSIONALS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (G. Geison, ed, 1983).

69. Carle, *supra* note 67, at 7.

70. *Id*.

71. David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, *in* EVERYDAY PRACTICE AND TROUBLE CASES 68, 70–79 (Austin Sarat, Marianne Constable, David Engel, Susan Lawrence & Valerie Hans eds., 1998) (describing the "traditional model" of the law governing lawyers as relying on four sets of assumptions about lawyers, clients, the nature of legal advice, and the workings of legal ethics).

72. *Id*. at 73.

whose services they both need and cannot understand."[73] In particular, clients are assumed to be relatively unsophisticated individuals,[74] who seek legal advice and counsel when they are in trouble. Some clients certainly fit this profile, for example, a criminal defendant who faces the death sentence or a long prison sentence,[75] an immigrant facing deportation,[76] a pedestrian hurt in a car accident,[77] a homeowner facing eviction or repossession,[78] a small business owner facing loss of the enterprise, or a taxpayer facing the IRS. While the profession is fond of highlighting clients' vulnerability to the state, all of these examples also manifest clients' vulnerability vis-à-vis their lawyers. Other clients, of course, do not fit the bill, for example, large entity-clients or sophisticated and powerful individuals,[79] yet the *Rules* assume clients are more or less a uniform monolith in need of protection.[80]

As importantly for purposes of understanding their client-centered approach, the *Rules* assume that most individuals with legal needs could and would become paying clients in our pay-to-play system, or more accurately, pay-to-be-represented apparatus.[81] Or, at least, that all those with meritorious legal needs would become clients if only the *Rules*, in conjunction with other legal devices, would facilitate greater access, for example, by means of class actions[82] and contingency fees.[83] The significance of this assumption cannot be overstated. While the *Rules* technically acknowledge the existence of people who cannot afford legal services, stating that "every lawyer has a professional responsibility to provide legal services to those unable to pay"[84] and recognizing "the critical need for legal services that exists among persons of limited means,"[85] the *Rules* marginalize and trivialize the phenomenon. Not only is the pro bono professional responsibility

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73. *Id.*

74. *Id.*

75. *See, e.g.*, Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

76. *See, e.g.*, Richard L. Abel, *Practicing Immigration Law in Filene's Basement*, 84 N.C. L. REV. 1449 (2006).

77. *See, e.g.*, Stephen Daniels & Joanne Martin, *"The Impact That It Has Had Is Between People's Ears:" Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453 (2000).

78. *See, e.g.*, William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991).

79. *See, e.g.*, David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2080–84 (2010).

80. *See* Wald, *supra* note 49, at 248–51.

81. In the criminal context, where this assumption was never plausible because the majority of clients-defendants cannot afford legal representation, representation is guaranteed by the U.S. Constitution. *See* Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1287–90 (2013).

82. *See* FED. R. CIV. P. 23. *See generally* A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441 (2013).

83. MODEL RULES R. 1.5(c).

84. *Id.* at R. 6.1.

85. *Id.* at R. 6.1 cmt. 2.

voluntary and aspirational,[86] but the challenge of insufficient access to legal services by those who cannot afford to pay is discussed in earnest only in this one voluntary, aspirational, tucked-away comment in Chapter 6 of the *Rules*,[87] following dozens of rules that deal with paying clients. Thus, the design, structure, and content of the *Rules*, by dealing mostly with paying clients, imply that nonpaying clients are a phenomenon worthy of little attention and further imply that individuals with problems and legal needs would ordinarily choose to become paying clients.[88] This assumption, in turn, justifies the *Rules*' focus on clients.

Lawyers, correspondingly, are assumed to be well-regarded professionals who possess knowledge and expertise their clients do not have.[89] Having gone through seven years of study, lawyers are educated and sophisticated, and, as lawyers and gentlemen, benefit from elevated social, cultural, and economic status, making them powerful vis-à-vis their clients.[90] Once again, some lawyers better fit this assumption than others, but the *Rules* assume that lawyers too are a more or less uniform group, from which clients need protection.[91] This universalist assumption "implies that differences among lawyers are relatively unimportant in the area of ethical decision making," and that "distinctions in the tasks lawyers perform[,] . . . the subject areas in which they practice[,] . . . the clients they represent[,] . . ." and "the setting in which they work" carry little significance.[92] This in turn means that a one-size-fits-all approach can effectively regulate all lawyers, the very approach undertaken by the *Rules*.[93]

Finally, the *Rules* make three assumptions about the practice of law. First, that the practice of law by all lawyers shares basic common traits. This, to be sure, does not mean that the *Rules* ignore one of the more salient practice realities of the twentieth century: increased specialization.[94] Rather, it is that the *Rules* sensibly assume that increased specialization notwithstanding, the practice of law by all lawyers, from litigators to transactional lawyers, from private to government lawyers, and across practice areas, shares common features such as the needs for

86. Rule 6.1 continues, "A lawyer should aspire to render at least (50) hours of pro bono legal services per year." *Id.* at R. 6.1.

87. *Id.* at R. 6.1 cmt. 2.

88. Wilkins also points out that the *Rules* assume that individuals' problems would naturally become legal problems in the sense that what individuals would ordinarily "want to 'win' are legal rights in *legal* fora." Wilkins, *supra* note 71, at 74.

89. Arrow, *supra* note 39.

90. Wilkins, *supra* note 71, at 74.

91. *Id.*

92. *Id.* at 71–72.

93. *See* MODEL RULES pmbl. In rare circumstances, the *Rules* do deviate from this one-size-fits-all approach, imposing unique obligations on specific types of lawyers. See, *e.g.*, MODEL RULES R. 3.8 (detailing the special responsibilities of prosecutors in criminal cases).

94. *See* Geoffrey C. Hazard, *Imputed Conflicts of Interest in International Law Practice*, 30 OKLA. CITY U. L. REV. 489, 511 (2005) (describing increased specialization as a law practice trend); *see also* KRONMAN, *supra* note 64 (arguing that increased specialization characterizes modern law practice and deprives lawyers of the perspective and opportunity to exercise practical wisdom and act as lawyer-statespersons).

confidentiality and effective communications, the duty of loyalty, and the expectation of competent representation.[95] Relatedly, the *Rules* assume that all lawyers are professionals. Once again, this does not mean that the *Rules* turn a blind eye to the differences in status and compensation among members of the profession,[96] as well as to the rise of new categories of weak lawyer-employees, who do not meet some of the defining characteristics of powerful professionals.[97] Nonetheless, it means that the *Rules* assume all lawyers are professionals and as such share common traits such as requiring a substantial period of formal education, mastery of esoteric knowledge, elevated social and economic status, and commitment to the public good.[98]

Second, the *Rules* assume that, consistent with the social bargain theory, lawyers should have a monopoly over the provision of legal services, explained in terms of a benefit to clients who cannot independently assess the quality of legal services they receive.[99] The assumption that the legal profession's monopoly serves clients and the public interest by ensuring the quality of legal services clients receive allows the *Rules* to exclude,[100] and mostly ignore, non-lawyers as providers of legal services and potential competitors of lawyers. Notably, it may seem like an overstatement to assert that the *Rules* exclude non-lawyers from the practice of law. On their face, the *Rules* apply to lawyers only, and since they do not apply to non-lawyers, they do not have the power to exclude non-lawyers from practicing law. Rather, it is states' unauthorized practice of law (UPL) statutes that exclude non-lawyers from the practice of law. Moreover, the *Rules*' stance on the monopoly of lawyers appears quite modest: prohibiting lawyers from offering legal services in collaboration with and sharing legal fees with non-lawyers,[101] and prohibiting lawyers from assisting non-lawyers with practicing law.[102]

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95. *See* Wald, *supra* note 49, at 257.

96. *See* Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1907 (2008); *see also* William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, 84 N.C. L. REV. 1691, 1742 (2006).

97. *See* Eli Wald, *In-House Pay: Are Salaries, Stock Options and Health Benefits a "Fee" Subject to a Reasonableness Requirement and Why the Answer Constitutes the Opening Shot in a Class War between Lawyer-Employees and Lawyer-Professionals*, 20 NEV. L.J. 243, 277–89 (2019) (describing the rise of a new class of lawyer-employees).

98. *See* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975); *see also* Wilkins, *supra* note 71. Treating all lawyers as professionals allows the *Rules* to demand rule compliance from all attorneys, irrespective of their varying degrees of power. See, *e.g.*, MODEL RULES R. 5.2(a) (stating that a subordinate "lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.").

99. *See* MODEL RULES pmbl. cmts. 10–12.

100. *See id.* at R. 5.4–5.5.

101. *See id.* at R. 5.4. For an excellent analysis of the UPL aspects of Rule 5.4, see Bruce A. Green, *Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate,* 84 MINN. L. REV. 1115 (2000).

102. *See* MODEL RULES R. 5.5(a) ("A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, *or assist another in doing so.*") (emphasis added).

Yet the history of UPL state statutes, the role the ABA played in enforcing them, and the position taken in the *Rules*' predecessor codes shed a revealing light on the *Rules*' contemporary mild stance to sustain the legal profession's monopoly. "In the colonial period, courts adopted UPL rules to control those who appeared before them. . ." but "[o]utside the courtroom . . . nonlawyers were free to engage in a wide range of activities which would be considered UPL today, such as giving legal advice and preparing legal documents."[103] This era of non-lawyer practice, explains Denckla, ended after the Civil War with the rise of bar associations and the corresponding growth of the lawyer professionalism movement, lobbying for the passage of broad UPL statutes.[104] Although until the 1930s, these statute were rarely invoked against non-lawyers, bar associations subsequently played a key role in systematically bringing lawsuits to enforce them.[105]

The ABA led the way. In 1930, it appointed a committee to address the topic of the unauthorized practice of law, which offered guidance to state and local bars and other authorities investigating UPL complaints.[106] In 1937, it amended the *Canons* "to include a strong attack on UPL,"[107] and in 1940, "ABA committees began to negotiate 'statements of principles' with other professionals and businesses seeking to limit competition with lawyers by proscribing certain conduct as UPL."[108] These efforts were immensely successful: by 1940, approximately 400 state and local bar associations had active UPL committees enforcing UPL statutes.[109] And although "[t]he actual work in the fight against unauthorized practice was done mainly at the state and local bar level, . . . valuable help, guidance, and direction came from the ABA committee."[110] Courts began to systematically rule in favor of bar associations seeking to enforce UPL statutes.

The rationale invoked by courts to prohibit UPL was in turn codified in the ethical considerations of the *Model Code of Professional Responsibility*, which replaced the *Canons*.[111] For example, Ethical Consideration 3-1 stated that "[t]he prohibition against the practice of law by a layman is grounded in the need of the

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103. Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2583 (1999).

104. *Id*. at 2583–84.

105. John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 90–91 (2000).

106. Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 8 (1981); *see also* RICHARD L. ABEL, AMERICAN LAWYERS 112–13 (1989) (discussing the efforts by the organized bar to encourage states to enact unauthorized-practice-of-law statutes).

107. Denckla, *supra* note 103, at 2584.

108. *Id*.

109. Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 1980 AM. BAR FOUND. RES. J. 159, 189 (1980).

110. *Id*. at 190.

111. Denckla, *supra* note 103, at 2593.

public for integrity and competence of those who undertake to render legal services."[112] Ethical Consideration 3-2 explained that "[t]he sensitive variations in the considerations that bear on the legal determinations often make it . . . essential that the personal nature of the relationship of client and lawyer be preserved,"[113] and Ethical Consideration 3-3 cautioned that a nonlawyer "is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer."[114] By the time the ABA replaced the *Mode Code* with the *Model Rules*, the UPL war was over, with all fifty states and the District of Columbia reserving the practice of law solely for licensed attorneys.[115] Not only could the ABA afford to take the mild monopoly-sustaining approach reflected in Rules 5.4 and 5.5, but it was prudent to do so given the risk that the U.S. Supreme Court, state courts, and even state legislatures may find a stronger stance anticompetitive and illegal and take appropriate action.[116]

Third, the *Rules* assume that our laws are generally just, such that lawyers, by practicing and upholding the law, pursue justice, even if in particular cases justice is not advanced. Similar to the assumption the *Rules* make about would-be clients ordinarily becoming paying clients, the assumption about the law being just is infused throughout the structure and content of the *Rules*. For example, although Rule 1.2(d) generally states that "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent," it adds that a lawyer "may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."[117] Thus, the *Rules* strongly imply that our laws in general are valid and just, that their meaning is clear, and that only as an exception and on the margin would lawyers be justified in helping clients determine the validity and meaning of the law.

Similarly, the comment to Rule 1.6 states that "[a] fundamental principle in the client-lawyer relationship is that . . . the lawyer must not reveal information relating to the representation."[118] Explaining the rationale of the rule, the comment notes that broad confidentiality "contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter."[119] Importantly,

> The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, *clients come to lawyers in order to determine* their rights and

112. MODEL CODE OF PROF'L RESPONSIBILITY EC 3-1 (1980) [hereinafter MODEL CODE].

113. *Id.* at EC 3-2.

114. *Id.* at EC 3-3.

115. *See* Dzienkowski & Peroni, *supra* note 105, at 90–91.

116. *See id.* at 93–94. *See also* Joyce Palomar, *The War Between Attorneys and Lay Conveyancers-Empirical Evidence Says "Cease Fire!"*, 31 CONN. L. REV. 423, 471–74 (1999).

117. MODEL RULES R. 1.2(d).

118. *Id.* at R. 1.6 cmt. 2.

119. *Id.*

> *what is*, in the complex of laws and regulations, deemed to be *legal and correct*. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.[120]

Thus, the *Rules* imply that our laws are just, conduct in violation of the law is "wrongful," our laws are "correct," and upholding the law is desirable.

These assumptions about clients, lawyers, and the practice of law support the profession's long-version claim that lawyers are three-legged stools, who serve clients, the legal system and the public, notwithstanding the *Rules*' client-centered focus and approach. Assuming easy access to lawyers and legal services by most would-be clients, supposing our laws are generally just such that justice is advanced by upholding the law, and relying on lawyers-gentlemen to act as lawyer-statespersons while representing clients and as public citizens outside of their practice of law, the *Rules* can credibly claim that by focusing on the role of lawyers as representatives of clients, by protecting clients, and by limiting what lawyers can do on behalf of clients, they serve the public interest. However, as detailed below, these assumptions no longer hold true.[121]

C. THE TWENTIETH CENTURY'S CRITIQUES OF THE *RULES*

Over the course of the twentieth century, commentators have criticized the *Rules* from at least two perspectives. Historically, critics have established that the *Rules* and their predecessors, early state codes and the ABA *Canons*,[122] were not adopted to protect clients and the public, but rather, to enshrine the privilege of the elite legal profession at the time and exclude and discriminate against "undesirable,"[123] would-be newcomers to the profession, such as immigrants, ethno-religious minorities, working class graduates of part-time and night-time law schools, lawyers of color, and women attorneys.[124]

The historical discriminatory critique proceeds in two steps. It begins with the historical record, documenting why the ABA promulgated the *Canons*. "[H]istorians have investigated the sociopolitical setting in which the ABA Ethics Committee undertook to draft the *1908 Canons*, and depicting that setting therefore requires only a summary sketch here."[125] The ABA was motivated to draft a national model code of legal ethics based on a confluence of factors. These included the American Medical Association's adoption of a code of professional ethics in 1903,[126] the influence of the Progressive Era to reform the law, legal

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120. *Id*. (emphasis added).

121. *See infra* Part III.

122. CANONS OF PROF'L ETHICS (1908); *see* Pearce, *supra* note 60, at 399–400; *see also* James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2399–2400 (2003).

123. *See* ABEL, *supra* note 106, at 85–90.

124. *Id*.; *see also* JEROLD S. AUERBACH, UNEQUAL JUSTICE (1976); MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876 (1976).

125. Carle, *supra* note 67, at 7 (internal citations omitted).

126. *Id*.

formalism's wish to see the law (including the law governing lawyers) develop as a coherent code-like legal science,[127] and a desire to respond to the public's perception of lawyers as corrupt and greedy.[128] These factors had little to do with directly protecting clients or the public.

At the same time, a different concern about the growing "commercialism" of law practice was expressed by an elitist sector of the legal profession. As Professor Auerbach has described, some within the ABA opposed the influx of "new" lawyers into the profession, especially those from immigrant backgrounds and low socioeconomic classes.[129] The well-connected elite looked with disdain on the "scrambling," "ungraceful" efforts to gain business engaged in by some newcomers to the bar, and condemned these lawyers for lacking proper socialization into "American" values.[130] As Carle explains, inspired by this mix of high-minded and less noble discriminatory motives, ABA President George R. Peck appointed a committee in 1905 to consider drafting a code of ethics for the American bar.[131] Given this history, according to critics, portraying the *Canons* in terms of client protection and the public interest smacks of contemporary rationalization or rewriting history.

The second step of the discriminatory critique consists of showing that the *Rules*, as a product of historical path-dependency, continue to closely follow the *Canons* and their underlying rationales. Professor Rice Andrews, for example, has argued that the *1908 Canons* were "largely a verbatim restatement of the 1887 Alabama State Bar Association Code of Ethics,"[132] and that the *Canons*, the *Model Code*, and the *Rules*, which replaced the *Model Code*, "are remarkably similar over time."[133] Sharing the core concepts of litigation fairness, competence, loyalty, confidentiality, reasonable fees, and public service rhetoric, Rice Andrews has concluded that while "modern codes have made significant advances, [] the primary changes have come in the degree of detail and the regulatory effect of the standards of conduct, not in the core duties."[134] Professor Ariens has similarly shown that the reasons behind replacing the *Canons* with the *Model Code* and later with the *Rules* had more to do with elitist attitudes within the ABA and responding to public critiques of the profession than with a desire to protect clients or guide lawyers' conduct.[135] Professor Morgan has painstakingly demonstrated that the

127. *Id*.

128. *Id*. at 7–8; *see also* Hoeflich, *supra* note 65, at 163.

129. AUERBACH, *supra* note 124, at 43–130.

130. *Id*.

131. Carle, *supra* note 67, at 15–16.

132. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1385 (2004).

133. *Id*. at 1386.

134. *Id*.

135. Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 433–51 (2008).

Model Code systematically preferred the interests of clients and indeed of lawyers themselves to the public interest and to promoting justice.[136]

A second twentieth century critique features a unique coalition of left-leaning critical scholars and right-leaning economists, arguing that the *Rules* are a thinly-veiled attempt to justify the legal profession's unfair monopoly over the provision of legal services. Critical scholars have argued that the practice of law is not a natural monopoly justified by economics of scale, the efficient provision of public goods, or concerns about collective action (e.g., energy utilities, water systems, technological infrastructure). Rather it is a monopoly explained by nothing more than the powerful and successful lobbying campaign of the legal profession.[137] The legal profession has a monopoly over the provision of legal services because it lobbied and litigated for it early on and fought to maintain it ever since.[138]

This critique is supported by conservative scholars who argue that the bar's professionalism claims embodied by the *Rules* are little more than professional mystique designed to justify its monopoly.[139] It may be true, critics concede, that some or even most clients cannot assess the quality of legal services, but that does not justify granting the bar a monopoly over the provision of legal service,[140] any more than it would justify granting auto mechanics a monopoly over automobile repair. Put differently, customers' inability to assess the quality of goods and services is a concern that can be addressed by means other than monopolies, for example, by licensure requirements ensuring competence, by the adoption of consumer protection laws, and by imposing liability for poor performance. Thus, whereas the ABA asserts that the *Rules* protect clients and not lawyers, critics retort that the monopoly over the provision of legal services provides the profession with the benefit of exclusive self-regulation. Moreover, the bar's monopoly inflicts real, significant harm on the public: it results in uncompetitive, high, monopolistic legal fees, which in turn exclude would-be clients with meritorious claims who cannot afford to pay for lawyers' services.[141] Both groups of critics have called for the deregulation of the legal profession's monopoly in the name of offering more clients a more competitive market for legal services.

D. AN UNEASY STATUS QUO: THE *RULES* AT THE DAWN OF THE TWENTY-FIRST CENTURY

Throughout the past century, the ABA has revised the *Rules* continuously, pursuing two agendas. First, consistent with a shift in the dominant ideology of

136. Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 706–07 (1977).

137. *See* ABEL, *supra* note 106; MAGALI S. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977); Morgan, *supra* note 136, at 707–12.

138. ABEL, *supra* note 106; *see also supra* notes 103–120 and corresponding text.

139. *See, e.g.*, RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 185–211 (1999).

140. *Id.*

141. DEBORAH L. RHODE, IN THE INTEREST OF JUSTICE 143–83 (2003).

professionalism from one in which lawyers were perceived to be benevolent gentlemen to one in which lawyers are understood to be agents serving clients in a competitive, meritorious marketplace,[142] the ABA has acknowledged that self-regulation cannot be assumed but must be enforced. That is, rather than assume that lawyers as professionals would do the right thing (the approach taken by the old *Canons* and their wishful thinking standards), the ABA first adopted the *Model Code*,[143] and then replaced it with the current *Rules*, pursuing a clear trend of replacing aspirational standards with enforceable disciplinary rules.[144]

Second, the ABA, implicitly acknowledging that early state codes and the *Canons* reflected the practice realities of the late nineteenth century in which most lawyers were WASP, male, general litigators who practiced individually in an adversarial model, has continuously attempted to expand the scope and application of the *Rules*.[145] Responding to the decline of litigation and general law practice as the paradigm for the practice of law and the corresponding rise of transactional work and increased specialization as common trends,[146] as well as the growth of law firms and technological advances impacting lawyers' practice realities,[147] the ABA has tried to add examples to the *Rules* from non-litigation areas of practice.[148] Responding in part to the challenge that the *Rules*' emphasis on adversarial zeal was gendered and inconsistent with some lawyers' perspectives,[149] the ABA has deleted all references to adversarial zeal from the *Rules*, retaining but three such references in the Preamble and the comments.[150] Acknowledging the gradual shift from solo practice to law firms as the dominant organizational unit of law practice, the ABA has attempted to add provisions in the *Rules* that deal with law firms as opposed to lawyers as individuals.[151] Moreover, the ABA has treated

142. Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245 (2010); Russel G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995).

143. MODEL CODE OF PROF'L RESPONSIBILITY (1969).

144. MODEL RULES OF PROF'L CONDUCT (1984).

145. *See* Wald, *supra* note 49.

146. *Id*. at 243–56.

147. Eli Wald, *Legal Ethics' Next Frontier: Lawyers and Cybersecurity*, 19 CHAPMAN L. REV. 501 (2016) (examining the then recent addition of Rule 1.6(c)).

148. *See, e.g*., MODEL RULES R. 1.7 cmt. 6 (explaining that direct adversity may arise in transactional matters).

149. *See* Carrie Menkel-Meadow, *Toward a Theory of Reciprocal Responsibility Between Clients and Lawyers: A Comment on David Wilkins' Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 901 (1998); Carrie Menkel-Meadow, *What's Gender Got to Do with It?: The Politics and Morality of an Ethic of Care*, 22 N.Y.U. REV. L. & SOC. CHANGE 265 (1996); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on A Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

150. *See, e.g*., MODEL RULES R. 1.3 cmt. 1 ("A lawyer must . . . act with . . . zeal in advocacy upon the client's behalf.").

151. MODEL RULES Ch. 5; *see also* Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Law Firms*, 39 S. TEX. L. REV. 245 (1998).

the *Rules* as universal, belittling the relevance of facets of lawyers' individual identity to their exercise of judgment as professionals.[152]

Most recently, the ABA has revised Rule 8.4, adding paragraph 8.4(g) to prohibit discrimination by lawyers in the practice of law.[153] Whether the ABA has been successful in overcoming the litigation, hired gun, WASP male, and individualistic biases of the *Rules* is a question that must be left to another day, but the ABA has certainly been trying to do so.[154]

In addition to reshaping the *Rules* as enforceable disciplinary rules and modernizing them, the ABA has revised the *Rules* on occasion in response to significant public pressure and the prospects of Congressional reform.[155] For example, following the accounting scandals of the early 2000s, calls of "where were the lawyers?" reflected public frustration with lawyers' assertions of broad confidentiality, understood by the public and critics to mean that "we could not disclose our clients' bad deeds because the information was confidential." With the threat of a Congressional regulatory response in the Sarbanes–Oxley Act of 2002 and related Securities and Exchange Commission rules looming, the ABA added three permissive exceptions to confidentiality.[156]

The ABA, however, has continued to defend lawyers' monopoly over the market for legal services on the ground that it embodies the social bargain and serves clients' interests and the public good.[157] The ABA opposed deregulation for as

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152. *See, e.g.*, Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577 (1993); Martha Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethics*, 150 U. PA. L. REV. 661 (2001); David B. Wilkins, *Beyond "Bleached Out" Professionalism: Defining Professional Responsibility for Real Professionals*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 207, 207, 218–25, 230–34 (Deborah L. Rhode ed., 2000); Martha Minow, *Not Only For Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647 (1996).

153. MODEL RULES R. 8.4(g).

154. Wald, *supra* note 49. Some critics have argued that in taking a stance against discrimination, the ABA could have done more. For example, Root Martinez asserts that by the time it took anti-discrimination action, the ABA should have addressed in the *Rules* not only explicit discrimination but also implicit bias. *See* Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805 (2019). Others have argued that the ABA has gone too far with its commitment to overcome discrimination and enhance diversity. *See, e.g.*, Debra Cassens Weiss, *Refusing to budge, top Florida court says ABA imposes CLE panel 'quotas,' state lawyers can't get credit for participation*, ABA J. (Dec 16, 2021), https://www.abajournal.com/news/article/top-florida-court-reaffirms-state-lawyers-cant-get-cle-credit-for-aba-programs-because-of-quotas [https://perma.cc/4LBM-QEVN] (reporting that the Florida Supreme Court banned Florida lawyers from receiving continuing legal education credit for programs that require diversity among panelists—including the ABA's CLE programs).

155. Rice Andrews, *supra* note 132, at 1386.

156. MODEL RULES R. 1.6(b)(2), 1.6(b)(3) & 1.13(c); *see* Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003); William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57 (2003).

157. Laurel S. Terry, *Putting the Legal Profession's Monopoly on the Practice of Law in a Global Context*, 82 FORDHAM L. REV. 2903 (2014); THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 71–83 (2010) (summarizing and criticizing the ABA's attempts to reinforce the legal profession's monopoly on the ground that it benefits clients and the public); William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 648 (2003).

long as it could,[158] and more recently, faced with emerging practice realities and calls to allow new, non-lawyer, legal service providers such as artificial intelligence (AI), has asserted that it ought to have a leading role in regulating non-lawyer legal service providers.[159]

Making sense of the ABA's allegiance to the client-centered, lawyers as three-legged stools approach in the face of the historical discrimination and the anti-monopolistic critiques is not a straightforward affair. Arguably, the ABA, having long ago secured a monopoly over the provision of legal services to the benefit of paying clients and its own members,[160] enforced by state UPL statutes and the courts, is brazenly simply ignoring critics. In a light more favorable to the ABA, however, one can argue that its approach is self-serving yet consistent with the public interest.

As to the historical critique, one can point out that viewed from a long-term perspective the *Canons*, *Model Code* and their state counterparts have generally failed in their attempt to restrict access into the profession.[161] Thus, even if predecessor codes of conduct were promulgated to serve the then-elite bar, divorced from their historical intent the *Rules* now serve clients, the legal system and the public.[162] This, to be clear, is not an assertion that the profession is welcoming to all, nor that following entry the profession offers equal advancement opportunities to all.[163] Quite the contrary, entry into the profession—especially for those who hail from a lower socioeconomic background—may have gotten more difficult as of late,[164] and

158. For example, in 2000 the ABA opposed relaxing Rule 5.4 to allow lawyers to collaborate with non-lawyers in multidisciplinary practices. *See* Linda Galler, *Problems in Defining and Controlling the Unauthorized Practice of Law*, 44 ARIZ. L. REV. 773 (2002). S*ee generally* Dzienkowski & Peroni, *supra* note 105; Green, *supra* note 101.

159. *See* ABA, Resolution 105 (2016), https://www.nccourts.gov/assets/inline-files/legal-3-1-16-ABA-Resolution-105.pdf?OpTcmpUqsJA3rvmmjIOYbSvmaANK6_VA [https://perma.cc/83QB-JN9E]. In 2022, the ABA House of Delegates affirmed its opposition to relaxing Rule 5.4, resolving that the sharing of legal fees with non-lawyers was "inconsistent with the core values of the legal profession." See ABA House of Delegates, Reaffirming Res. 00A10F, Aug. 9, 2022, at 1; Matt Reynolds, *Sharing Fees With Nonlawyers is Inconsistent With Profession's 'Core Values,' ABA House Says*, ABA J. (Aug. 9, 2022), https://www.abajournal.com/web/article/resolution-402-aba-house-of-delegates-position-on-sharing-of-legal-fees-with-nonlawyers [https://perma.cc/5UXF-WY2G].

160. Morgan, *supra* note 136.

161. ABEL, *supra* note 106.

162. *See supra* Part II.A.

163. *See generally* Eli Wald, *A Primer on Diversity, Discrimination and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011); David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998); David Wilkins & G. Mini Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996); Cynthia Fuchs Epstein, Robert Saute, Bonnie Oglensky & Martha Gever, *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 306 (1995).

164. Eli Wald, *Serfdom Without Overlords: Lawyers and the Fight Against Class Inequality*, 54 U. LOUISVILLE L. REV. 269 (2016).

wealth inequality within the profession has grown.[165] Rather, the more modest argument is that to the extent that early codes of professional conduct were designed to discriminate against newcomers and restrict entry into the profession, they ultimately failed,[166] and the *Rules* now, notwithstanding their earlier intentions, do protect clients and the public.

As to the anti-monopolistic critique, the ABA may retort that as long as the assumptions underlying the *Rules* hold, that is, as long as individuals with legal problems typically become vulnerable clients, most attorneys are powerful professionals who act as lawyer-statespersons and public citizens, and our laws are generally just, granting the legal profession a monopoly and expecting lawyers to act as three-legged stools serves the public interest. The challenge for the ABA, as we shall see in Part III, is that practice realities in the twenty-first century contradict the very assumptions that justify its lawyers as three-legged stools approach.

E. THE BEST DEFENSE OF THE *RULES*: PROTECTING THE PUBLIC BY PROTECTING CLIENTS

The ABA's long-version defense of the *Rules*—that they serve clients, the legal system, and the public by guiding lawyers to serve as three-legged stools, balancing competing interests as representatives of clients, officers of the legal system, and public citizens—lacks credibility. Even supposing the assumptions underlying the *Rules* hold, the *Rules*, contrary to their lofty rhetorical posturing, simply do not deliver the goods, focusing primarily on duties to clients and doing too little to develop in detail the duties of lawyers as officers of the legal system and as public citizens. Moreover, although the *Rules* do limit some lawyer conduct on behalf of clients, they do not do enough to strike effective balances between service to clients and service to the public, for example by curtailing wrongful client conduct in the public interest.[167]

In defense of the *Rules*, a defense the ABA itself has not attempted, one can argue that the ABA's short answer to the question "who is served by the *Rules*?"—"clients"—is in fact a shorthand to another answer—"the public and the public interest"—notwithstanding the profession's monopoly in the market for legal services. Such a defense—the best defense of the *Rules*—is that by serving clients through a monopoly, lawyers serve the public in three interrelated ways. First, because the *Rules* deem paying clients the paradigmatic clients and

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165. Lyle Moran, *State of the Profession 2021: BigLaw Proved to be Most Resilient to COVID-19*, ABA J. (Dec. 2021), https://www.abajournal.com/magazine/article/state-of-the-profession-2021-biglaw-proved-to-be-most-resilient-to-covid-19 [https://perma.cc/NDE2-N99U]; Joshua Holt, *Lawyer Salaries Are Weird*, BIGLAW INVESTOR (Sept. 28, 2021), https://www.biglawinvestor.com/bimodal-salary-distribution-curve/ [https://perma.cc/U4C9-AXVN] (documenting the growing pay inequality over time among junior lawyers entering the profession).

166. ABEL, *supra* note 106.

167. 170. *See, e.g.*, Allison Herren Lee, *Send Lawyers, Guns and Money: (Over-) Zealous Representation by Corporate Lawyers*, *in* PLI'S CORPORATE GOVERNANCE – A MASTER CLASS (Mar. 4, 2022), https://www.sec.gov/news/speech/lee-remarks-pli-corporate-governance-030422#_ftnref1 [https://perma.cc/N7RC-YK2K].

assume that when problems arise, whether private disputes or normative disagreements,[168] clients will be able to afford lawyers' fees and hire lawyers to represent their interests, disputes big and small will be channeled into the legal system and resolved in the public interest pursuant to the law.

Notably, this is not an argument akin to Adam Smith's Invisible Hand, pursuant to which the actions of self-interested individuals interacting in a free competitive marketplace will result in beneficial economic and social outcomes even if the individuals do not intend to bring about these outcomes.[169] This is because the practice of law is not a free competitive market but a monopoly, and because legal resolutions are not market outcomes. Still, in a society in which laws are just and most disputes are channeled to the legal system by clients, one can plausibly claim that by serving clients and upholding our laws, lawyers—exactly because of the monopoly they possess over legal dispute resolution in the United States—are serving the public interest. Some provisions of the *Rules* seem consistent with this reasoning. For example, although the United States Supreme Court has struck down the bar's minimum fee schedules scheme,[170] Rule 1.5(a)'s reasonableness of fees mandate stands, ensuring that the profession's monopolistic fees will be reasonable, arguably resulting in client access and affordability.[171]

A second, related, way that the monopoly over legal services serves the public is by upholding the Rule of Law. The *Rules* assume that clients are vulnerable, unsophisticated and deferential to their lawyers, and that lawyers use their power and influence to serve the public interest by dissuading clients from wrongdoing. By virtue of their monopoly, only lawyers can practice law and therefore no legal advice is given that fails to promote the Rule of Law. The comment to rule 1.6 states:

> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. *The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.* Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. *Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.*[172]

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168. Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?,* 61 FORDHAM L. REV. 275 (1992).

169. *See generally* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

170. Goldfarb v. Va. State Bar, 421 U.S. 773, 780, 793 (1975).

171. MODEL RULES R. 1.5(a); *see* Wald, *supra* note 97, at 246–62.

172. MODEL RULES R. 1.6 cmt. 2 (emphasis added).

Even assuming away some of the obvious shortcomings of this assertion—lawyers who violate the law,[173] and lawyers who are not in a position to know or assess whether their clients may commit wrongdoing, for example, subject matter experts who, due to their specialized perspective, do not have a big picture of the client's objectives, or outside counsel who lost their seat at the client's decision-making table to in-house lawyers[174]—the ABA has offered no support for this compound empirical assertion, to show that lawyers regularly advise clients to refrain from wrongful conduct or that clients follow such advice if it is given. Notably, lawyers are prohibited from advising and assisting clients in conduct that is criminal or fraudulent but not merely illegal.[175] Yet, not assisting clients in criminal or fraudulent conduct is a far cry from advising clients to refrain from wrongful conduct. Nonetheless, the comment reveals the ABA's belief that, by serving clients, lawyers serve the public interest by upholding the law.

Third, lawyers, either as "gentlemen" inspired by the Progressive spirit, or acting as public citizens, community leaders, elected politicians, and statespersons, serve the public interest directly.[176] Lawyers do this not by serving clients. Rather, building on their elevated social, cultural, and economic status in the United States as members of a governing class gained by virtue of their monopolistic position, lawyers regularly act as public citizens, serving the public and the public interest. Lawyers do this, for example, by running for political offices, serving in leadership positions of for-profit and non-profit organizations, volunteering on boards of community organizations, and acting as civics teachers. Thus, by guiding lawyers to serve clients, the legal system, and the public interest as public citizens, the *Rules* serve the public.

In sum, the best defense of the *Rules* is not the one advanced by the ABA pursuant to which they guide lawyers to serve as three-legged stools who effectively balance serving clients with serving the legal system and the public. Rather, the best defense for the *Rules* is that they serve the public by serving clients. Yet, this best defense is far from a great defense. Representing clients, lawyers do channel disputes, private and public, into the legal system; do support the Rule of Law; and do build the economic, social and cultural status that allows them to then serve as public citizens if they so desire. But representing clients who act lawfully but contrary to the public interest can inflict great harm on the public,[177] and there

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173. *See generally* RICHARD L. ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS (2008).

174. KRONMAN, *supra* note 64 (detailing outside counsel's loss of power and influence to in-house lawyers and lamenting the inability of large law firms' partners to act as lawyer-statespersons who exercise practical wisdom on behalf of clients and the public).

175. MODEL RULES R. 1.2(d).

176. *See Lawyers as the "American Aristocracy," supra* note 63, at 4–7; *Public Calling*, *supra* note 63, at 265–66; *Citizen-Lawyer*, *supra* note 63, at 1176. *See generally* Robert W. Gordon, *The Return of the Lawyer-Statesman?*, 69 STAN. L. REV. 1731 (2017) [hereinafter *Return of the Lawyer-Statesman*].

177. In other words, the effective representation of clients is a desirable objective but it is not the only desirable objective the *Rules* ought to pursue, because client representation may result in harm to others. David

are no guarantees that lawyers who can choose to act as public citizens will actually do so. Moreover, the serving the public by serving clients defense of the *Rules* is acutely dependent on the assumptions of easy client access to lawyers, powerful lawyers who can and do stand up to their clients in appropriate circumstances, and the justness of our laws, which as the next Part shows, are increasingly strained in the twenty-first century.

III. THE PRACTICE OF LAW IN THE TWENTY-FIRST CENTURY: NEW CHALLENGES TO THE *RULES*

Modern law practice realities have disproven many of the assumptions made by the *Rules*, the very assumptions that justify the ABA's lawyers as three-legged stools approach and the best defense of the *Rules* pursuant to which lawyers serve the public by serving clients.

A. CONTEMPORARY PRACTICE REALITIES: THE PRO SE CRISIS AND "LUMPING IT" IN THE INDIVIDUAL HEMISPHERE, THE DECLINE OF OUTSIDE COUNSEL AND THE DEMISE OF PROFESSIONAL STATUS IN THE CORPORATE HEMISPHERE

Three changes have challenged the *Rules*' assumptions about clients. First, the rise and growth of a class of large entity clients, dubbed by legal profession scholars the "corporate hemisphere."[178] These large entity clients, increasingly aided by in-house counsel,[179] are powerful and sophisticated and do not need protection from their lawyers.[180] Although the existence of a class of large, powerful, sophisticated entity clients would not in and of itself contradict the *Rules*' claim to protect clients in the sense that these clients could simply ignore or not take advantage of protections they do not need, the *Rules*' client-centered model applied not to vulnerable clients but to powerful entity clients may result in harm to the public good. Recall that early criticisms of lawyers selling out and overzealously representing the interests of large corporations to the detriment of the public good were among the reasons that drove the ABA to adopt the 1908

Luban eloquently made this point, noting the "crucial distinction between the desirability of people acting autonomously [with the assistance of lawyers] and the desirability of their autonomous act." David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. BAR FOUND. RES. J. 637, 639 (1987).

178. On the individual and corporate hemispheres of the legal profession, see JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319–20 (1982) (finding that the legal profession consists of two categories of lawyers whose practice settings, socioeconomic and ethno-religious backgrounds, education, and clientele differ considerably); JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 30–31, 44 (2005) (documenting that lawyers work in two fairly distinct hemispheres—individual and corporate—and that mobility between these hemispheres is relatively limited).

179. *See* Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L. J. 479 (1989).

180. Wilkins, *supra* note 79 (offering detailed examples of attorney-client relationships in the corporate hemispheres in which large entity clients are powerful sophisticated actors who do not need protection from their outside counsel).

Canons.[181] Put differently, the rise of this large class of powerful clients suggests that instead of protecting clients from their lawyers and the state, the *Rules* need to systematically address situations in which lawyers, the state, and the public need protection from clients.[182]

Second, the corporate hemisphere crowds out individual clients and small businesses from the market for legal services.[183] Crowding out does not merely mean that individual clients will experience extended delays, for example, when complex and time-consuming litigation between large entity clients clogs up the courts. Rather, it means that some individual clients will be unable to obtain legal services at all. To begin with, large entity clients can afford to pay higher fees, making them more attractive to lawyers who are facing increasingly higher debt burdens for their legal education.[184] Moreover, the rising cost of legal education means that some lawyers increasingly feel like they cannot afford to represent clients in the individual hemisphere.[185] Next, large entity clients and their legal needs are considered more prestigious than individual clients, further driving lawyers away from the individual hemisphere. That is, even lawyers who can afford to and are willing to walk away from the corporate hemisphere, notwithstanding the economic penalty of lower compensation, also experience social and cultural penalties in the form of lower prestige and diminished professional standing.[186]

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181. Hoeflich, *supra* note 65, at 163 ("[A] prime motivation for the adoption of [the Canons] was to combat the popular perception, expressed in literature and popular art, that all lawyers were, in fact, money-grubbing pettifoggers who would do anything for a fee, even that which was immoral or illegal."); *see also* M.H. Hoeflich, *Legal Ethics in the Nineteenth Century: The "Other Tradition,"* 47 U. KAN. L. REV. 793, 816 (1999) (critics "see the rise of corporate law practice as having a deleterious effect upon legal ethics").

182. Large entity clients, for example, may seek to opt out of the *Rules*, negotiating additional protections and guarantees in contracts known as Outside Counsel Guidelines. Anthony E. Davis & Noah Fiedler, *Indemnity Provisions in Outside Counsel Guidelines: A Tale of Unintended Consequences*, 23 PRO. LAW. 1 (2016). Davis and Fiedler point out that some powerful entity clients routinely demand that their outside counsel lawyers avoid representing their business competitors, a practice clearly permitted by the *Model Rules*. *See* MODEL RULES R. 1.7 cmt. 6 ("[S]imultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients."). Anthony E. Davis & Noah Fiedler, *The New Battle Over Conflicts of Interest: Should Professional Regulators – or Clients – Decide What is a Conflict?* 24 PRO. LAW. 38 (2017). Irrespective of how one answers Davis and Fiedler's query, the *Rules* must address who gets to decide what constitutes a conflict of interest.

183. Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 999–1000 (2000).

184. Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. 651, 669–72 (2012); Herwig Schlunk, *Mamas 2011: Is a Law Degree a Good Investment Today?*, 36 J. LEGAL PROF. 301 (2011); Steven C. Bennett, *When Will Law School Change*?, 89 NEB. L. REV. 87, 89–90, 108–09 (2010).

185. *See generally* Emily Zimmerman & Leah Brogana, *Grit and Legal Education*, 36 PACE L. REV. 114 (2015) (rising cost of legal education deters some from applying to law school and impacts the ability of low-income individuals to secure legal services).

186. *See* John Bliss, *From Idealists to Hired Guns? An Empirical Analysis of 'Public Interest Drift' in Law School*, 51 U.C. DAVIS L. REV. 1973 (2018); Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43 (2014).

Third, and relatedly, many individuals and small businesses experience chronic, insufficient access to lawyers and legal services, with a majority of litigants in the individual hemisphere navigating the legal system alone,[187] in what some commentators have dubbed the "pro se crisis."[188] As of early 2022, "in state courts, in a shocking *three-quarters* of civil cases, at least one side is unrepresented—consigned to navigate the often baffling legal system alone, without guidance or assistance."[189] For example, in New York, which is representative of the challenges of insufficient access to legal services in state courts:

- 98 percent of tenants are unrepresented in eviction cases;
- 96 percent of parents are unrepresented in child support matters; and
- 44 percent of homeowners are unrepresented in foreclosure actions.[190]

Moreover, as Professor Freeman Engstrom explains, the pro se numbers may be just the tip of the iceberg, "for below the pro se crisis (which is visible), lies a larger but hidden crisis. That consists of the tens of millions of Americans who are currently confronting a legal problem. . . but are 'lumping it,' i.e., taking no steps to protect their interests."[191] Incredibly, in 2020 the World Justice Project ranked the United States 109th out of 128 countries, in terms of the accessibility and affordability of civil justice."[192] As Deborah Rhode has concluded, "It is a shameful irony that the nation with the highest concentration of lawyers fails so miserably at making their services available to those who need them most."[193]

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187. *See* RHODE, *supra* note 36.

188. Nora Freeman Engstrom, *She Stood Up: The Life and Legacy of Deborah L. Rhode*, 74 STAN. L. REV. ONLINE 1, 8 (2021); Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 607–08 (2018) (documenting that in federal courts, approximately a quarter of claims are filed by pro se plaintiffs, and the majority of appeals are pursued by unrepresented individuals).

189. Nora Freeman Engstrom, *UPL, Upsolve, and the Community Provision of Legal Advice*, SLS BLOGS / LEGAL AGGREGATE (Jan. 27, 2022) (emphasis in the original), https://law.stanford.edu/2022/01/27/upl-upsolve-and-the-community-provision-of-legal-advice/?sf159208106=1&fbclid=IwAR2oa_5xA4GSTuhSJF7VRXnUVAC5RXINl1_Bnfc2xm2ryjjk2qf5107Yya0 [https://perma.cc/46GW-PLRG]; *see also* Resnik, *supra* note 188, at 608.

190. Freeman Engstrom, *supra* note 189 (citing THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, A REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2010), https://ww2.nycourts.gov/sites/default/files/document/files/2018-04/CLS-TaskForceREPORT.pdf [https://perma.cc/HU3R-26A4]).

191. *Id*. at 8 (citing Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 448 (2016) (discussing a national survey showing that only 14% of legal problems "involved courts.")); *see also* William L.F. Felstiner, *Influences of Social Organizations on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 81 (1974) (coining the term "lumping it," in reference to unaddressed legal problems).

192. *WJP Rule of Law Index* (index 7.1), WORLD JUSTICE PROJECT (2020), https://worldjusticeproject.org/rule-of-law-index/factors/2021 [https://perma.cc/W4WV-L7T7].

193. Deborah L. Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437, 445 (2013).

Insufficient access to legal services, assert critics, is not only a function of the bar's monopoly over the provision of legal services enforced by states' UPL statutes, which excludes potentially cheaper non-lawyers, but also of a host of structural and cultural barriers. One such obstacle is the high and rising cost of legal education, which *de facto* excludes college graduates from lower socioeconomic classes from law schools and drives graduates carrying significant student loan debt into the corporate hemisphere and large entity clients and away from the individual hemisphere.[194]

Another obstacle is the legalization of private and public lives in America, which colors many challenges and problems as legal issues, and results in manufactured demand for lawyers and legal services.[195] Questions, issues, and disputes that could be resolved by non-legal democratic means, such as by public debate, social movements, community organization, social mobilization, and voting, instead become legal disputes argued by lawyers and decided by juries and judges. This means that everyday problems become legal problems, the resolution of which requires lawyers, systematically privileging those who can afford to pay for them.[196] This is the flip side of the ABA's claim that channeling disputes into courts and deciding them pursuant to the law is a desirable public good justifying the legal profession's monopoly over the provision of legal services. Next is the professional status expectations of lawyers who expect to move up the socioeconomic ladder and are reluctant to serve the "mundane" and "cheap" needs of would-be individual clients.[197]

Finally, and perhaps most disturbingly for purposes of this Article, are UPL state statutes and the rules of professional conduct, which not only aggravate the insufficient access problem by making it harder for non-lawyers to offer legal services,[198] but trivialize and marginalize the access problem by pretending that ample access by paying clients is the prevailing reality. The result of this mismatch between access assumptions and insufficient access realities is that the *Rules* help constitute a status quo in which paying clients are treated as the norm and the default baseline, whereas those who cannot afford to pay for legal services are considered the exception to the rule or a "problem" in need of "fixing."[199]

The access problem is not new, although its scope has grown significantly.[200] What contemporary practice realities reveal is the systematic failure of the

194. *See* Zimmerman & Brogana, *supra* note 185.

195. Clark, *supra* note 168.

196. Galanter & Henderson, *supra* note 96.

197. Wald, *supra* note 164, at 273.

198. *See* MODEL RULES R. 5.4 (prohibiting non-lawyer ownership and investment in law firms) and R. 5.5 (prohibiting lawyers from assisting non-lawyers in the unauthorized practice of law).

199. RHODE, *supra* note 141; Hadfield, *supra* note 186.

200. *See supra* notes 188–191 and corresponding text; *see also* Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: Legal Resources for Ordinary Americans*, *in* BEYOND ELITE LAW – ACCESS TO CIVIL JUSTICE IN AMERICA 21–52 (Samuel Estreicher & Joy Radice eds., 2017) (compiling and analyzing available civil access data indicating that "Americans are led to 'lump' their legal problems and do nothing about them at higher rates than is the case in. . . other countries.").

mechanisms envisioned by the *Rules* to address the challenges of insufficient access to lawyers and legal services. Nearly half a century ago, leading commentators cautioned about the access problems and speculated that the monopolistic days of the profession were numbered.[201] At about the same time, the *Rules* were adopted, embodying the hope that their vulnerary pro bono arrangements, combined with long-standing legal aid societies and the newly promulgated Legal Services Corporation Act, could effectively tackle insufficient access.[202] This cautious optimism has been thoroughly disproven by practice realities.

Thus, the changes in client identity and needs are not simply a matter of an organic, gradual changing mix of clients, with fewer individual clients and more large entity clients. Instead, the growth of the corporate hemisphere and the rise of powerful and sophisticated entity clients is making it harder for individual clients to find and to be able to afford lawyers, in turn pulling the rug from underneath the *Rules*' assumption that most would-be clients with legal problems could easily and naturally become paying clients.

The client-driven clustering of lawyers into the two hemispheres of the legal profession has in turn eroded the *Rules*' assumptions about lawyers in counterintuitive and complex ways. Large law firms and in-house lawyers dominate the representation of large entity clients in the corporate hemisphere.[203] In some ways—including professional status and compensation—these lawyers are the most powerful elite of the legal profession.[204] In other ways, however, these lawyers have lost ample power and influence over their clients.[205] BigLaw equity partners, who in the past were considered trusted influential advisers, are often relegated to the role of subject-matter experts and have lost their seats at the clients' decision-making tables. In-house counsel, including general counsel and

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201. Christensen, *supra* note 109. Writing in 1980, Christensen opined that:

> It seems inevitable, however, that such challenges will come. The forces that have led to changes in delivery of legal services-most notably an apparently *rising tide of dissatisfaction with the adequacy of legal services furnished to the public, and particularly to the poor and to people of moderate means*-can be expected to cause many 'public-interest' groups and organizations, which have heretofore directed their efforts toward improving the distribution of lawyers' services, now to concern themselves with the production of legal services.

Id. at 160. *See also* Rhode, *supra* note 106.

202. Legal Services Corporation Act, Pub. L. No. 93-355, 88 Stat. 378 (1974) (codified at 42. U.S.C. §2996 (1976)). *See* Roger Cramton, *Crisis in Legal Services for the Poor*, 26 VILL. L. REV. 521, 525 (1981):

> The American Bar Association, which had committed itself to publicly-funded legal assistance a few years earlier under the leadership of Lewis F. Powell, Jr., now Justice Powell, fought hard for the establishment of a permanent legal services program in a form that would remove it from the immediate supervision of the President and vicissitudes of politics.

203. HEINZ & LAUMANN, *supra* note 178; HEINZ, NELSON, SANDEFUR & LAUMANN, *supra* note 178.

204. MITT REGAN & LISA H. ROHRER, BIGLAW: MONEY AND MEANING IN THE MODERN LAW FIRM (2021); ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (1988).

205. Rosen, *supra* note 179; Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749 (2010).

chief legal officers,[206] who in theory could have taken over the role of big-picture trusted advisors,[207] often think of themselves as part of the business team and management, not as lawyer-statespersons.[208]

The consequences of this power shift from outside counsel to large entity clients and their in-house lawyers are far-reaching. To begin, BigLaw and in-house lawyers are often not in a position to influence decision-making by large entity clients, let alone dissuade them from wrongdoing. In this sense, even if they wanted to, lawyers in the corporate hemisphere are unable to serve the public interest while serving their clients.[209] They are unable to tell clients that they are "damn fools and should stop."[210]

Nor are they willing to, not because they are evil or bad people, but rather because they do not think of themselves as public citizens.[211] The rise of individualism and atomism in American culture and its manifestations in the practice of law, including the triumph of Profit-Per-Partner and subsequently Profit-Per-Equity-Partner,[212] as well as shifting professional ideologies that increasingly define merit and excellence in terms of around-the-clock service to clients, mean that some BigLaw and in-house lawyers do not consider it their role to confront their clients and advise them that their conduct is lawful but ill-advised.[213] In other words, lawyers who increasingly understand themselves to be service providers as opposed to professionals committed to the public good are less inclined to engage their clients and attempt to persuade them to act in the public interest.

Next, the erosion in the power of outside counsel partners, the increased power of some in-house lawyers, and the shifting understanding of their roles, are taking place at the same time as large entity clients are growing bigger and more powerful, wielding unprecedented power nationally and globally. This means that large entity clients are able to inflict, intentionally and unintentionally in good faith, unprecedented harm on the public.[214] Unfortunately, this is exactly what has

206. Omari Scott Simmons, *Chief Legal Officer 5.0*, 88 FORDHAM L. REV. 1741 (2020).

207. *See* BEN W. HEINEMAN, THE INSIDE COUNSEL REVOLUTION: RESOLVING THE PARTNER-GUARDIAN TENSION, 317–57 (2016) (arguing that elite general counsel can act as lawyer-statespersons filling the shoes of large law firm partners who can no longer act in that role).

208. Wald, *supra* note 97, at 295–300.

209. Wilkins, *supra* note 79; KRONMAN, *supra* note 64.

210. *See* 1 PHILIP C. JESSUP, ELIHU ROOT 133 (1938); Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1 (2011).

211. ERWIN O. SMIGEL, THE WALL STREET LAWYER (1973) (documenting the transformation in the self-conception of large law firms' lawyers).

212. *See* Galanter & Henderson, *supra* note 96, at 1873–82 (discussing the role of Profits-Per-Partners and Profits-Per-Equity-Partner in the organization and structure of large law firms).

213. JESSUP, *supra* note 210, at 133; Pearce, *supra* note 142; Wald, *supra* note 142.

214. *See* JOSHUA B. FREEMAN, BEHEMOTH: A HISTORY OF THE FACTORY AND THE MAKING OF THE MODERN WORLD 226–313 (2018); ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 231–55, 377–95 (2018).

happened.[215] When such corporate calamities take place—for example, when massive fraudulent accounting and reporting practices result in the loss of billions of dollars for the investing public,[216] or when lending improprieties contribute to widespread foreclosures, the collapse of the so-called housing-bubble and a massive loss of capital for the middle class[217]—the public often inquires in outrage and dismay "where were the lawyers?"[218] Critics, in turn, wonder why lawyers did not act as gatekeepers and did not stop their clients from the wrongdoing.[219] Lawyers, however, having lost the ability to strategically influence C-Suite decision-making and having come to increasingly understand their role within the C-Suite as team-players as opposed to gatekeepers, are no longer lawyer-statespersons, community leaders, and public citizens. They are representatives of clients, who defer to their clients either because the clients are powerful or because of an autonomous, individualistic, partisan culture.

The increasingly dominant corporate hemisphere understanding of lawyers' role has ramifications outside of it when juxtaposed against the evolving identity of large entity clients. This lawyer-as-servant corporate hemisphere ideology risks creating a false schism within the profession, pursuant to which lawyers in the individual hemisphere ought to help individual clients pursue justice, whereas lawyers in the corporate hemisphere ought to focus on helping their entity clients pursue wealth maximization without worrying about justice or about acting as public citizens promoting the public interest. This schism is false not only because the hemispheres intersect—for example, when individual and entity clients collide in litigation—but because given their outsized presence and influence in our society and culture, large entity clients can inflict tremendous harm and injustice on their customers, employees, third parties, and on the communities in which they do business. The notion that lawyers in the corporate hemisphere ought to be primarily engaged in serving and deferring to the wealth maximization objectives of their clients gets it exactly upside-down. It is precisely lawyers for large entity clients, which can cause the most harm and inflict the most injustice, who ought to focus on justice.[220]

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215. Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983 (2005); Eli Wald, *Lawyers and Corporate Scandals*, 7 LEGAL ETHICS 54 (2004).

216. *See* Wald, *supra* note 215.

217. *See* Adam J. Levitin & Susan M. Wachter, *Second Liens and the Leverage Option*, 68 VAND. L. REV. 1243 (2015).

218. *See* Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990) (noting that there were "literally scores of accountants and lawyers" involved in the savings and loan case, Judge Sporkin asked pointedly: "Where were these professionals . . .? Why didn't any of them speak up or disassociate themselves from the transactions? Where also were the outside accountants and attorneys when these transactions were effectuated?").

219. *See* Kim, *supra* note 215. *See generally* JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE (2006).

220. *See* Eli Wald, *Formation Without Identity: Avoiding a Wrong Turn in the Professionalism Movement*, 89 UMKC L. REV. 685, 707–13 (2021).

As we have seen, the best defense of the *Rules,* pursuant to which lawyers serve the public by serving clients, depends on the ability and willingness of lawyers to dissuade clients from lawful but wrongful conduct, as well as on the tendency of clients to listen and defer to their lawyers. Contemporary practice realities disprove these assumptions and thus undermine the best justification for the *Rules*. In the individual hemisphere, a majority of litigants appear pro se, at the same time as millions of Americans are "lumping it." In the corporate hemisphere in which most entity clients are represented, ongoing restructuring of the attorney-client relationship makes it less likely that lawyers, outside and in-house alike, will attempt let alone succeed in dissuading their clients from engaging in wrongful conduct.

B. THE *RULES*' RESPONSE TO THE CHANGING LANDSCAPE OF LAW PRACTICE

The *Rules* have been slow to respond to these sea-changes. Relatively new exceptions to Rule 1.6 grant corporate lawyers discretion, but do not impose a duty, to reveal confidential information in some limited circumstances when significant financial harm may result to the interests of third parties.[221] Similarly, revisions to Rule 1.13 grant lawyers discretion in limited circumstances to reveal confidential information to prevent harm to the entity client.[222] Yet because these rules ignore practice realities by continuing to assume that lawyers are powerful vis-à-vis their clients, the *Rules* do little to provide real guidance to BigLaw and in-house lawyers, who may be the ones needing protection from their powerful clients. In other words, contemporary practice realities suggest that granting relatively weak corporate lawyers discretion to reveal reasonably certain fraud by their entity clients is going to be unhelpful: these lawyers would often not be in a position to do so, or would face strong disincentives not to exercise their discretion to disclose confidential information. In contrast, mandatory disclosure, giving these lawyers a credible stick with which to dissuade their clients from committing fraud, would have been more appropriate. Consequently, the *Rules* end up offering little practical guidance to lawyers who are likely to find themselves in the circumstances envisioned by Rules 1.6(b)(2), 1.6(b)(3), 1.13(b) and 1.13(c).

At the same time, the *Rules* have been slow to respond to the needs of a new emerging class of attorneys, lawyer-employees.[223] Lawyer-employees are not a new phenomenon, dating back to in-house lawyers in the late nineteenth century,[224] and significantly growing in numbers beginning in the mid-1970s with

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221. MODEL RULES R. 1.6(b)(2)-(3).

222. *Id*. at R. 1.13(c).

223. *See* Wald, *supra* note 97 at 277–89 (documenting the rise and practice realities of lawyer-employees).

224. *See* Eli Wald, *Getting In and Out of the House: The Worlds of In-House Counsel, Big Law, and Emerging Career Trajectories of In-House Lawyers*, 88 FORDHAM L. REV. 1765, 1767–69 (2020).

the return of in-house counsel.[225] These in-house lawyers, usually former partners and associates recruited from within the ranks of large law firms, generally conformed to the *Rules*' assumption that lawyers are powerful professionals.[226] Thus, while the *Rules*, with their historical focus on the role of lawyers as outside counsel, tend to offer little relevant guidance to in-house lawyers, at least they apply to powerful in-house lawyers who are professionals in the traditional sense.

However, the twenty-first century has seen a significant growth in the number of lawyer-employees other than powerful in-house lawyers, including staff and temporary attorneys.[227] These lawyer-employees, contrary to the *Rules*' assumption, are not powerful professionals.[228] Earning hourly wages as opposed to salaries and often working on short contracts without benefits, such lawyers are employees rather than professionals in ways that require special attention from the *Rules*, raising new questions large and a small. For example, what happens when the *Rules*, promulgated by the ABA and put in place by state supreme courts, clash with statutory employment law protections such as minimum wage requirements?[229]

Finally, the *Rules* have been non-responsive to the pro se crisis and the "lumping it" realities of average Americans. The *Rules*' silence has been deafening given that the *Rules*' assumptions about the practice of law have also been eroding. In particular, the *Rules*' assumptions that channeling disputes, private and public, into the legal system is desirable, and that by serving clients lawyers are serving the public, the public interest and justice are undermined by evolving practice realities. Borrowing from Dr. Martin Luther King, Jr., lawyers are fond of asserting that "the arc of the moral universe is long, but it bends toward justice,"[230] by which the legal profession means to acknowledge the deep injustices that plague America but assert its conviction that law and lawyers help move us in the right direction toward a more just society.

The slow-moving justice machinery is an optimistic image that some critics have come to doubt. Some have pointed out that in the United States law and lawyers tend to dominate and legalize social movements such that they end up

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225. *Id*. at 1769–75. *See generally Return of the Lawyer-Statesman*, *supra* note 176.

226. *See* Wald, *supra* note 97.

227. *Id*. at 277–89.

228. *See* Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1189 (2008) ("[w]ith temporary attorneys, large law firms appear to have created a new lawyer underclass that greatly conflicts with the idea that attorneys are members of a noble, autonomous profession.").

229. *See* Wald, *supra* note 97.

230. Dr. Martin Luther King Jr., *Remaining Awake Through a Great Revolution*, Speech given at the National Cathedral, March 31, 1968. *See* Dr. Martin Luther King Jr., SMITHSONIAN ARCHIVES ONLINE, https://www.si.edu/spotlight/mlk [https://perma.cc/6FFM-89HN] (last visited May 1, 2022); *see also* Mychal Denzel Smith, *The Truth About "The Arc Of The Moral Universe,"* HUFFPOST.COM (Jan. 18, 2018), https://www.huffpost.com/entry/opinion-smith-obama-king_n_5a5903e0e4b04f3c55a252a4 [https://perma.cc/2TQV-A22J].

unintentionally suffocating and silencing grassroots organizations and movements.[231] Others, carefully examining the role of lawyers in social movements have suggested that the cause of justice may be better served by lawyers playing secondary supportive as opposed to lead roles.[232] The BLM and #MeToo movements of the early twenty-first century, for example, have demonstrated the shortcomings of our legal system to effectively address justice concerns and perhaps as alarmingly questioned the relevance of law and lawyers and their role as meaningful actors in addressing justice concerns.[233]

The point here, to be sure, is not only that the legal profession should have done a lot more to support the BLM and #MeToo movements than offer statements of sympathy.[234] Rather, it is that law sometimes may be, even in the long run, part of the injustice problem as opposed to part of the justice solution. For example, constitutive aspects of our criminal justice system include mass and disproportionate incarceration of people of color,[235] and a high rate of plea bargaining.[236] Combined with the prevalent and by-now well-documented systematically unjust treatment of people of color by police departments, prosecutors, jurors, and courts,[237] the assertion that the criminal bar pursues justice by practicing law rings hollow. This is not to dismiss the important work done by dedicated prosecutors and overworked public defenders and defense counsel who labor tirelessly to ensure justice. Rather, it is to point out that notwithstanding the hard work of many lawyers within the criminal justice system, to assert in the twenty-first

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231. *See* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 953–54 (2011); Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 480 (2004). *See generally* Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQ. L. REV. 263, 269–77 (2010) (cataloguing different scholarly theories that question litigation as a vehicle for social change).

232. SCOTT L. CUMMINGS, AN EQUAL PLACE: LAWYERS IN THE STRUGGLE FOR LOS ANGELES (Oxford University Press 2021).

233. *See, e.g.*, TA-NEHISI COATES, BETWEEN THE WORLD AND ME (2015). Mr. Coates, a public intellectual, offers a critical account of racial injustice and inequality in America. Incredibly, his account does not mention lawyers at all, suggesting that lawyers are not relevant actors in a contemporary discourse about injustice and means of addressing it. Similarly, eminent legal ethics and legal profession scholar Deborah Rhode publicly criticized well-known civil rights attorney David Boies for his representation of Harvey Weinstein, suggesting that the legal system and its leading members may be ill-equipped to address the gender justice considerations inherent to the #MeToo movement. *See* Deborah L. Rhode, *Opinion, David Boies's Egregious Involvement with Harvey Weinstein*, N.Y. TIMES (Nov. 9, 2017), https://www.nytimes.com/2017/11/09/opinion/david-boies-harvey-weinstein.html [https://perma.cc/D264-NNHE].

234. *See, e.g.*, Kathryn Rubino, *What Biglaw Is Saying About The Unrest Sweeping The Nation*, ABOVETHELAW.COM (June 2, 2020), https://abovethelaw.com/2020/06/biglaw-george-floyd/ [https://perma.cc/8GVH-ZURV] (reporting that more than seventy large law firms called for racial justice reform and issued statements of support for the BLM movement following the murder of George Floyd).

235. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

236. Gaby Del Valle, *Most Criminal Cases End in Plea Bargains, Not Trials*, THE ATLANTIC (Aug. 7, 2017), https://theoutline.com/post/2066/most-criminal-cases-end-in-plea-bargains-not-trials?zd=1&zi=xbxztglm [https://perma.cc/7H3F-KGV3].

237. *See generally* IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith, eds., 2012).

century that criminal law attorneys, let alone all lawyers, pursue justice by practicing law is tragically laughable.

Similarly, the notion that by practicing and upholding the law lawyers advance gender justice in areas like domestic violence,[238] family law,[239] sexual harassment,[240] and equal pay[241]—especially considering the high pro se and "lumping it" rates in these practice areas—is highly problematic. Once again, the point here is not to dismiss the incredible work done by many lawyers dedicated to gender justice in these legal arenas, but to challenge the legal profession's assumption that because our laws are generally just, lawyers sufficiently advance justice by practicing law.

Indeed, even institutions within the legal profession have struggled with the quest for greater equality and justice. BigLaw, for example, long regarded as a core constituent of the legal profession's elite, has invested considerably in Equity, Diversity and Inclusiveness (EDI) programs and policies and notwithstanding making some important gains, including routinely hiring previously excluded and discriminated-against lawyers in representative numbers,[242] has continued to struggle with retaining and promoting lawyers equally and justly.[243] The judiciary too continues to struggle with equality and justice within its ranks, showcasing underrepresentation of women and judges of color.[244] Even law schools, believed by some to be bastions of liberal thinking and practices, not only have similar track records of underrepresentation in their student bodies and faculties, but have also generally abandoned the commitment to even engage their students meaningfully with justice concerns and considerations.[245]

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238. *See generally* Deborah M. Weissman, *In Pursuit of Economic Justice: The Political Economy of Domestic Violence Laws and Policies*, 2020 UTAH L. REV. 1 (2020).

239. *See, e.g.*, MODEL RULES R. 1.5(d)(1) (disallowing contingency fee arrangements in domestic relations matters).

240. *See* Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37 (2019).

241. Jocelyn Frye & Robin Bleiweis, *Rhetoric vs. Reality: Making Real Progress on Equal Pay*, CTR. FOR AM. PROGRESS (Mar. 26, 2019), https://www.americanprogress.org/article/rhetoric-vs-reality-making-real-progress-equal-pay/ [https://perma.cc/BNL7-Z9KE].

242. *See* Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1090 (2011).

243. *Id.*; *see* Wilkins & Gulati, *supra* note 163; Fuchs Epstein, *supra* note 163; Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585 (1996); Deborah L. Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39 (1994); Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L. J. 1731 (1991).

244. *See, e.g.*, Eli Wald, *Judicial Under-Representation, Over-Representation and "Catch Up": Insights from a Study of US District Court Judges in the 10th Circuit*, 26 INT'L J. LEGAL PROF. 33 (2019).

245. *See* ROBIN L. WEST, TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM (2014) (explaining how Formalism, with its commitment to establishing law as an objective science, and the Socratic Method, designed to teach law students to think like lawyers by effectively developing equally powerful arguments for both sides in the adversary system, ended up undermining justice as a core value in legal education); Eli Wald, *The Contextual Problem of Law Schools*, 32 NOTRE DAME J. L. ETHICS & PUB. POL'Y 281 (2018) (asserting that legal education must embrace a contextual approach to teach law students to identify, appreciate and advise clients about the justice implications of clients' courses of conduct); Wald, *supra* note 220 (arguing that law schools must not shy away from engaging law students in discussions about justice and the justice consequences of legal advice).

To be clear, law and lawyers are not actively and intentionally advancing an unjust agenda, and many within the legal profession have long been committed to the pursuit of greater justice and equality. Nonetheless, the move away from justice as a defining aspect of law practice and a meaningful commitment of most lawyers in their daily practices is consistent with individualistic and partisan trends in American culture and is reinforced by the emergence of professional ideologies that stress service to clients as opposed to justice.[246]

This dominant service and business orientation is undermining the *Rules*' assumption about the common features that unite all lawyers as professionals, their increased specialization and practice difference notwithstanding. While the rise of the service ideology is certainly not unique to lawyers, its impact on the *Rules* should not be overlooked. The one-size-fits-all approach of the *Rules* is explained in terms of the common attributes of all lawyers as professionals committed to the public and the public good, manifested in competence, confidentiality, loyalty to clients, and the like.[247] To the extent that lawyers are veering away from justice and the public good as a constitutive feature of what it means to be a lawyer, then the *Rules*' three-legged stool approach may be less compelling and less convincing.

Finally, at the same time as the bonds of justice, equality, and commitment to the public good holding the legal profession together fray, non-lawyers are endeavoring to undermine the monopoly of the profession and enter the market for legal services. Although some of these non-lawyers who seek to compete with lawyers are for-profit entities, others justify their position in terms of increased access to justice for those currently unable to afford lawyers.[248] Moreover, while the push to lessen the monopolistic hold of lawyers over the provision of legal services faces many obstacles and has foes within the profession, some access-minded lawyers are helping to spearhead the deregulatory efforts.[249]

All these changes are not caused by the *Rules*, and many have roots outside of—and as importantly outside the control of—the legal profession. Yet, if the

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246. *See* Pearce, *supra* note 142; Wald, *supra* note 142.

247. MODEL RULES pmbl.; *see, e.g.*, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, REPORT OF THE NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATION (2000).

248. RHODE, *supra* note 141. For example, Upsolve, a financial education and civil rights nonprofit, has recently filed a lawsuit alleging that New York's UPL restrictions, including pertinent sections of the rules of professional conduct, which bar non-lawyers from giving debtors sued by debt collectors basic advice, violate the First Amendment. *See* Upsolve Inc. v. James, Case 1:22-cv-00627, Compl. (S.D.N.Y. filed Jan. 25, 2022), https://uploads-ssl.webflow.com/60d147561d53665ec78fff2c/61f0242df612a4421158177a_American-Justice-Movement-Case.pdf [https://perma.cc/MP2P-EDF3]; *see also*, Andy Newman, *They Need Legal Advice on Debts. Should It Have to Come From Lawyers?* N.Y. TIMES (Jan. 25, 2022).

249. *See* THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (IAALS), STATE ACTION ON LEGAL REGULATION, https://iaals.du.edu/knowledge-center/state-action [https://perma.cc/2GQN-3FFM] (last visited May 1, 2022) (summarizing reform efforts across states to liberalize access to legal services by non-lawyers).

legal profession, the ABA, and its *Rules* strive to serve the public and the public interest, and if the *Rules* purport to meaningfully help guide the practice of lawyers not only as representatives of clients but also as officers of the legal system and as public citizens,[250] the *Rules* must adopt and adapt or risk becoming anachronistic and irrelevant.

IV. THE FUTURE: WHO IS AND SHOULD BE SERVED BY THE RULES?

An inherent characteristic of lawyers as professionals is a commitment to the public and the public good.[251] By definition then, lawyers as professionals are and should be committed to the public—clients included—and to the public good. Legal ethics—that is, the law governing lawyers—must accordingly reflect and aspire to exemplify commitment to the public interest. The *Rules*, as a subset of legal ethics, must serve the public, the public good, and justice. Moreover, to the extent that the *Rules* purport to guide lawyers' conduct, they must embody obligations to clients, the public, and the public good.

That the *Rules* must serve the public and stand for justice is not a new claim. Examining the internal working documents of the ABA's *1908 Canons* drafting committee, Carle has shown that lawyers' duty to evaluate the justice of their clients' causes in civil cases was hotly debated by committee members, and established that "a clash of perspectives among these men—traceable in part to their backgrounds but also to their unpredictable allegiances to conflicting trends in legal thought at the turn of the century—prevented the committee from reaching a satisfactory resolution on the duty-to-do-justice issue."[252] Carle concluded that "[t]he committee members instead adopted ineffectual compromise language in the *Canons*, leaving us with a legacy of concealed ambivalence on the question of lawyers' 'duty to do justice' in civil cases."[253]

For a century or so, the profession has argued that the *Rules* serve clients, the legal system, the public, and justice by balancing their competing interests. Although not free of compelling criticisms about historical accuracy, rationalization and economic realities, the profession's assertion was plausible. Although lawyers' duties as officers of the legal system and as public citizens were underdeveloped, by serving and protecting clients, the *Rules*—and with their aid, lawyers—served the public and the public interest.

The practice of law and the market for legal services continuously evolve. The underlying assumptions, on which the *Rules* based their claim to serve the public by serving clients, have changed. To continue serving the public and the public interest and avoid becoming anachronistic and irrelevant, the *Rules* must evolve too. Specifically, as practice realities change, so must the *Rules*, revising their

250. MODEL RULES pmbl. cmt. 1.
251. *See* Wasserstrom, *supra* note 98.
252. Carle, *supra* note 67, at 1.
253. *Id.*

core assumptions about clients, lawyers, and the practice of law. As significant and persistent insufficient access to legal services has become more widely recognized, exposing the fundamental flaw in the assumption that those with legal needs will mostly become paying clients, the *Rules* must begin to meaningfully address the access concern. And as widespread systemic forms of injustice continue to plague our self-described "justice system," the *Rules* must engage with the problem and guide lawyers' conduct toward greater justice.

A. CLIENTS AND LAWYERS UNDER THE *RULES*: THE ACCESS IMPERATIVE

The *Rules* can no longer assume that most everybody with a meritorious legal need will become a client and that the needs of those who cannot afford to pay for legal services will be effectively met within the existing framework by lawyers, for example, via voluntary and aspirational pro bono legal services.[254] The pro se crisis and the "lumping it" realities for millions of Americans who have unaddressed legal problems disprove this wishful thinking.

The *Rules*, alongside other aspects of legal ethics, must prioritize access to legal services for those who cannot afford to pay for them, both structurally and substantively. Structurally (and symbolically) the *Rules* can feature access as a priority by moving Chapter 6—Public Service[255]—up, reordering and renumbering it as Chapter 1, replacing the current chapter highlighting the attorney-client relationship.[256] Substantively, instead of a loose assortment of aspirational rules,[257] which practically mostly apply to litigators but not to other lawyers,[258] the Public Service chapter of the *Rules* can be greatly expanded and some of its Sections made mandatory. For example, pro bono commitments could be made mandatory and greatly expanded to include offerings for all types of lawyers.[259]

Increasing access to legal services need not be blind to context and varying practice circumstances. For example, given the significant debt burden increasingly carried by law school graduates,[260] mandatory pro bono can be designed as a progressive tax, exempting recent graduates shouldering a documented debt burden and increasing gradually with seniority as a lawyer.[261] Pro bono can also reflect lawyers' practice settings and earning capacity, acknowledging the growing compensation disparity between BigLaw lawyers working in the corporate

254. MODEL RULES R. 6.1.

255. MODEL RULES Ch. 6, Public Service.

256. MODEL RULES Ch. 1, Client-Lawyer Relationship.

257. MODEL RULES Ch. 6, Public Service.

258. *See* Wald, *supra* note 49, at 245–47.

259. *See* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 99–106 (2004); Scott L. Cummings, *Access to Justice in the New Millennium – Achieving the Promise of Pro Bono*, 32 HUM. RTS. 6, 10 (2005); Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well By Doing Better*, 78 FORDHAM L. REV. 2357, 2391 (2010); Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know – And Should Know – About American Pro Bono*, 7 HARV. L. & POL'Y REV. 83, 88–89 (2013).

260. *See supra* text accompanying note 184.

261. *See* Cummings, *The Politics of Pro Bono, supra* note 259, at 106.

hemisphere and attorneys practicing in the individual or nonprofit hemispheres.[262] More generally, pro bono obligations can gradually increase as lawyers' compensation increases. And a revised, mandatory pro bono approach can also account for practice area variations and expertise, by allowing some lawyers in certain circumstances to opt out of providing pro bono legal services and instead supporting authorized providers of legal services to the indigent, such as state chapters of the Legal Services Corporation. It is outside the scope of this Article to fine-tune the details of such a pro bono overhaul, rather, the point is to drive home the imperative of making access to legal services for those who cannot afford to pay a priority under the *Rules*. Indeed, it should be a mandatory priority,[263] as opposed to an aspirational afterthought and an add-on toward the end of the *Rules* which reads like an exception to the general for-pay model. Moreover, increasing access must be made a priority for all lawyers, and not be seen as a commitment for a select few, such as public interest lawyers and pro bono coordinators.[264]

Politically, mandating pro bono is likely to be an uphill tough battle.[265] And, admittedly, mandating pro bono is unlikely to fully address the access problem because even a large increase in pro bono activity is unlikely to address the unmet legal needs of those who cannot afford to pay for them.[266] Indeed, because increased pro bono alone would not solve the insufficient access problem, some may believe that a battle for mandatory pro bono would not be a worthwhile priority. Professor Hadfield, a leader in the fight for greater and improved access to legal services correctly argues that "The access problems in the U.S. legal system are largely conceptualized by the profession as problems of the ethical commitments of individual lawyers to assist the poor and the failure of federal and state bodies to provide adequate levels of funding to legal aid agencies and the courts."[267] However, insists Hadfield, "The problem is not a problem of the ethical commitment of lawyers to help the poor."[268] Therefore, she concludes, the problem "cannot be solved with an increase in pro bono efforts, as welcome as

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262. *See* Cummings & Rhode, *supra* note 259, at 2365–72.

263. Tom Lininger, *From Park Place to Community Chest: Rethinking Lawyers' Monopoly*, 101 NW. U. L. REV. 1343, 1356–58 (2007). Some jurisdictions have adopted mandatory pro bono requirements. *See, e.g.*, Cummings & Sandefur, *supra* note 259, at 84, n.7.

264. *See* Atinuke O. Adediran, *Solving the Pro Bono Mismatch*, 91 U. COLO. L. REV. 1035, 1041 (2020); Atinuke O. Adediran, *the Relational Costs of Free Legal Services*, 55 HARV. C.R.C.L. L. REV. 357, 367–68 (2020). *See generally* DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS (2005).

265. *See* Liza Q. Wirtz, *The Ethical Bar and the LSC: Wrestling with Restrictions*, 59 VAND. L. REV. 971, 1015 (2006).

266. *See, e.g.*, Leslie Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2614 (2014) ("[E]ven if every lawyer in the country performed 100 hours of pro bono work annually, it would not fill the enormous gap in the need for legal services."); Hadfield & Heine, *supra* note 200, at 50.

267. Hadfield & Heine, *supra* note 200, at 50.

268. *Id.*

such an increase would be," and while "more legal aid funding would be welcome and is clearly called for. . . it cannot make a serious dent in the nature of the problem."[269]

Although Professor Hadfield is right that the insufficient access problem cannot be solved with more pro bono, the *Rules* nonetheless must be revised to require mandatory pro bono as part of their new access imperative. This is because the *Rules* trivialize and marginalize the access problem, framing the very conceptualization of the access problems in the U.S. as problems of the ethical commitments of individual lawyers. Recall that the *Rules* capture the values and commitments of the legal profession. As long as the *Rules* refuse to acknowledge the problem and pretend that most individuals would become paying clients, the problem will never be solved. Only when lawyers—every lawyer—are forced to reckon with the problem, would a change likely ensue.

Thus, the rationale for mandatory pro bono is two-fold: alleviating the insufficient access problem in situations where lawyers' assistance and expertise is needed and cannot be addressed by non-lawyer representation; and helping combat the profession's *access blind spot* or its *access state of mind*. Both of these justifications for mandatory pro bono are important. Although many routine legal needs can be effectively addressed by non-lawyers, other more complex needs do require lawyers. As importantly, the profession's access blind spot, that is, the adherence of lawyers to the status quo reflected in the *Model Rules*' aspirational pro bono stance notwithstanding the well-documented access problem constitutes a real hurdle for increasing access. While some lawyers may oppose access reform out of self-interest, others oppose it out of ignorance and indifference. To make increased access a priority and an imperative this access state of mind, this indifference, must be challenged by mandating pro bono and making every lawyer accountable and part of the access solution.

Still, exactly because pro bono alone will not suffice, efforts to increase access to legal services should not be limited to mandating pro bono.[270] The *Rules* can relax restrictions on the unauthorized practice of law to make it easier for non-lawyers to offer legal services in some circumstances,[271] and on non-lawyer investment in and ownership of law firms.[272] Welcoming non-lawyers into the market for legal services will constitute a significant course reversal for the ABA, which has long supported lawyers' monopoly over the provision of legal services and orchestrated the UPL campaign executed by state bar associations,[273] but it

269. *Id.*

270. *See generally* Paul R. Tremblay, *Surrogate Lawyering: Legal Guidance, Sans Lawyers*, 31 GEO. J. LEGAL ETHICS 377 (2018).

271. MODEL RULES R. 5.5. Several states have recently liberalized their rules of professional conduct along those very lines. *See, e.g.*, STATE OF UTAH SUP. CT., UTAH LEGAL REGULATORY REFORMS: BASIC FACTS, https://www.utahbar.org/wp-content/uploads/2020/05/UTAH-Communications-Fact-Sheet-FINAL.pdf [https://perma.cc/G64A-G86V]; IAALS, STATE ACTION ON LEGAL REGULATION, *supra* note 249.

272. MODEL RULES R. 5.4.

273. *See supra* Part II.D.

does not require reinventing the legal wheel. Recent monopoly-deregulation rule experimentation in Utah, Arizona and Delaware, and a pending proposal in California have done exactly that,[274] delineating routine and relatively straightforward legal services which can be offered competently by non-lawyers.[275]

Yet, the recently terminated deregulation experiment in Washington state of its Limited License Legal Technician (LLLT) program should serve as a cautionary tale and drive home the imperative for the ABA to treat access as an imperative and revise the *Rules* accordingly.[276] On paper, the LLLT program in Washington followed the recommended contours of increasing access by non-lawyers by purporting to identify routine areas of law in which non-lawyers can offer competent representation. At the same time, however, the program curtailed competition by non-lawyers by imposing costly regulations.[277] The experiment also faced fierce opposition from some segments of the bar. The Washington State Supreme Court allowed the program to sunset, citing its high cost and inability to draw interest from prospective LLLTs,[278] notwithstanding a fiery

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274. *See* UTAH CODE JUDICIAL ADMIN. R. 14-802(c) (2017) (permitting licensed paralegal practitioners to engage in limited practice in areas including divorce and cohabitant abuse). Arizona has also begun a two-year pilot project that will license a small number of nonlawyer "legal advocates" to provide limited advice on civil matters arising from domestic violence; Stephanie Francis Ward, *Training for Nonlawyers to Provide Legal Advice Will Start in Arizona in the Fall*, ABA J. (Feb. 6, 2020), https://www.abajournal.com/web/article/training-for-nonlawyers-to-provide-legal-advice-starts-in-arizona [https://perma.cc/LL9J-FAZS]. In 2022, Delaware announced that non-lawyers, Qualified Tenant Advocates will be permitted to represent residential tenants in eviction cases free of charge. *See* Joe Irizarry, *Delaware changes rule on non-lawyer representation for people facing eviction*, DELAWARE PUBLIC MEDIA (Feb. 3, 2022). As of November 2021, the State Bar of California was considering a proposal that would permit nonlawyer paraprofessionals to provide legal advice and undertake other tasks typically handled by attorneys in areas such as family law, housing, consumer debt, employment/income maintenance, and collateral criminal law. Paraprofessionals would also be able to have minority ownership interests in law firms. *See* STATE BAR OF CAL., CALIFORNIA PARAPROFESSIONAL PROGRAM WORKING GROUP, REPORT AND RECOMMENDATIONS 21–22 (Sept. 23, 2021), https://www.calbar.ca.gov/Portals/0/documents/publicComment/2021/CPPWG-Report-to-BOT.pdf [https://perma.cc/EJ4Z-JRZ5].

275. *See* IAALS, STATE ACTION ON LEGAL REGULATION, *supra* note 249.

276. Washington was the first state in the country to experiment with a nonlawyer affordable legal support option to help meet the needs of those unable to afford the services of an attorney. It authorized Legal Technicians, also known as Limited License Legal Technicians (LLLT), to advise and assist people going through divorce, child custody, and other family-law matters in Washington. On June 4, 2020, the Washington Supreme Court decided to sunset the LLLT program. *See Become a Legal Technician*, WASH. BAR ASS'N., (Oct. 8, 2021), https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/become-a-legal-technician [https://perma.cc/7RDY-7LA4].

277. *See, e.g.*, THOMAS M. CLARKE & REBECCA L. SANDEFUR, PRELIMINARY EVALUATION OF THE WASHINGTON STATE LIMITED LICENSE LEGAL TECHNICIAN PROGRAM 3 (2017) http://www.americanbarfoundation.org/uploads/cms/documents/preliminary_evaluation_of_the_washington_state_limited_license_legal_technician_program_032117.pdf [https://perma.cc/72FK-UBDD] ("The biggest current bottleneck is the required year of training [at a law school]. Washington State is actively pursuing other ways to mitigate that constraint. The regulatory costs of the program are not yet close to breaking even, but scaling up the program significantly would resolve that issue.").

278. *See* Letter from Debra L. Stephens, Chief Justice of the Wash. Sup. Ct., to Stephen R. Crossland, Chair of the Ltd. License Legal Technician Bd., Rajeev Majumdar, President of the Wash. State Bar Ass'n, Terra Nevitt, Interim Exec. Dir. Of the Wash. State Bar Ass'n (June 5, 2020), https://www.lawsitesblog.com/wp-content/uploads/2020/06/Crossland-Majumdar-Nevitt.6-5-20FINAL.pdf [https://perma.cc/PSB2-ZBDW].

dissent.[279] Deregulation designed to truly make a difference and increase access to legal services for those who cannot afford to pay for them ought to allow for meaningful competition by non-lawyers, imposing fewer restrictions on would-be LLLTs, to avoid the fate of the Washington experiment.

"The United States stands largely alone in the world in terms of the extraordinary extent to which the bar and judiciary wield exclusive authority for shaping the cost and market structure of legal goods and services,"[280] in part via UPL state statutes echoed in Rule 5.5. In light of the deregulatory experiment in Washington, deregulation in Utah, Arizona and Delaware, and contemplated reform elsewhere, some commentators have voiced cautious optimism that "for the first time in decades, when it comes to promoting access to legal services, there is a palpable sense that we are on the cusp of durable change."[281] At the same time, the moment feels like déjà vu all over again.[282] Importantly, the deregulation campaign stands a better chance of becoming, finally, a reality if in addition to the piecemeal states-based efforts, the ABA joined it in full force. Making access a priority addressing it in the *Rules* before Chapter 6, mandating pro bono, and revising Rule 5.5 to allow non-lawyer practice, all understood as part of a new access imperative endorsed by the legal profession in the *Rules* will reduce the probability of opposition of the sort seen in Washington and hasten the pace of reform.

Such deregulation could hurt some lawyers' bottom line. On the one hand, the likely impact of increased non-lawyer competition for routine legal services should not be exaggerated. Insufficient access to legal services in America is taking place while the U.S. has one of the highest rates of lawyers per capita,[283] suggesting that lawyers simply do not offer cheap legal services, and therefore would not lose services they do not provide. On the other hand, unlike in Washington state, if non-lawyers were to gain meaningful access into the marketplace for legal services, they could, over time, address not only the current unmet needs of

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279. *See* Memorandum from Debra L. Stephens, Chief Justice of the Wash. Sup. Ct., to Stephen R. Crossland, Chair of the Ltd. License Legal Technician Bd., Rajeev Majumdar, President of the Wash. State Bar Ass'n, Terra Nevitt, Interim Exec. Dir. Of the Wash. State Bar Ass'n, 1 (June 5, 2020), https://www.lawsitesblog.com/wp-content/uploads/2020/06/Professional-Responsibility-LLLT-Dissent.pdf [https://perma.cc/P35P-9Q99]:

> Today, the court issued a letter announcing its vote to 'sunset' the Limited License Legal Technician (LLLT) 'program. . .' What took over a decade of toil to create, this court erased in an afternoon. I passionately disagree with the court's vote as well as the way in which it was carried out.

280. Hadfield & Heine, *supra* note 200, at 51; *see also* Limor Zer-Gutman & Eli Wald, *Is the Legal Profession Too Independent?* 105 MARQUETTE L. REV. 341 (2022) (cautioning against potentially harmful, self-interested conduct of a too powerful and too independent legal profession).

281. Freeman Engstrom, *supra* note 189, at 10; Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and the Deregulation of the Lawyer's Monopoly*, 89 FORDHAM L. REV. 1315, 1326 (2021) (calling this a "revolutionary moment for the legal profession" and observing that "the market for legal services is undergoing its most dramatic reexamination in decades").

282. Christensen, *supra* note 201 and corresponding text.

283. Rhode, *supra* note 193.

those who cannot afford to pay lawyers' prevailing fees, but also compete with and undercut lawyers in the individual hemisphere. Yet even if in the long run, non-lawyers would crossover from serving pro se litigants and "lumpers" to competing with lawyers for the work of paying clients, and even if lawyers would lose some ground to non-lawyer legal providers, increasing access to those who cannot afford to pay is the right move the *Rules* must endorse.

Moreover, deregulation is not only the right move, it may also be inevitable. If the *Rules* continue to stand in the way of non-lawyers, they risk being struck down as unconstitutional in violation of the First Amendment,[284] and the ABA Model Rules risk being overshadowed by revisions to states' rules of professional conduct following in the footsteps of Arizona, Utah and Delaware.

Relatedly, the *Rules* can relax independence requirements to allow non-lawyer investment and ownership of law firms,[285] which can lead to greater capital investment and innovation in the means of providing access to legal services, for example, via artificial intelligence.[286] Such deregulatory efforts are not science fiction. Recent experimentation with online courts,[287] legal bots,[288] and artificially generated smart forms[289] suggests that while claims about the death of lawyers and a future without them are greatly exaggerated,[290] well-funded technological advances can meaningfully increase access for legal services.[291] Once again, however, notwithstanding promising state-based deregulatory experiments revising Rule 5.4 in Arizona and Utah and similar consideration elsewhere, the increased access reform agenda stands a better chance of success if backed by the ABA. Such endorsement will accelerate the speed of reform and reduce the likelihood of opposition of the sort recently seen in Florida, which rejected a proposal to relax its rule 5.4.[292]

Moreover, ABA inaction is nothing short of baffling and is likely to cause confusion and slow down the much needed access reform. In 2022, the ABA opposed relaxing Rule 5.4, stating that sharing of legal fees with non-lawyers was

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284. *See, e.g.*, Upsolve Inc., Case 1:22-cv-00627 (alleging that New York's UPL restrictions, preventing non-lawyers from assisting debtors with the filing of basic forms, violate the First Amendment).

285. MODEL RULES R. 5.4. In 2020, Arizona became the first state to relax its version of rule 5.4.. *See* ARIZ. JUD. BRANCH, *Alternative Business Structure*, https://www.azcourts.gov/Licensing-Regulation/Alternative-Business-Structure [https://perma.cc/W83P-PYW7]. *See also* Green, *supra* note 101.

286. *See* Milan Markovic, *Rise of the Robot Lawyers?*, 61 ARIZ. L. REV. 325 (2019); Dana Remus & Frank S. Levy, *Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law*, 30 GEO. J. LEGAL ETHICS 501 (2017).

287. Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J.L. & PUB. POL'Y 331 (2016).

288. *See* Markovic, *supra* note 286, at 325.

289. *See* Remus & Levy, *supra* note 286.

290. *See, e.g.*, RICHARD SUSSKIND, THE END OF LAWYERS RETHINKING THE NATURE OF LEGAL SERVICES (Oxford Univ. Press. ed., 2010).

291. *See* Tremblay, *supra* note 257.

292. *See*, Sam Skolnik, Florida Bar Board Rejects Plan To Loosen Firm Ownership Rules, BLOOMBERG LAW (Nov. 12, 2021).

"inconsistent with the core values of the legal profession."[293] Yet, in the very resolution upholding Rule 5.4, the ABA also stated that its stance does not contradict a resolution it adopted in 2020 encouraging U.S. jurisdictions to consider innovative approaches to the access to justice crisis. Specifically, Resolution 115 in 2020 called on U.S. jurisdictions "to consider regulatory innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services, while also ensuring necessary and appropriate protections that best serve clients and the public,"[294] arguably including revisions to Rule 5.4, which the ABA opposed in 2022. Instead of calling for regulatory reform and then confusingly opposing the very innovation it called for, the ABA ought to lead the increased access campaign by relaxing Rules 5.4 and 5.5.

To be sure, revisions to Rules 5.5 and 5.4 are not going to be enough to increase access to legal services. Rather, states would have to undo their UPL statutes. Just as it led the way nearly a century ago advocating for the adoption of UPL state statutes and supporting state and local bar associations' efforts to enforce them,[295] the ABA should now lead the way to thoughtfully and systematically unwinding these very UPL statutes to increase access to legal services. Furthermore, as important as the *Rules* are in terms of the legal profession taking a proactive public stance to reduce insufficient access to legal services, increasing access need not and should not be limited to the *Rules*. For example, the profession can push for greater access plans, ranging from a civil Gideon entitlement to judicare,[296] and from taxing lawyers in support of access funds to working with (as opposed to against) non-lawyer constituents to open up the market for legal services to non-lawyers.[297] In sum, because the assumption that most would-be clients would ordinarily become paying clients no longer holds in the twenty-first century, increasing access to legal services must become an imperative for the *Rules*.

B. CLIENTS AND LAWYERS UNDER THE *RULES*: ACKNOWLEDGING THE DYNAMIC POWER RELATION IMPERATIVE

The *Rules* must come to terms with relevant differences between different types of clients with different legal needs and corresponding differences between

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293. ABA Resolution 402 (2022), *supra* note 159.

294. *See* ABA Resolution 115, Encouraging Regulatory Innovation (2020), https://www.americanbar.org/groups/centers_commissions/center-for-innovation/Resolution115/ [https://perma.cc/SJV6-6AEP].

295. *See supra* Part II.D.

296. Stan Keillor, James H. Cohen & Mercy Changwesha, *The Inevitable, If Untrumpeted, March Toward "Civil Gideon"*, 64 SYRACUSE L. REV. 469 (2014); Thomas D. Rowe, Jr., *If We Don't Get Civil Gideon: Trying to Make the Best of the Civil-Justice Market*, 37 FORDHAM URB. L.J. 347 (2010); Larry R. Spain, *The Opportunities and Challenges of Providing Equal Access to Justice in Rural Communities*, 28 WM. MITCHELL L. REV. 367, 377–78 (2001) (defining "Judicare" as legal services programs "patterned after the approach used in the health care field under the Medicaid and Medicare programs that support services provided by private medical providers paid on a fee-for-service basis by governmental funds.").

297. RHODE, *supra* note 141.

different types of lawyers and their varying needs and obligations. Recognizing the importance of context, however, does not necessarily mean abandoning the *Rules*' one-size-fits-all approach.[298]

Acknowledging the new prevailing practice realities in the twenty-first century should include at least three changes to the *Rules*. First, the *Rules* must systematically address the different ethical challenges experienced by different types of lawyers. The *Rules* already recognize and address certain unique practice areas and roles. For example, Chapter 2 addresses the role of lawyers as counselors,[299] and Chapter 3 regulates advocates,[300] with a specific rule in that Chapter imposing unique duties on prosecutors.[301] Just as the *Rules* attempt to guide the conduct of counselors and advocates, they can also guide the practice of advisers, transactional lawyers who generally operate outside the adversary system,[302] and of in-house lawyers who experience relatively unique practice challenges by virtue of having one client and being members of business teams dominated by non-lawyers.[303]

Second, the *Rules* must respond to new power dynamics in some attorney-client relationships, acknowledging circumstances in which clients are powerful vis-à-vis their lawyers and provide such lawyers protection from their clients to advance the public interest. The current chapter on advocates contains a special rule for prosecutors, recognizing the special public interest responsibilities of lawyers whose role has a meaningful impact on justice,[304] and a special rule for lawyers who represent organizational clients, implicitly recognizing the public interest in demanding lawyers go up-the-corporate-ladder with certain concerns regarding the conduct of the client.[305] Similarly, a new chapter on advisers can contain a special rule for lawyers, both outside and in-house counsel, representing publicly-traded entity clients, imposing a mandatory disclosure obligation in

298. Wald, *supra* note 49 (introducing the concept of univertext rules of professional conduct, which are universal rules that are grounded in the actual contextual empirical realities of practicing lawyers rather than outdated assumptions about them, as a way of retaining the *Rules*' one-size-fits-all regulatory approach).

299. MODEL RULES Ch. 2.

300. *Id*. at Ch. 3.

301. *Id*. at R. 3.8.

302. *See Public Calling*, *supra* note 63, at 235; Gordon, *supra* note 156, at 1185; Simon, *supra* note 156, at 57.

303. Notably, Rule 5.5(d) allows in-house lawyers to practice on a national basis without violating the UPL rules. *See* MODEL RULES R. 5.5(d) (stating in relevant part "a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that: [] are provided to the lawyer's employer or its organizational affiliates. . . "); *see, e.g*., Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L. J. 1011 (1997); Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 EMORY L. J. 1201 (1997); Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277 (1985).

304. MODEL RULES R. 3.8.

305. *Id*. at R. 1.13(b), (c).

certain circumstances in which the client's conduct will cause significant harm to the public.[306]

Third, the *Rules* must recognize that some categories of lawyer-employees are relatively vulnerable vis-à-vis their law firm employers and grant these lawyers, who are not powerful professionals, protections which may include minimal pay and adequate work conditions. These protections can be afforded to relatively weak lawyer-employees at law firms, such as staff and temporary attorneys, in Chapter 5 of the *Rules*, which deals with law firms and associations; and can be extended to weak in-house attorneys working for in-house legal departments, which are deemed law firms under the *Rules*.[307]

Practice realities in the twenty-first century have disproven the assumption made by the *Rules* pursuant to which all lawyers are powerful professionals from whom vulnerable clients need protection. To stay relevant and protect the public and the public interest, it is imperative that the *Rules* become more sensitive to different power dynamics in varying client-attorney and lawyer-law firm relationships.

C. MODERN LAW PRACTICE: THE JUSTICE IMPERATIVE

The *Rules* can no longer assume that lawyers advance justice merely and predominantly by practicing law representing clients, advising compliance with the law, acting as lawyer-statespersons, upholding the Rule of Law, and by serving as public citizens in their communities outside of their practice. In the wake of lingering gender and racial injustice concerns highlighted by the #MeToo and BLM movements, as well as other grave widespread injustices, the *Rules* must simply do more than assert that lawyers are "public citizens with a special responsibility for the quality of justice,"[308] without spelling out in detail the content and meaning of such a responsibility.[309] Instead, the *Rules* must include new chapters dedicated to advancing justice in the United States, and offering lawyers contextual guidance about how to identify and address injustice concerns.[310]

Importantly, specifying the content of a justice obligation in the *Rules* does not mean that all lawyers need to agree in advance about the meaning and application

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306. Lee, *supra* note 167.

307. MODEL RULES R. 1.0 cmt. 3 ("With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct.").

308. *Id*. at pmbl. cmt. 1.

309. Rhode, *supra* note 50 (calling for infusing the empty promise of "lawyers as public citizens" with substantive content); Carle, *supra* note 67.

310. Wald, *The Contextual Problem of Law Schools*, *supra* note 245. On the importance of context to the construction of the *Rules*, see David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 473, 476, 515–19 (1990) ("The importance of taking context into account is clear when we reexamine how lawyers actually interpret and apply legal rules."). *See also* David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145 (1993); David B. Wilkins, *Who Should Regulate Lawyers?* 105 HARV. L. REV. 799, 814–19 (1992).

of the justice duty in particular circumstances.[311] Rather, the *Rules* must facilitate and guide lawyers to systematically consider justice in their practice of law. Given the general retreat in our public lives and in law schools from a serious engagement with justice,[312] the *Rules* can become part of a justice push, working alongside law schools, regulators, and law firms to make justice an integral aspect of law practice. For example, Rule 1.1 on competence can be revised to state that "A lawyer shall provide competent *[and just]* representation to a client," (additions and revisions italicized and in brackets),[313] and comment 1 to Rule 1.1 can be revised to state that "In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity*[, justice implications,]* 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." (additions and revisions italicized and in brackets).[314] Furthermore, comment 8 to the rule can be revised to state that "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the *[justice implications of a proposed course of conduct,]* benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." (additions and revisions italicized and in brackets).[315]

Similarly, a new subsection can be added to Rule 1.4(a) on communications:

> (a) A lawyer shall:
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
> (3) keep the client reasonably informed about the status of the matter;
> (4) promptly comply with reasonable requests for information; and
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the *Rules of Professional Conduct* or other law. *[and*

311. WEST, *supra* note 245; Wald, *The Contextual Problem of Law Schools*, *supra* note 245.

312. Eli Wald & Russell G. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L.J. 403, 435 (2011); Wald, *supra* note 220. As Professor West explains, while the retreat from justice may be recent in American culture and the legal profession, the seeds of this trend were sowed in the formative Formalistic era of legal education. *See* WEST, *supra* note 245.

313. MODEL RULES R. 1.1 (additions and revisions italicized and in brackets).

314. *Id*. at R. 1.1 cmt. 1 (additions and revisions italicized and in brackets).

315. *Id*. at R. 1.1 cmt. 8 (additions and revisions italicized and in brackets).

> (6) *reasonably consult with the client about the justice implications of the client's objectives and the means by which the client's objectives are to be accomplished.]*

Additions and revisions italicized, stricken through and in brackets.[316] Comment 5 to the rule, construing Rule 1.4(b) can correspondingly be revised as follows:

> The client should have sufficient information to participate intelligently in decisions concerning the *[just]* objectives of the representation and the *[just]* means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client*[, including its justice implications]* before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense*[, injustice]* or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act *[justly]* in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

Additions and revisions italicized and in brackets.[317]

Notably, the justice imperative must be delineated for lawyers working in the corporate hemisphere with the same force and specificity as it is for lawyers working in the individual hemisphere, for nonprofit lawyers as it does for lawyers practicing in these two for-profit hemispheres,[318] and for government lawyers as it does for lawyers working in private practice. Thus, while it is important that a lawyer representing a rich borrower discusses with their client the justice implications of taking advantage of the statute of limitations and refusing to pay a debt to a poor lender,[319] it is as important that lawyers representing a large rich bank discuss with their entity client the justice implications of lawful but predatory lending practices to poor clients,[320] and that lawyers representing a large automaker

316. *Id*. at R. 1.4(a) (additions and revisions italicized and in brackets).

317. *Id*. at R. 1.4 cmt. 5 (additions and revisions italicized and in brackets).

318. *See* Wald, *supra* note 224, at 698 (arguing that spelling out justice obligations for lawyers in the corporate and individual hemispheres is not going to adequately address the justice commitments of lawyers working in the "priced-out, non-profit zone").

319. Wald, *supra* note 48, at 939.

320. *See, e.g*., 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 (1998).

discuss with their entity client the justice implications of lawful but disturbing practices that may inflict great harm on innocent customers and third parties.[321] Similarly, while it is important that lawyers representing a private client discuss with their client the justice implications of making false claims about the elections results,[322] it is as important that lawyers representing the government discuss with their client the justice consequences of torture.[323] Justice, like increased access, must be made an integral, inherent, frequent part of the daily practice of law for all lawyers, and the *Rules* must facilitate this commitment.

Such a commitment to justice can also be bolstered outside of the *Rules*, for example, by means of CLE requirements and annual registration statements. Just as some state supreme courts have recently begun to adopt EDI CLE requirements,[324] they can adopt justice CLE mandates, requiring lawyers to take courses exploring justice implications across practice areas and arenas. Similarly, in registration statements lawyers can briefly describe their annual contributions to and engagement with the justice imperative.

CONCLUSION

The *Rules* state that "A lawyer. . . is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice,"[325] and proceed to spell out the responsibilities of lawyers as representative of clients, officers of the legal system and public citizens. By guiding the conduct of lawyers as three-legged stools, the *Rules* thus purport to serve clients, the legal system, the public and the public interest, including justice.

Historically, the *Rules* have focused their attention on the attorney-client relationship, assuming that those in legal need would become clients, that serving clients necessitates protecting them from their powerful lawyers, and that serving clients and empowering them to pursue their autonomy would enhance the public interest.[326] Furthermore, the *Rules* assumed that emphasizing the attorney-client relationship was justified by the cultural expectation that in the United States lawyers qua lawyers regularly serve the public interest in addition to representing clients as gentlemen and as lawyer-statespersons by leading, from running for office

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321. *See* Sung Hui Kim, *Inside Lawyers: Friends or Gatekeepers?*, 84 FORDHAM L. REV. 1867 (2016) (describing General Motors Company's tragic decision-making processes relating to eventually recalling 2.6 million vehicles due to a defective ignition switch, but not before the malfunctioning switch caused numerous fatal injuries).

322. *See* Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies They Tell*, 69 WASH. U. J.L. & POL'Y (forthcoming 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3982663 [https://perma.cc/JJQ3-CNJG].

323. WENDEL, *supra* note 8, at § 6.1, The Case of the Torture Memos.

324. *See, e.g.*, the recent CLE rule change in Colorado. *Rule Change 2021(5)*, https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2021/Rule%20Change%202021(05).pdf [https://perma.cc/MZD2-W4P7] (last visited May 1, 2022).

325. MODEL RULES, pmbl. cmt. 1.

326. Pepper, *supra* note 40, at 617.

to running non-profits and by acting as community leaders. Finally, the *Rules* assumed that because our laws are generally just, by serving clients and advising them to uphold the law, lawyers were serving the public interest and the cause of justice.

Contemporary practice realities in the twenty-first century have disproven these assumptions. Many would-be clients appear as pro se litigants or are systematically priced out of the market for legal services, and others are powerful, not particularly likely to defer to their lawyers, and not in need of protection from their attorneys. While some lawyers continue to be relatively powerful vis-à-vis their clients, others are increasingly vulnerable to their clients, including some of the legal profession's elite, BigLaw and in-house lawyers; and many, perhaps most lawyers, increasingly understand their job and role to be serving clients, not serving the public interest. Next, some within and outside the practice of law increasingly understand our laws as a means of cooperating and "doing business," not as pursuing justice.[327] Finally, the persistence of widespread forms of injustice shows that while our laws may be relatively just compared with those of non-democratic or autocratic countries, lawyers cannot credibly claim to be advancing justice simply by practicing law on behalf of paying clients. Against this evolving background, the *Rules* can no longer credibly purport to serve the public, the public interest, and justice by primarily focusing on the attorney-client relationship and the representation of clients.

Adjusting to these contemporary practice realities and staying relevant requires revising the *Rules* to account for these new access challenges, power dynamics, and justice imperatives. This, to be sure, is not a quick fix but rather a long term, ongoing, multifaceted undertaking, the contours of which have been identified in this Article. And yet, the enormity of the task ahead should not be used by the profession as an excuse not to begin to act now. Notwithstanding the rise of a new class of lawyer-employees, most lawyers are professionals who, by definition, as professionals, serve the public. The *Rules*, which are lawyer-made, should serve the public and the public interest. In order to carry out their objective effectively, the *Rules* must be revised, in response to evolving practice realities, to respond to the access and justice needs of the public.

327. Hadfield, *supra* note 186 at 961–63.