Doing the "Right" Thing: An Analytical Model Examining the Interplay between Ethical Professional Conduct, Morality and Justice

Paul J. Cain, Northern Illinois University
DOING THE RIGHT THING: AN ANALYTICAL MODEL
EXAMINING THE INTERPLAY BETWEEN ETHICAL
PROFESSIONAL CONDUCT, MORALITY, AND JUSTICE

Paul J. Cain*

“We cannot seek or attain health, wealth, learning, justice[,] or kindness in general. Action is always specific, concrete, individualized, [and] unique.”1

John Dewey

Most attorneys and law students want to do the right thing. Contrary to our public image,2 and perhaps even our self-image within the legal community, most attorneys are not primarily interested in earning big bucks and trampling over adversaries. Like most people, we are generally good people.

The practice of law sometimes requires attorneys and law students who are practicing under a student-practice rule3 to make extremely difficult decisions in some situations. The right decision is subjective. People, including attorneys, may decide differently based upon a number of factors. Sometimes doing the right thing

1 Managing Attorney, Northern Illinois University College of Law, Zeke Giorgi Legal Clinic. I want to thank all of those who provided valuable comments and suggestions at the “Work-in-Progress” presentation at the AALS Workshop on Clinical Legal Education (April–May 2005). In addition, I want to thank the group at the 2006 Clinical Law Review Writer’s Workshop for their helpful and thoughtful suggestions and comments, including Jane Aiken, Isabel Gunning, Lauren Carasik, Mary Hanna, and Spencer Rand. Finally, I especially want to thank Faith Mullen of Columbus School of Law, Catholic University of America for her extensive, valuable comments and time, as well as her encouragement.
2 See THE GALLUP ORGANIZATION, THE GALLUP POLL: PUBLIC OPINION 519 (Alec M. Gallup and Frank Newport eds., 2007) (stating a Gallup Poll in December 2006 found that only 18% of the American public rated the honesty and ethical standards of lawyers are ‘high’ or ‘very high’), available at http://www.gallup.com/poll/1654/Honesty-Ethics-Professions.aspx.
3 Ill. Sup. Ct. R. 711 (stating the student practice rule, which allows students to practice law under the supervision of a licensed attorney, is usually restricted to the setting of a law school clinic or externship).
Discussion about justice or morality do occur. But, they are not usually a discussion’s primary focus. Every accredited law school teaches the Model Rules of Professional Conduct (Model Rules)\(^4\) in preparation for the Multistate Professional Responsibility Exam.\(^5\) This article explores the interplay between competing obligations and the difficulty in deciding the right thing to do.\(^6\) This article proposes an analytical model to help resolve these often difficult questions.

We are governed by moral code. A moral code is derived from beliefs about right and wrong. A moral code may be secular, philosophical, or religious in nature. We may be secular and adhere to the teaching of philosophers like Plato or Aristotle.\(^7\) We may have religious beliefs and follow the teachings of the Bible, the Koran, or the Torah. In addition, we are governed by our sense of justice: we desire both society and the parties to be served in a just manner with a just result.

\(^4\) Discussions about justice or morality do occur. But, they are not usually a discussion’s primary focus. Every accredited law school teaches the Model Rules of Professional Conduct. Few law schools offer law and morality classes. However, some law schools, particularly those with a religious affiliation, do offer law and morality classes.


\(^6\) An act may be one of commission or omission, but a decision is still made. Therefore, “to do” refers to an act of commission or omission.

Attorneys are governed primarily by the Model Rules\(^8\) or the Model Code\(^9\) of Professional Responsibility. They guide our legal ethical obligation to both our client and to the legal system. They recognize the interplay between the Rules and our moral governance in reaching ethical decisions.\(^{10}\)

This article proposes an analytical model, which uses a series of questions and related issues to determine the right decision in a methodical, well-reasoned manner. The analytical model will be applied to three scenarios.

The first scenario discusses whether testifying before a grand jury and disclosing my client’s confidences was the right thing to do. The second scenario involves law students, whom I supervised, representing an elderly Middle-Eastern woman in political-asylum removal proceedings. While her story did not seem credible, it was likely she would have been arrested and put to death if she was forced to return to her country. The third scenario discusses a prosecutor’s decision to deceive a murder suspect to get him to surrender to police. This article describes the analytical model, its components, and then discusses each question, which builds the analytical model. In addition, the article discusses how the model’s application affected each decision when applied to each scenario.

\textit{Scenario One}\(^{11}\)

On September 22, 1988, at 11:37 a.m., William LeFever was pronounced dead at Licking Memorial Hospital. An autopsy revealed

\begin{flushright}
\footnotesize

\textit{9} Id. (“The Model Code was adopted by the House of Delegates [of the American Bar Association] on August 12, 1969, and subsequently by the vast majority of state and federal jurisdictions.”).

\textit{10} See infra The Analytical Model section p. 6.

that solid objects, containing strychnine, arsenic, and amitriptyline, had been inserted rectally. Abnormally high levels of sulfates were found in his blood and tissue. Fluid was found in his lungs. An injection site was located on his left buttock with a large ratio of amitriptyline to nortriptyline. The coroner concluded that he received an intramuscular injection of amitriptyline. In other words, William LeFever was murdered.

William LeFever had a long history of alcohol and drug abuse. Virginia LeFever filed for divorce in April of 1988. They separated in August of 1988 when Virginia LeFever moved out, and a divorce hearing was scheduled for September 27, 1988. William LeFever visited Virginia LeFever’s home on September 19, 1988, to baby-sit one of their children. Virginia LeFever was a registered nurse.

The police searched Virginia’s home. They discovered garbage bags with poison peanuts used to kill rats, a 35mm film canister containing residue consistent with strychnine-laced poisoned peanuts, a pink dye consistent with dye used in Ro-dex (used to kill rats), an empty bottle of Terro Ant Killer, syringes, hypodermic needles, and charred remnants of a fumigant stick (used to kill moles). The investigation discovered that Virginia beat William while he was passed out from alcohol consumption. She inserted rat poisons in his rectum to further debilitate his condition and lit a fumigation stick near him. Virginia left the house and returned to inject William with a fatal dose of amitriptyline.

During the investigation, my business card was found in William’s possession. I was subpoenaed by the prosecutor to testify before a grand jury investigating the charges against Virginia. The prosecutor wanted to know if William was my client and if he had told me anything that might aid in the investigation. At the grand jury proceeding, I refused to testify and cited the attorney-client privilege. A hearing determined that I was not required to answer.

---

12 Amitriptyline is an antidepressant medication.
14 Ohio Rev. Code Ann. § 2317.02 (LexisNexis 1996) (stating that “[an attorney] shall not testify in certain respects . . . concerning a communication to the attorney by client in that relation or [the attorney’s] advise to [a] client).
15 Ohio Rev. Code Ann. § 2939.14 (LexisNexis 1996) (“If a witness before a grand
The period between being subpoenaed and appearing before the grand jury was filled with angst. Assuming that I had useful information, I faced a difficult question: what is the right thing to do? At the time, I did not have an analytical model to follow. However, I, somewhat intuitively, followed this article’s proposed model: I considered the rules and ethical considerations of the Code of Professional Responsibility, my sense of moral obligation, the alternatives available to me and the prosecution, and my thoughts as to how justice might be served. My decision-making process was not methodical. It was an anxious, gut-wrenching, decision-making process.

I decided to protect my client’s confidences by not testifying before the grand jury. Eventually, the State successfully prosecuted Virginia for William’s murder. Any information that I may have had was clearly not essential to her prosecution. Although I was relieved that justice prevailed without my disclosure, the underlying question of whether my decision was right was not answered.

The Analytical Model

The analytical model is comprised of a series of questions with related issues as a subset of the questions. Applying each question to the action will guide attorneys and law students in the decision-making process. The analytical model is not a mathematical equation that formulates an absolute, correct answer. It helps attorneys and law students reach decisions based on carefully thought-out methods, instead of gut reactions, feelings, instincts, or blind adherence to the rules.

jury refuses to answer an interrogatory, the court of common pleas . . . shall determine whether the witness is required to answer . . . ”).

16 ABA JOINT COMM. ON PROF’L SANCTIONS, STANDARDS FOR IMPOSING LAWYER SANCTIONS 5 (1991) (stating that the analytical model is similar in its theoretical framework to the Standards for Imposing Lawyer Sanctions (Standards) adopted by the American Bar Association. The model provided by the Standards requires courts imposing sanctions to answer four questions: “(1) What ethical duty did the lawyer violate? . . . (2) What was the lawyer’s mental state? . . . (3) What was the extent of the actual or potential injury caused by the lawyer’s misconduct? . . . (4) Are there any aggravating or mitigating circumstances?”).
The questions are derived from my own experience. I asked myself these questions as I struggled to make the right decision. Additionally, these questions arose in the law school clinical setting where law students struggled to decide how they should represent their client. These questions also arose during my research for this article.

Each individual must weigh the importance of the questions as they relate to each other. One attorney may decide that the consequences of his or her actions are too costly while another attorney may not. One attorney may decide that the obligation under the Model Rules outweighs the obligation under his or her moral code. Another attorney may conclude that the obligation under his or her moral code outweighs the obligation under the Model Rules.

The questions and subsets are as follows:


   What do the Model Rules say about your proposed action?20

   a. Is the rule imperative or permissive in nature?21

---

17 See supra scenario one p. 151 and accompanying text.
18 See infra scenario two p. 175 and accompanying text.
19 See infra scenario three p. 190 and accompanying text; People v. Pautler, 35 P.3d 571 (Colo. 2001); In re Pautler, 47 P.3d 1175 (Colo. 2002).
20 I am referring only to the Model Rules since most states have adopted the Model Rules rather than the old Canons of Professional Responsibility.
21 Thomas D. Morgan & Ronald D. Rotunda, *Selected Standards on Professional Responsibility* 5 (1991) ("The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline. Others, generally cast in the term “may” are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role. Many of the Comments use the term “should.”")
b. What do the Comments to the Rules state?
c. How have the courts interpreted the Rules?
d. What do secondary sources say about the Rules?22


What does your belief system or moral code say about your proposed action?

a. Would your action be a major or minor violation of your beliefs and morals?
b. Does your belief system or moral code allow for extenuating or mitigating circumstances in applying those beliefs?

3. *Consequences.*

What are the consequences of your action?

a. to the client;
   i. Will the client be harmed by your action and, if so, how?
b. to you;
   i. Civil litigation
   ii. Disciplinary
      1. reprimand to disbarment
   iii. Pecuniary
      1. loss of business or income
   iv. Reputation
      1. within the legal community
      2. within the community at large
      3. among your family and friends
c. to the legal system?

---

22 *See, e.g.,* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).
4. Alternatives.

What are your alternatives?

a. Do nothing
b. Restructure the situation or theory to avoid conflicts
c. Withdraw

*Question One: What do the Model Rules say about your proposed action?*

The first question concerns an attorney’s obligation to adhere to the Model Rules. The Preamble to the Model Rules recognizes and acknowledges that lawyers may be faced with ethical dilemmas in practice. Various sections of the Preamble to the Model Rules address the responsibilities of lawyers in general terms as they function in their professional capacity. Section 2 addresses representational functions that include acting as the client’s advocate. It states that “[a]s advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.” 23 Section 5 of the Preamble to the Model Rules states that “a lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials.” 24 Sections 7, 8, and 9 are more direct in addressing the competing ethical concerns that lawyers may have. Those sections state the following:

[7] Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal

---

profession[,] and to exemplify the legal profession’s ideals of public service.

[8] A lawyer’s responsibilities as a representative of clients, an officer of the legal system[,] and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and[,] at the same time[,] assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system[,] and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer’s obligation [to zealously] protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous[,] and civil attitude toward all persons involved in the legal system.25

The above sections provide some guidance in resolving ethical dilemmas. We should follow our personal conscience and our peers’ approbation. We should look within ourselves and seek guidance from our peers. We may have a mentor from whom we can seek guidance. If not, many bar associations have formal-mentor

25 Morgan & Rotunda, supra note 21, at 4.
programs to pair less-experienced attorneys with more-experienced attorneys for guidance.

Is the rule imperative? Is the rule cast in terms of “shall” or “shall not”? If so, the rule describes conduct subject to professional discipline. Is the rule permissive? Is the rule cast as “may”? If so, no disciplinary action should be imposed when the lawyer chooses not to act or acts within the bounds of such discretion. Would you violate your ethical obligation to the client, the public, the legal system, or the profession?

**Question Two: What does your belief system or moral code say about your proposed action?**

The second question discusses your moral code or belief system. Is your action a violation of your morals? If so, is the violation large or small? Are there conflicting moral beliefs that must be weighed against each other? Is your moral belief absolute, or does it allow mitigating or extenuating circumstances? For example, if your moral code upheld the sanctity of human life, then the taking of life would violate your moral code. However, your moral code may allow extenuating circumstances to take life. Such extenuating circumstances may include self-defense or defending your country during war. Your moral code may be very complex and allow the death penalty, but prohibit abortion.

Lawrence Kohlberg, a Harvard professor, outlined the stages of moral development based upon both his research and the work of Jean Piaget and John Dewey. He concluded that people transition through three levels, or six stages, of moral development. One may

---

progress from one stage to another, but can not skip any stage.\textsuperscript{30} The levels and stages of moral development are as follows:

KOHLBERG’S LEVELS AND STAGES OF MORAL DEVELOPMENT

<table>
<thead>
<tr>
<th>LEVEL</th>
<th>STAGE</th>
<th>SOCIAL ORIENTATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-conventional</td>
<td>1</td>
<td>Obedience and Punishment</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>Individualism and Exchange</td>
</tr>
<tr>
<td>Conventional</td>
<td>3</td>
<td>Good Boy/Girl</td>
</tr>
<tr>
<td></td>
<td>4</td>
<td>Law and Order</td>
</tr>
<tr>
<td>Post-conventional</td>
<td>5</td>
<td>Social Contact</td>
</tr>
<tr>
<td></td>
<td>6</td>
<td>Principled Conscience</td>
</tr>
</tbody>
</table>

At the pre-conventional level, a person’s moral judgments are characterized by a concrete, individual perspective. At the conventional level, a person’s moral judgments are characterized by societal norms and conventions where morality is what society determines is right or wrong. At the post-conventional level, a person’s moral judgments are characterized by reason based upon underlying principles that rejects a uniform application of any rule or norm.\textsuperscript{31} If Kohlberg’s theory\textsuperscript{32} is accepted, then an individual’s level, or stage of development, affects that individual’s perspective and evaluation of moral action. An individual at the conventional level may give greater moral weight to question one (societal and professional rules) than an individual at the post-conventional level who may be more concerned with the underlying principles of question one.

\textsuperscript{30} Id.


\textsuperscript{32} Id. (It should be noted that not all psychologists, or educators, have accepted Kohlberg’s theories. Chancellor’s Professor Elliot Turiel, of the University California at Berkeley, advanced the domain theory that draws a distinction between a child’s developing concept of morality and other domains of social knowledge.).
Question Three: What are the consequences of your action?

The third question concerns consequences in several contexts. The most important context considers any consequence to your client. Will your actions violate a duty owed to your client? Will your client be harmed? How extensively may your client be harmed? Will any harm be long-term or short-term?

What consequences may you suffer? Such consequences may include suit by your client or others, discipline by the regulating authority in your jurisdiction, pecuniary loss through loss of income or clients, and damage to reputation. If you are sued, will your malpractice insurance provide coverage? Disciplinary action may be a private reprimand or disbarment. Additionally, one may lose income or clients, especially, if the actions become widely known or publicized. Other attorneys may view your actions as unethical. The public may vilify you for your actions. Family and friends may find your actions objectionable. Your perception of these consequences may change throughout your life. You may give more weight to loss of income and clients early in your career if you are struggling financially, but you may give less weight to loss of income and clients later in your career if you are financially sound.

What are the consequences of your actions to the legal system? Will your actions serve or thwart justice? Will your actions enhance, or hurt, the legal profession’s public perception? The legal profession is not the only profession facing these difficult decisions. The medical profession faces difficult decisions on a regular basis. Life and death decisions may be made with more frequency by doctors than by lawyers. Medical ethics in Britain provide an analytical model of “four principles plus scope.” The principles provide a simple, accessible, and culturally neutral approach to thinking about ethical issues in health care. This approach is based upon four

---

33 *Id.* at 9 (“In determining the nature of the ethical duty violated, the standards assume that the most important ethical duties are those obligations which a lawyer owes to clients.”) (emphasis in original).

common moral commitments: (1) respect for autonomy, (2) beneficence, (3) non-maleficence, and (4) justice and concern for their scope and application. This approach does not provide an answer, but it provides a basis for making a health-care decision.

*Question Four: What are your alternatives?*

The fourth question examines any alternative you may have. Can you restructure the case’s legal theory to avoid violating any legal ethics or moral beliefs? Is there a way to restructure the problem to avoid an ethical or moral conflict? The change may use different evidence to prove a material fact, or it may use a different theory of the case. In applying the fourth question, one should think outside-the-box to resolve the situation. One alternative is to get out of the situation. Will the court allow withdrawal? Will withdrawal jeopardize your client’s interests? Many situations involve deciding whether an act is right, but some situations involve deciding whether to act. Will it matter if an act is one of commission or omission? Most states do not require one to aid another. One who does aid another may be exposed to liability. Nevertheless, a decision must be made.

The American Medical Association (AMA) House of Delegates adopted nine principles of medical ethics on June 17, 2001. The preamble states that physicians must recognize responsibility to “patients first and foremost, as well as to society, to other health

---

35 Id. (“The principle plus scope approach can . . . provide a common set of moral commitments, a common moral language, and a common set of moral issues.”).
36 See, e.g., ILL. COMP. STAT. ANN. RULES OF PROF’L CONDUCT R. 1.16 (West 2004) (Declining or Terminating Representation); ILL. COMP. STAT. ANN. S. Ct. R. 13 (West 2000) (Withdrawal) (Most, if not all, states have statutes or rules governing the withdrawal of attorneys from cases. The primary purpose of the rules or statutes is to protect clients from the untimely withdrawal of their attorney leaving them without legal representation at a crucial time.).
37 RULES OF PROF’L CONDUCT R. 1.16 (d) (“In any event, a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the client . . . .”).
professionals, and to self.’39 This concept resembles my analytical model because it addresses how actions may affect clients, attorneys, and the legal profession.

Let us apply my proposed analytical model to the situation I faced in Scenario One (the LeFever case). The first question asks, “What do the Model Rules say about your proposed action?”40 The Code of Professional Responsibility (the Code) determined my legal ethical considerations.41 The Code is divided into Ethical Considerations (EC) and Disciplinary Rules (DR). Lawyers should aspire to follow the EC, but are required to follow the DR because they will subject lawyers to disciplinary action if the DR are violated.42

Every attorney admitted to practice in Ohio takes an oath of office.43 In the oath, the attorney swears, or affirms, to abide by the Ohio Rules of Professional Responsibility (OCPR). Canon 4 of the OCPR is entitled “A Lawyer Should Preserve the Confidences and Secrets of a Client.”44 The EC discuss the reason for, and function of,

---

39 Id.
40 See supra note 20.
41 Lawyers in Ohio were then governed by the Code of Professional Responsibility, and not the Rules of Professional Conduct. Therefore, although the analytical model utilizes the Model Rules, I am utilizing the Code of Professional Responsibility in my personal scenario. Ohio adopted the Model Rules of Professional Conduct on August 1, 2006, effective February 1, 2007. Of the states or territories that have adopted the Model Rules, Ohio is the most recent to have done so.
43 Ohio Sup. Ct. R. l(8)(A) (2007-08) (“I, _______, hereby (swear or affirm) that I will support the Constitution and the laws of the United States and the Constitution and the laws of Ohio, and I will abide by the Ohio Rules of Professional Conduct. In my capacity as an attorney and officer of the Court, I will conduct myself with dignity and civility and show respect towards judges, court staff, clients, fellow professionals, and all other persons. I will honestly, faithfully, and competently discharge the duties of an attorney at law. (So help me God.)”) (I took the oath of office in 1980. I still remember the thrill and sense of special responsibility I felt by saying aloud, under oath, that I would represent my clients zealously and protect their confidences.).
maintaining client confidences and secrets. They also provide some guidance for circumstances where a lawyer may reveal a client’s confidences and secrets. Further, the EC distinguishes between attorney-client privilege and maintaining client confidences and secrets.

The language of EC 4-1 clearly provides that I could not testify before the grand jury because testifying would break the inherent trust within the fiduciary relationship. Maintaining my client’s confidences and secrets would enhance the “proper functioning of the legal system.” However, the language of EC 4-2 is unclear: it allows attorneys to reveal client confidences and secrets when the “client consents after full disclosure.” If it were possible, would William LeFever consent to my testimony even if his confidences and secrets were revealed to help prosecute the person who murdered him?

DR 4-101(A) defines “confidences” and client “secrets.” Unless the client consents to disclosure, disclosure is required by law or a court orders disclosure. DR 4-101 prohibits disclosure. The DR clearly, and unequivocally, states that an attorney may disclose under limited circumstances. Failure to adhere to those limitations could result in disciplinary action. I did not have, and could not obtain, William LeFever’s consent. No DR allowed disclosure under my

---

45 **MODEL CODE OF PROF’L RESPONSIBILITY** EC 4-1 (1970) ("Both the fiduciary relationship existing between the lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidence and secrets of one who had employed or sought to employ him.").
46 EC 4-2 (1970) ("The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law.").
47 EC 4-4 (1970) ("The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client . . . . A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.").
48 EC 4-1.
49 Id.
50 EC 4-2.
51 **MODEL CODE OF PROF’L RESPONSIBILITY** DR 4-101(A) (1970).
circumstances. However, DR 4-101(B)(2) seemed to allow some wiggle room. I could not use my client’s confidences and secrets to my client’s disadvantage. Could I use my client's confidences and secrets to my client’s advantage? Would it be advantageous for William LeFever’s murderer to be prosecuted using his confidences and secrets?52

What do secondary sources say about my obligations to maintain the confidences and secrets of my client? Restatement (Third) of The Law Governing Lawyers (Restatement) provides some guidance. Section 60 states that a “lawyer may not use or disclose confidential client information . . . if there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information.”53 The Comments provide further guidance about disclosure. Comment (b) states:

[T]he broad prohibition against divulging confidential client information comes at a high cost to both lawyers and society. Lawyers sometimes learn information that cannot be disclosed because of the rule of confidentiality[,] but that would be highly useful to other persons . . . . Those may include persons . . . who could accomplish great public good or avoid great public detriment if the information were disclosed . . . . Nevertheless, despite those costs, the confidentiality rule reflects a considered judgment that high net social value justifies it.54

Surely, my circumstances fit into the situation described in the Comments. After all, perhaps the information that I gained from my client would be highly useful to the prosecutor in prosecuting Virginia LeFever. Therefore, my disclosure would serve the public good and avoid public detriment if it aided the prosecution. But, how

52 In re Burns, 42 Ohio Misc. 2d 12, 15 (C.P. Hamilton County 1988) (“The rule with regard to privileged communications between client and attorney is well understood; difficulty is often encountered in its application.”).
54 § 60 cmt. b (2000).
does that weigh against the net social value of maintaining that confidence? Did the net social value of my client’s trust outweigh the possible good in aiding Virginia LeFever’s prosecution?

What if the prosecutor revealed that any evidence against Virginia LeFever was weak, but my client’s information could aid Virginia LeFever’s prosecution? The Comments seem to suggest that the net social value of maintaining confidentiality outweighs the public good of prosecuting Virginia LeFever. That is an easy position to adopt abstractly and intellectually, but it is much more difficult to surmise what I would have done if I really believed that but for my information, Virginia LeFever would get away with murdering William LeFever.

Additional resources include Ohio statutes. Ohio Rev. Code Ann. § 2317.02(A) provides that after a client’s death, an attorney may not disclose the client’s communications or legal advice given to the client except “by the express consent of the surviving spouse[,] . . . executor[,] or administrator of the estate of the deceased client . . . .” This source supported my decision against disclosure since Virginia LeFever was not going to consent to my disclosure.

Another resource is the ABA Standards for Imposing Lawyer Sanctions (the Standards). While this source perhaps is more appropriately considered under the third question (consequences) and the subcategory regarding disciplinary sanctions, it provides guidance under the Model Rules. The Standards “assume that the most important ethical duties are those obligations which a lawyer owes to clients.” One of those duties is the duty of loyalty, which includes maintaining client confidences. Since my conduct involved a duty

---

56 Id.
59 Id.
that was considered the most important duty owed to my client, extra care had to be taken in contemplation of violating that duty.

The Standards also look to the attorney’s mental state. Intent is the most culpable mental state (acting with conscious objective or purpose to accomplish a particular result). Since my testimony would be intentional, my mental state would be in the most culpable mental state. Therefore, extra care was required when deciding whether or not to testify.

It is arguable whether the Canons allow disclosure of client confidences. However, a strong argument is that a breach, such as disclosure, would violate the Canons and subject me to disciplinary action.

What does my belief system or moral code say about breaching confidentiality? I was raised Roman Catholic. Although I have not been a practicing Roman Catholic for many years, my parochial school and religious instruction certainly influenced my belief system and morals. There are several sources that help determine what Catholicism teaches. These sources include the Code of Canon Law (the Canons), the Catechism of the Catholic Church (the Catechism) and Encyclicals issued by various Popes of the Catholic Church.

All attorneys swear, or affirm, that they will conform to and follow their jurisdictions professional code or rules. What does Roman Catholicism say about this? First, let us examine the Code of Canon Law.

60 See Id. at 10.
61 See supra note 42.
62 See generally 1983 CODE OF CANON LAW.
63 1983 CODE C. 1199, § 1.
64 1983 CODE C. 1204.
as an attorney was a promissory oath. Among other obligations, I swore before God that I would preserve my client’s confidences.\textsuperscript{67} Therefore, another question arises: do the Canons allow any exceptions to adherence? “If an oath is added to an act which directly tends toward the harm of others or toward the disadvantage of the public good or of eternal salvation, then the act is not reinforced by the oath.”\textsuperscript{68} Would preserving my client’s confidences serve the “disadvantage of the public good?”\textsuperscript{69} Other sources state that the preservation of client confidences and its accompanying “high net social value”\textsuperscript{70} are to the advantage, not disadvantage, of the public good. Canon 1201, § 2 does not relieve my obligation to preserve my client’s confidences.

“The obligation arising from a promissory oath ceases: (1) if it is remitted by the person for whose benefit the oath was made; (2) if the matter sworn to is substantially changed or if, after the circumstances have changed, it becomes either evil or entirely indifferent or, finally, impedes a greater good; (3) if the purpose or a condition under which the oath may have been taken ceases; [or] (4) by dispensation or commutation, according to the norm of can. 1203.”\textsuperscript{71} Does this Canon relieve me of my obligation to preserve my client’s confidences?

Obviously, William LeFever could not remit the oath because he is deceased. Does his death substantially change\textsuperscript{72} the matter, considering that his wife was the defendant? Did I “impede . . . a greater good”\textsuperscript{73} by preserving William LeFever’s confidences? According to some legal sources, William LeFever’s death did not substantially change\textsuperscript{74} the matter. For example, \textsc{Ohio Rev. Code Ann.} § 2317.02(A)\textsuperscript{75} provides that an attorney may not testify about a client’s communications or legal advice to a client except “by the

\textsuperscript{67} \textsc{Model Code of Prof’l Responsibility} Canon 4 (1983).
\textsuperscript{68} C. 1201, § 2.
\textsuperscript{69} \textit{Id.}
\textsuperscript{70} \textsc{Restatement (Third) of the Law Governing Lawyers} § 60 cmt. b (2000).
\textsuperscript{71} C. 1202.
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textsc{Ohio Rev. Code Ann.} § 2317.02(A) (LexisNexis 2003).
express consent of the surviving spouse[,] . . . executor[,] or administrator of the estate of the deceased client” following that client’s death. Therefore, William LeFever’s death did not substantially change the matter under Ohio statutory law. Additionally, I did not “impede . . . a greater good” because the “net social value” fostered maintaining client confidences.

Could someone other than William LeFever remit my oath? If a person has the power to commute a vow does that person have the power to commute an oath? Who can commute a vow? Canon 1196 provides governing authority. The Roman Pontiff (the Pope) can dispense a private vow and, therefore, can commute an oath. In my case, the local ordinary and the pastor could also commute my oath. Therefore, I could have explained my dilemma to my pastor without revealing my client’s confidences and requested that he remit the oath that I took upon admission to the Bar. This would allow disclosure without a violation of Catholic Code of Canon Law.

The second commandment states that “You shall not take the name of the LORD, your God, in vain.” The Catechism states that

---

76 Id.
77 C. 1202.
78 Id.
79 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. b (2000).
80 C.1203 (“Those who can suspend, dispense, or commute a vow have the same power in the same manner over a promissory oath; but if the dispensation from the oath tends to the disadvantage of others who refuse to remit the obligation of the oath, only the Apostolic See can dispense the oath.”).
81 C.1196 (“In addition to the Roman Pontiff, the following can dispense from private vows for a just cause provided that a dispensation does not injure a right acquired by others: 1 the local ordinary and the pastor with regard to all their subjects and even travelers; 2 the superior of a religious institute or society of apostolic life it is clerical and of pontifical right with regard to members, novices, and persons who live a day and night in a house of the institute or society; 3 those to whom the Apostolic See or the local ordinary has delegated the power of dispensing.”).
82 C.1192, § 1 (“A vow is public if a legitimate superior accepts it in the name of the Church; otherwise, it is private.”).
83 Exodus 20:7 (New American Bible).
the second commandment “forbids false oaths.”85 An oath places “God as witness to what one affirms.”86 An oath invokes “the divine truthfulness as a pledge of one’s own truthfulness.”87 “An oath engages the Lord’s name.”88 A person that does not keep an oath commits perjury.89 Perjury equates to “a grave lack of respect for the Lord of all speech.”90 Therefore, the teachings of the Catechism and the Canon Law are related and compatible.

How does my belief system affect the decision-making process? The balance of authority suggests that I should not testify before the grand jury. How much weight should I give to Roman Catholic doctrine if I am not a practicing Catholic, but I am strongly influenced by Roman Catholic doctrine? That is a difficult and personal question. The primary teachings would guide my decision, but the procedural aspects of the Canons would not. Therefore, I would not ask a priest to remit my oath.

What are the consequences of my actions? There are several subset topics and questions to the primary question. The first asks whether the client will be harmed and, if so, how the client will be harmed. Would William LeFever be harmed by disclosure to the grand jury and, if so, how? The answer depends on what information I had, and whether that information was likely to be disclosed in the grand jury proceedings.

Assume that William LeFever gave me information about his relationship with Virginia LeFever. Furthermore, that this information would be relevant and helpful to the grand jury proceedings and was likely to be inquired about if the information helped Virginia LeFever’s prosecution. Also, assume that Mr. LeFever gave me irrelevant information regarding an unrelated matter that was not the subject of the grand jury proceedings. Moreover, assume that Mr. LeFever’s business rival was going public in a few months and my prematurely revealing this information could severely harm the stock

85 *Id.* at 520 (emphasis in original).
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.*
value. Revealing this information may be detrimental to William LeFever’s estate because it could reduce the value of his stock holdings and his bequest to any heirs or devises. Determining whether William LeFever would be harmed under these assumptions requires balancing competing interests.

I am the second subtopic. This subtopic examines several potential consequences that affect me personally. The first potential consequence that affects me personally is civil litigation. Could I be sued if I testified before the grand jury? Besides the prosecutor and the grand jurors, it is unlikely anyone would know that I testified because such proceedings are kept secret. If my testimony became public knowledge, who would probably sue me? Virginia LeFever, or her family, would probably sue me. Would they have standing? A strong argument could be made that neither Virginia LeFever nor her family would have standing to sue me for a breach of duty owed to my client. However, if the lawsuit were brought by William LeFever’s estate, rather than Virginia LeFever’s family, then the estate’s executor, or administrator, would have standing. Even if the lawsuit was brought by William LeFever’s estate, what are the damages? Damages appear to be none or nominal. The threat of a lawsuit seems minimal.

The second potential consequence is disciplinary proceedings for breach of the Code of Professional Responsibility. This threat is real and substantial. The consequences could range from a reprimand to disbarment. While my circumstances may result in a lesser sanction, a sanction of some kind seems probable. Therefore, this factor weighs heavily in my decision-making process.

---

91 See OHIO REV. CODE ANN. § 2939.19 (LexisNexis 2006); See also OHIO R. CRIM. P. 6(E).
92 Ohio Gov. Bar R. 5 § (6)(B); See, e.g., Bar Ass’n of Greater Cleveland v. Watkins, 427 N.E.2d 516 (Ohio 1981) (holding that revealing confidences of client for own advantage and to disadvantage of client warrants indefinite suspension from practice of law). (My own case is arguably distinguishable, in that, I was not revealing my client’s confidence for my own advantage. However, any possible suspension from the practice of law is extremely discomforting.)
In determining a possible sanction, the Standards for Imposing Lawyer Sanctions (Standards) provide at § 3(C) R. 4.22\footnote{ABA JOINT COMM. ON PROF’L SANCTIONS, STANDARDS FOR IMPOSING LAWYER SANCTIONS 17 (1992), available at http://www.abanet.org/cpr/regulation/standards_sanctions.pdf (“Suspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.”).} that a knowing disclosure of client confidences with potential injury to the client warrants suspension. Clearly, my testimony would be a knowing disclosure of client confidences. It is questionable, however, whether or not my disclosure would cause potential injury to Mr. LeFever.

The third potential consequence to me is pecuniary (the loss of income or legal business). Similar concerns arise regarding civil litigation. Outside of the prosecutor and the grand jurors, it is unlikely anyone would know that I testified. Even if my disclosure became public knowledge, two questions arise: (1) how widespread would the public’s knowledge be, and (2) how would the public react? Unless the local newspaper revealed the information, publication and dissemination would probably be limited. Therefore, it would have little impact on prospective clients and the economics of my law practice. Even if my disclosure were widely disseminated, I believe that the public would largely support my disclosure under the circumstances. Although, my belief may be entirely wrong because the public’s reaction to the \textit{D.A. Pautler} case was not entirely favorable.\footnote{See infra Scenario Three.}

The fourth potential consequence is to my reputation in differing contexts. First, would my reputation within the legal community suffer if disclosed? This consequence is difficult to ascertain. Undoubtedly, there will be attorneys and judges on both sides of the issue. Some will favor disclosure under these circumstances. Others will not favor disclosure under these circumstances. My reputation would probably suffer to some extent, but even those attorneys and judges who would not favor disclosure would empathize with my difficult decision. Would my reputation suffer in the community at
large? If my disclosure became public knowledge, then how widely disseminated would that knowledge be, and how would the public react? Would my reputation among my family and friends suffer? I think their reaction may be similar to the public at large: their reaction would probably support or, at least, empathize with the difficult decision.

How do the consequences to my reputation weigh in the decision-making process? There probably would not be severe negative consequences to my reputation from disclosure. Of all the different factors, this factor would not weigh heavily in my decision making.

The third sub-topic examines the consequence of my actions to the legal system. Will my actions serve justice? This is a difficult question. I wanted to see Virginia LeFever convicted for my client’s murder, if she murdered him. But, will justice be served if Virginia LeFever’s conviction is obtained by any means? Are not defendants’ rights protected by the Fourth Amendment? Does not the Fourth Amendment ensure justice and safeguard civil liberties? If I violate my oath and breach William LeFever’s trust for Virginia LeFever’s conviction, is justice really served? Probably not: stepping on that slippery slope would probably cause the protection that all clients have to tumble down.

What consequence will my actions have on the public’s perception of the legal system? It is unlikely that my disclosures would become widely disseminated if I had disclosed them. But, assuming that there was wide dissemination, I believe the public would largely support my disclosure under the circumstances. Therefore, the public’s perception of this would not negatively affect the legal profession. Although, I may be entirely wrong, there would also be those who, upon learning that I refused to disclose, would believe I

---

96 U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).
was obstructing the truth and inhibiting the prosecution for no good reason. This segment of the public would probably reinforce any negative impression of the honesty and ethical standards of lawyers.97

What were the alternatives? Several possible alternatives are listed, but the list is not exhaustive. In my circumstance, I could not do nothing because I had to respond to the subpoena. Nor could I withdraw as the attorney.

A possible choice was to restructure the situation, or theory, to avoid conflicts. From a moral standpoint, I could restructure the situation by having a priest remit my oath, thus freeing me from my religious constrictions to maintain the confidences of my client. A priest could relieve my obligation to keep the oath I took upon admission to the practice of law. I could then disclose without violating Roman Catholic teachings. This would not, however, relieve other considerations and consequences previously discussed such as possible disbarment.

What other alternatives might be available? OHIO REV. CODE ANN. § 2317.0298 provides the statutory basis for privileged communications and acts, including attorneys.99 Attorneys are prohibited from testifying about privileged communications with limited exceptions. An attorney may testify about privileged communications “if the client is deceased, by the express consent of the surviving spouse[,] . . . executor[,] or administrator of the estate of the deceased client . . . .”100 Virginia LeFever probably would not give her consent to my disclosure as the surviving spouse, executor, or administrator of William LeFever’s estate. However, what if someone else were appointed as the executor, or administrator, of William LeFever’s

97 See Mark Hansen, Ethics: The Toughest Call, 93 A.B.A. J. 28 (2007) (describing how two attorneys, Frank Armani and Francis Belge, were vilified by the public for keeping a client’s confidence about the location of the bodies of murder victims told to them by their client. In fact, a grand jury indicted Belge for failing to report a dead body although the charges were later dismissed by the trial judge. The lawyers received hate mail and death threats, long time friends stopped speaking to them, and their law practices suffered severe pecuniary losses, forcing Belge to give up his practice.).
98 OHIO REV. CODE ANN. § 2317.02(A) (LexisNexis 2001).
99 Id.
100 Id.
estate? Someone appointed as executor, or administrator, from the prosecutor’s office, a private attorney friendly to that office, or a member of William LeFever’s family could probably give me consent to disclose.

**Ohio Rev. Code Ann. § 2113.18**\(^{101}\) would allow the probate court to remove Virginia LeFever as executor, or administrator, based upon the unsettled, wrongful death claim existing between her and William LeFever’s estate.\(^{102}\) Or, Virginia LeFever could probably be removed for refusing to bring the claim against herself because she had sufficient information to make a prima-facie case for wrongful death.

What did this mean for my decision-making process? The statutory authority allowed me to refuse to testify unless the prosecutor took the necessary steps to have someone favorable appointed as the executor, or administrator, of William LeFever’s estate. It allowed me to restructure the situation to avoid the conflict. If the prosecutor wanted my information, then there were legal means available, supported by statutory authority, for the prosecutor’s office to obtain that information. I did not have to breach a client’s confidences.

The Model Rules did not allow me to testify and breach my client’s confidences. My moral code prohibited disclosure unless a priest remitted my oath. I faced disbarment if my disclosure became

---

\(^{101}\) **Ohio Rev. Code Ann. § 2113.18-(A)-(B) (LexisNexis 2007)** (“The probate court may remove any executor or administrator if there are unsettled claims existing between him and the estate, which the court thinks may be the subject of controversy or litigation between him and the estate or persons interested therein . . . . The probate court may remove any executor or administrator upon motion of the surviving spouse, children, or other next of kin of the deceased person whose estate is administered by the executor or administrator if both of the following apply: (1) The executor[,] or administrator[,] refuses to bring an action for wrongful death in the name of the deceased person; (2) The court determines that a prima-facie case for wrongful death can be made from the information available to the executor[,] or administrator.”).

\(^{102}\) **Ohio Rev. Code Ann. § 2105.19(A) (LexisNexis 2007)** (“Except as provided in division (C) of this section, no person who is convicted of, pleads guilty to, or is found not guilty by reason of insanity of a violation of or complicity in the violation of sections 2903.01 [Aggravated Murder], 2903.02 [Murder], or 2903.03 [Voluntary Manslaughter] of the Revised Code . . . shall in any way benefit by the death.”).
known to the appropriate sanctioning authority. Alternatives, besides my disclosure, were available to the prosecutor’s office. Therefore, the model supports my decision not to disclose.

**Scenario Two**

Mary M. was a Middle-Eastern woman in her mid-60s seeking political asylum based upon religious persecution. She was raised a Christian, and she was a minority in her country. Her persecution did not begin until her country had a revolution that produced a Muslim fundamentalist government.

The persecution began when her and her husband’s liquor store was burnt down. They were refused a permit to open another liquor store, but they were granted a permit to open a sandwich shop with the condition that they post a sign outside of their shop stating that only the religious minority, the Najis, would be serviced. The persecution continued for twenty years.

Their persecution became worse when her husband was accused of having a relationship with a Muslim woman. A non-Muslim man was prohibited from this. The religious military authorities arrested, and imprisoned, her husband. He was convicted, and sentenced, to one year of prison and fifty lashes. While in prison, he was tortured and beaten. After two months, Mary M. sold the store to pay for her husband’s release.

Upon her husband’s release, Mary M. held a prayer meeting inviting church members and two Muslim neighbors. The punish-

---

103 “Mary M.” is not her real name.

104 3A AM. JUR. 2D Aliens and Citizens §1049 (2005) (“To establish a well-founded fear of religious persecution, the alien must show: (1) that the government is aware of the alien’s beliefs; (2) special, individualized circumstances indicating that he or she has been, or will be, singled out for persecution beyond some general threat of harm affecting the entire population of the country; (3) that the government has punished members of this particular religious group; and (4) receipt of specific threats as a result of his or her religious beliefs.”).

ment for converting a Muslim to Christianity was death. Shortly after the prayer meeting began, the religious military authorities broke into the home and arrested Mary M. and her two Muslim neighbors. She was imprisoned, beaten, and interrogated for three days. Mary M. appeared in court where the Mullah Judge sentenced her to prison for a year and fifty lashes.

While in prison, she was lashed, beaten, and had cigarettes put out on her arm. After one month, her husband sold their home and paid for her release. The conditions of her release prohibited her from proselytizing, or leaving, the city or country for three years. If she violated these terms, her punishment would be death by stoning. Mary M. escaped to the United States where she applied for political asylum.

The University of Denver clinic students were faced with the task of proving Mary M.’s story. In the course of representing Mary M., the students investigated her story and were convinced that she was Christian, but her story of conversion was less credible because her name was not located on a membership list (which listed only thirty-five members) of her religious denomination for her country. The local pastor claimed not to remember her. The list was an extremely important piece of evidence. Mary M. claimed that she was a member of a particular religion and congregation. If that part of her story lost credibility, then the immigration judge may question the credibility of her story. However, her prison-abuse story was substantiated through a physical examination by a physician who noted her scarring and old injuries.

How far could we push the ethical envelope to represent Mary M.? One student suggested doctoring the membership list to include Mary M.’s name. The student argued that the act was justified because Mary M. would probably be deported and stoned to death if we lost this case.

What do the Model Rules say about the proposed action? The Model Rules of Professional Conduct have several rules that address

106 8 THE NEW ENCYCLOPEDIA BRITANNICA 406 (15th ed. 2007) (“[A] Muslim title generally denoting ‘lord’ . . . The most common application of the title mullah is to religious leaders, teachers in religious schools, those versed in the canon law, leaders of prayer in the mosques (imams), or reciters of the Qur’an (qurrā’).”).
the ethical concerns of this scenario. Rule 3.3 (Candor Toward the Tribunal) states “a lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal . . . [or] offer evidence that the lawyer knows to be false.”107

In referring to the duty of presenting the client’s case with persuasive force, the Comment states that “[p]erformance of that duty while maintaining confidences of the client, however, is qualified by the advocate’s duty of candor to the tribunal.”108 The Comment specifically addresses the issue of false evidence stating “[a] lawyer should present any admissible evidence the client desires to have presented unless the lawyer knows, or from facts within the lawyer’s knowledge should know, that such testimony or evidence is false, fraudulent[,] or perjured.”109

Doctoring the membership list is prohibited by the Rules. Further, the rule is mandatory—not permissive. The Comment even requires a lawyer to take remedial measures if false evidence is presented.110 Remedial measures may include disclosing the client’s deception to the court or other party.111

Rule 3.4 (Fairness to Opposing Party and Counsel) states:

A lawyer shall not: (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy[,] or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; (b) falsify evidence . . . ; (e) in trial, allude to any matter that . . . will not be supported by admissible evidence . . . .112

The Comment provides the rationale:

108 R. 3.3 cmt.
109 See Id.
110 Id.
111 Id. (“If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation . . . .”).
Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed[,] or destroyed . . . . Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.\textsuperscript{113}

Doctoring the membership list falls squarely within conduct prohibited by Rule 3.4.

Rule 8.4 (Misconduct) states that “[i]t is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness[,] or fitness as a lawyer in other respects [or] engage in conduct involving dishonesty, fraud, deceit[,] or misrepresentation.”\textsuperscript{114} The Comment notes that, traditionally, this rule was intended to address acts involving “moral turpitude.”\textsuperscript{115} Additionally, the Comment notes that “[o]ffenses involving violence, dishonesty, . . . breach of trust, or serious interference with the administration of justice are in that category.”\textsuperscript{116} Doctoring the membership list would violate Rule 8.4 because the conduct involves dishonesty, fraud, and deceit.

In addition to violating rules of professional conduct, the proposed action is possibly criminal in nature. Doctoring the membership list would directly interfere with the legal process of determining whether Mary M. is entitled to political-asylum status.

Secondary sources are in accord with the Rules. The Restatement states that “[i]n representing a client in a matter before a tribunal, a lawyer may not, in the presence of the trier of fact . . . allude to any matter . . . that will not be supported by admissible evidence.”\textsuperscript{117} A

\textsuperscript{113} R. 3.4 cmt.
\textsuperscript{114} MODEL RULES OF PROF’L CONDUCT R. 8.4 (2007).
\textsuperscript{115} R. 8.4 cmt.
\textsuperscript{116} Id.
\textsuperscript{117} RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 107 (2000).
doctored membership would not be admissible evidence. This provision would prohibit students from mentioning, or making reference to, the membership list during the course of the hearing, even if the list was not offered into evidence.

The Restatement states that “[a] lawyer may not falsify documentary or other evidence.”\(^{118}\) The alteration of the list would be exactly what the provision prohibits: falsifying documentary evidence. The Comment to this rule is even more explicit in its prohibitions. Custodians of evidence may not alter documents, or other evidence, in a way that impairs evidentiary value.\(^{119}\) The Comment cites examples of prohibited conduct that includes forging, or altering, a document: “removing the document to another file to create a false impression of its provenance, deleting[,] or adding language to . . . alter its effect, or materially changing its physical appearance.”\(^{120}\) Therefore, under the Restatement, it does not matter that the students wanted to alter the document to reflect what they believed was the client’s true story. Moreover, disbarment is generally the appropriate sanction for this type of conduct.\(^{121}\)

The Restatement also states that “A lawyer may not . . . knowingly counsel or assist a witness to testify falsely or otherwise to offer false evidence[,] . . . knowingly make a false statement of fact to the tribunal[,] [or] . . . offer testimony or other evidence as to an issue of fact known by the lawyer to be false.”\(^{122}\) The Comment provides that “An advocate seeks to achieve the client’s objectives . . . [,] but in doing so may not distort fact finding by the tribunal by knowingly offering false testimony or other evidence.”\(^{123}\) Different jurisdictions and sources have defined what “knowingly” means.\(^{124}\) In this case, the students were proposing to falsify

\(^{118}\) Restatement (Third) of the Law Governing Lawyers § 118 (2000).
\(^{119}\) § 118 cmt. b.
\(^{120}\) Id.
\(^{122}\) Restatement (Third) of the Law Governing Lawyers § 120 (2000).
\(^{123}\) § 120 cmt. b.
\(^{124}\) Model Rules of Prof’l Conduct R. 1.0 (2007) (“[D]enotes actual knowledge of the fact in question. A person’s knowledge may be inferred from the circumstances.”).
evidence; therefore, the appropriate standard of knowledge was not an issue.\footnote{RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. c (2000) (discussing various standards of “knowledge”).}

What do the Model Rules say about the proposed action? The answer is clear: altering the membership list by adding Mary M.’s name is prohibited under the Model Rules and secondary sources.

What does your belief system or moral code say about your proposed action? This question is more difficult to answer. Since the clinical students were a diverse group of individuals representing different religions and cultures, there was no one singular belief or code to look to for guidance. For example, students were both Christian and Jewish. Students were both United States citizens and foreign citizens. However, common to all of the students’ beliefs and morals were the concepts of honesty and the sanctity or inherent value of human life. Despite these common understandings, the right thing to do was not immediately apparent because these values suggested conflicting action.

If being honest were the highest value, the membership list could not be altered. However, if the sanctity of human life were the highest value, then it would probably be acceptable to sacrifice honesty to save Mary M.’s life.

Were there sufficient mitigating circumstances in Mary M.’s case to bend the rules? Would altering evidence be a minor, or major, infraction of the collective moral beliefs of the students? This presented a difficult issue. Altering evidence was clearly a major violation of professional ethics rules, but it was not a major violation of moral beliefs. We believed our client was persecuted for her religious beliefs, or associations, even if she was not a member of the specific congregation to which she claimed membership. If she was being persecuted for her religious beliefs, or associations, then did it really matter whether or not she was a member of this specific congregation? Was it such a big moral leap to make her a member of this specific congregation? Was a probable threat of death an overriding, mitigating circumstance?

Regarding the consequences of the legal system, this particular client’s circumstances should be weighed against the following: how
question one (What does your belief system or moral code say about your proposed action?) interacts with question three (What are the consequences of your actions?). After all, the argument could be made that death is always an overriding, mitigating circumstance. If this were true, defense counsel could fabricate evidence in every death penalty case, especially, if they believed their client was actually innocent. These actions would destroy the integrity of the criminal justice system.

In addition to interacting with question three, question two also interacts with question four (What are your alternatives?) If an alternative was available, then the importance of morally mitigating circumstances would be diminished in determining whether altering evidence was the right thing to do. Question two was not dispositive standing alone. It had to be considered with the other questions in the model to determine how much beliefs and morals would be weighed in reaching a decision.

What are the consequences of your action? The sub-questions examine consequences to the client, the lawyer, and the legal system. Would Mary M. be harmed by altered evidence? If the alteration were not discovered, then Mary M. would not be harmed and would probably avoid deportation and death.

However, if the fabrication was discovered, how would that affect Mary M.? Potentially, it could have a devastating effect on her case. Her credibility would be irreparably damaged. Credibility is an important factor that immigration judges consider in determining asylum seekers claims.126 If the immigration judge determined Mary M. was not credible because of our action, then those parts of her claim that were consistent with the conditions of her country might also not be found credible. Such a lack of credibility would probably result in a denial of her application for political asylum. The proposed action could harm our client instead of helping her.

What are the consequences to the supervising attorney and law students involved in the proposed action? There was little likelihood of a civil action being brought. Even if Mary M. had a malpractice

126 3A C.J.S. Aliens § 1065 (“In asylum cases, credibility findings, and particularly an Immigration Judge’s demeanor findings, are accorded substantial deference on review . . . .”).
claim for the fabrication of evidence that showed her lack of credibility and her application for asylum was denied, she could not file that claim as a result of her deportation and probable death.

There was a possibility of criminal action being instituted. The fabrication of the membership list would be a criminal act. COLO. REV. STAT. ANN. § 18-8-610\textsuperscript{127} (Tampering with Physical Evidence) states:

(1) A person commits tampering with physical evidence if, believing that an official proceeding is pending or about to be instituted and acting without legal right or authority, he . . . . (b) Knowingly makes, presents, or offers any false or altered physical evidence with intent that it be introduced in the pending or prospective official proceeding.

(2) “Physical evidence,” as used in this section, includes any article, object, document, record, or other thing of physical substance.

(3) Tampering with physical evidence is a class [-six] felony.\textsuperscript{128}

The proposed action falls squarely within the definition of tampering with physical evidence.

There was a strong likelihood of disciplinary action against the supervising attorney and the law students. The law students acted under the auspices of a supervisory lawyer. COLO. RULES OF PROF’L CONDUCT R. 5.1\textsuperscript{129} (Responsibilities of a Partner or Supervisory Lawyer) states:

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the

\textsuperscript{127} COLO. REV. STAT. ANN. § 18-8-610 (West 2004).

\textsuperscript{128} COLO. REV. STAT. ANN. § 18-1.3-401 (West 2004). (A class-six felony provides for a presumptive sentence of one year minimum to eighteen months maximum imprisonment and one year mandatory parole.).

\textsuperscript{129} COLO. RULES OF PROF’L CONDUCT R. 5.1(b)-(c)(1)(2) (2008).
other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:
(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved;
(2) the lawyer . . . has direct supervisory authority over the other lawyer, and knows of the conduct at the time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.\(^ {130}\)

As previously discussed, the proposed action would be a clear violation of professional ethics and criminal law. In the clinic supervisory model, the students’ action would probably be ratified, if not ordered, by the supervising attorney.

Subordinate lawyers may be relieved of professional misconduct under the correct circumstances, but not under all circumstances. COLO. RULES OF PROF’L CONDUCT R. 5.2\(^ {131}\) (Responsibilities of a Subordinate Lawyer) states:

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.\(^ {132}\)

Therefore, the law students were bound by professional ethics. Falsifying a document was not a “reasonable resolution of an arguable question of professional duty.”\(^ {133}\) While it may be arguable in the larger scope of what is right or just, it is not arguable in regards to legal ethics and the professional code. Therefore, student lawyers

\(^ {130}\) Id.
\(^ {131}\) COLO. RULES OF PROF’L CONDUCT R. 5.2(a)-(b) (2008).
\(^ {132}\) Id.
\(^ {133}\) Id.
could not justify their proposed action by hiding behind the supervising attorney.

This has implications if the clinic was not unanimous in its decision. Let us assume that the supervising attorney and all but one student reached a consensus that altering the membership list would be the right thing to do. However, while realizing that such an action was not ethical, it would also have severe consequences. What would the obligations of the “holdout” student be? Clearly, the student could not participate in fabricating evidence. What ethical obligation would the student have regarding the actions of her fellow students and supervising attorney?

**COLO. RULES OF PROF’L CONDUCT R. 8.3** (2008) states:

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness[,] or fitness as a lawyer in other respects, **shall** inform the appropriate professional authority (emphasis added) . . . .

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 . . . .

The Comment to the rule states that “A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client’s interest.” At first blush, it would appear that the student is mandated to report her colleagues’ violation of the ethical rules. However, the “otherwise protected by Rule 1.6” language must be considered. **COLO. RULES OF PROF’L CONDUCT R. 1.6** is the confidentiality rule. Subsection (a) provides that lawyers shall not

---

135 Id.
137 Id.
138 COLO. RULES OF PROF’L CONDUCT R. 1.6 (2008).
139 Id.
reveal information relating to representation without the client’s consent subject to limited exceptions. For example, (b)(2) of the Rule states that the intent of the client to commit a crime and information necessary to prevent the crime may be revealed without first obtaining the client’s consent. Comment 3, to the rule, states that the attorney-client privilege includes the work-product doctrine. Confidentiality is embodied in the law of professional ethics and is a broader concept. Confidentiality applies “not only [to] matters communicated in confidence by the client[,] but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized, or required, by the Rules of Professional Conduct or other law.”

The membership list falls within confidentiality because it relates to representation. Therefore, the student “should encourage [the] client to consent to disclosure where prosecution would not substantially prejudice the client’s interest.” In this circumstance, disclosure would substantially prejudice the client’s interest. Disclosure of the fraud to the “appropriate professional authority” could cause the immigration court to learn about the fraud. The client’s credibility may be irreparably harmed, enhancing the probability of deportation and subsequent death.

If disciplined, the sanction imposed against the supervising attorney could be disbarment. The ABA Standards for Imposing Lawyer Sanctions (Standards) set forth criteria for evaluating the appropriate sanction. Section 5.1 (Failure to Maintain Personal Integrity) states:

Absent aggravating or mitigating circumstances . . . the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

---

140 R. 1.6 cmt. 3.
141 Id.
143 R. 8.3(a).
5.11 Disbarment is generally appropriate when:
(a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft . . . or
(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer’s fitness to practice.  

There is no doubt that the proposed action involved “serious criminal conduct” because it is classified as a felony offense rather than a misdemeanor offense. Further, the act of falsifying the document includes the necessary elements of “intentional interference with the administration of justice” and “misrepresentation.” Under the Standards, disbarment would be the probable disciplinary outcome.

Aggravating factors in determining the appropriate sanction might include refusal to acknowledge the wrongful nature of the conduct and illegal conduct. Under 9.32 of the Standards, mitigating factors may “include [the] absence of a prior disciplinary record[,] [the] absence of a dishonest or selfish motive[,] inexperience in the practice of law[,] . . . character or reputation, or imposition of other penalties or sanctions.”

The next subcategory of consequences is potential pecuniary harm to the supervising attorney and law students. As discussed above, the supervising attorney could be disbarred and their employment terminated. Law students could be denied Bar admission, which would limit their legal careers. The law school, and the

\[144\] ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 5.1 (2006).
\[145\] Id.
\[146\] Id.
\[147\] Id.
\[148\] ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 9.22(g)(k) (2006).
\[149\] ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 9.32 (2006). (While inexperience may mitigate the sanctions applied to the law students, it would not apply to sanctions applied to the supervising attorney. The last mitigating factor might apply if a criminal charge and sentence were imposed on the law students, the supervising attorney, or both.)
university, could suffer a decrease in alumni donations or diminished grant monies.

The next subcategory is the loss of reputation within the legal community, the community at large, and among friends and family. The loss of reputation from the proposed action would likely occur. There would be many people in all of the different categories, or communities, who would not find any circumstance which justified falsifying a document to the court. Even among those who would agree that the proposed action was the right thing to do, there could be a significant loss of trust regarding representations to them. Moreover, even if they would not agree, they would, at least, empathize with the difficulty of the choice without significant condemnation. After all, if an attorney misrepresented facts once, how would the community know that the attorney was not going to doing it again? Finally, the proposed action could cause a loss of reputation to the law school, or university, among the local legal community, prospective students, current students, faculty, staff, and alumni.

What would be the possible consequences to the legal system? Would justice be served? This is a difficult question to answer. Some of our greatest philosophers and legal scholars have been unable to define justice. Different types of justice have recently been written about and discussed including Restorative Justice and Therapeutic Justice.

Some say that justice (and the adversary system) is the search for truth. If justice is the search for truth, then falsifying documents may have negative consequences to the legal system. The truth is that Mary M.’s name was not on the membership list. However, was

---

the list of all congregation members accurate? Did Mary M.’s government persecute her because she was an unlisted member of the congregation? Which truth served justice? In the end, each of us have to determine what justice means to us and follow our own conscience.153

The last question asks, “What are your alternatives?” The first sub-section suggests doing nothing. In one sense, this option was available to the clinic: doing nothing to the purported congregation’s membership list was an option. However, the clinic still had to decide whether to present and admit the list as evidence at the removal hearing. In another sense, doing nothing was not an option.

The analysis asks us to consider restructuring the situation, or theory, to avoid the conflict. Could the clinic’s legal theory, or argument, be restructured to avoid Mary M.’s deportation without altering or falsifying the list? The clinic chose this option and was ultimately successful. The judge ruled in Mary M.’s favor, allowing her to remain in the United States.

Rather than focusing on her specific religious affiliation, which would emphasize the importance of the membership list, we focused on her affiliation with Evangelical Christians and how the government perceived that affiliation. An expert witness in this subject testified by telephone at the hearing. This strategy avoided falsifying the evidence. If the judge had ruled adversely, resulting in Mary M.’s deportation and death, the question of whether we did the right thing would have been more difficult to answer.

The final option is to withdraw as counsel.154 This option was not available because the decision of whether to falsify the list was considered only three weeks before Mary M.’s deportation hearing.

---


154 8 C.F.R. § 1003.17(b) (2007) (“Withdrawal or substitution of an attorney or representative may be permitted by an Immigration Judge during proceedings only upon oral or written motion submitted without fee.”).
Given the cultural and language barriers inherent in political-asylum cases and the trust issues involved, we would have irreparably harmed Mary M.’s case if we attempted to withdraw so close to the hearing date. Withdrawing would have raised other professional ethics issues under COLO. RULES OF PROF’L CONDUCT R. 1.16.\textsuperscript{155} Mary M. did not speak English, and we relied on interpreters and one of the clinical students for most communication. Having come from a horribly harsh, political regime, it took months to build the trust necessary for an effective attorney-client relationship. Withdrawing only weeks before the hearing would have destroyed that trust and would have made it almost impossible for any new attorney to re-establish that trust.

The proposed action would clearly violate not only the Rules of Professional Conduct, but also the criminal code. It would probably result in severe disciplinary action and criminal prosecution. An alternative course of action was available that appeared to be viable, although not certain.\textsuperscript{156}

Falsifying evidence would have violated numerous laws or codes. One question that we did not consider was “Are immigration laws that require Mary M.’s deportation and death moral, fair, or just?” The answer to that question may have influenced the application of the decision-making model, and the discussion’s outcome, if the immigration laws were not moral, fair, or just.

As an analogy, we can look to \textit{Schindler’s List},\textsuperscript{157} which tells the story of Oskar Schindler who saved the lives of 1,100 Jews in Nazi Germany by employing them as workers in his factory. He saved them from labor camps or concentration camps, where many people

\textsuperscript{155}COLO. RULES OF PROF’L CONDUCT R. 1.16(c)-(d) (2008).

\textsuperscript{156}U.S. Dep’t. of Justice, Ex. Office for Immigration Review, Index of Frequently Requested FOIA Processed Records, http://www.usdoj.gov/eoir/efoia/foiafreq.htm (last visited May 23, 2008) (stating at the time, less than 20% of asylum requests were granted. In Fiscal Year 1999, the percentage of asylum requests granted was 15%. In 2001 and 2002 the percentage dipped to 13% and 12%, respectively, possibly as a reaction to the events of September 11, 2001. The percentages have increased so that in fiscal year 2006, the percentage granted was 25%.)

\textsuperscript{157}See THOMAS KENEALLY, SCHINDLER’S LIST (Simon & Schuster, Inc. 1982); \textit{See also} THOMAS KENEALLY, SCHINDLER’S ARK (Hemisphere Publishers 1982); \textit{Schindler’s List} (Universal Pictures 1993).
died. To accomplish this, he deceived German authorities by falsifying documents and by using other deceptive acts. Undoubtedly, virtually everyone agreed that he did the right thing, despite the risk of his own life, his duplicity, and the violation of German law. Why do we say this? We say this because the laws that subjected the Jews to labor camps or concentration camps were not moral, fair, or just.

Scenario Three

On July 8, 1998, Chief Deputy District Attorney Mark Pautler (D.A. Pautler) arrived at a gruesome crime scene where three women had been murdered. Each victim suffered blows to the head from a wood-splitting maul. The killer, William Neal, had abducted and killed the women at an apartment over a three-day period. A fourth, abducted woman, J.D.Y., witnessed one of the murders while she was tied to a bed. William Neal later raped her.

At a second apartment, William Neal held J.D.Y. and two other people hostage for over thirty hours. During this time, he dictated details of his crime into a recorder. He abandoned the apartment and hostages, leaving instructions to contact the police, and to page him when the police arrived.

When D.A. Pautler arrived at the second apartment, the sheriff had already paged Neal, who had called the apartment on a cell

---

158 David M. Crowe, Oskar Schindler, The Untold Account of His Life, Wartime Activities, and the True Story Behind the List (2004). Oskar Schindler was officially awarded the honor of “Righteous Gentile” on June 24, 1993. Although, the honor was supposed to be awarded in 1962, controversy surrounding some of his activities prevented the Righteous Gentile Commission from ever officially giving him the distinction. Instead, they planted a tree along the Avenue of the Righteous, next to a plaque bearing Schindler’s name.

159 See People v. Pautler, 35 P.3d 571 (Colo. O.P.D.J. 2001), aff’d, 47 P.3d 1175, 1176-78 (Colo. 2002). It should also be noted that D.A. Pautler was faced with a terribly difficult, stressful situation involving, potentially, the lives of others. This article addresses how the proposed model may have been applied to the situation D.A. Pautler faced, but should not be construed as “Monday morning quarterbacking” and “arm chair” criticism for a situation that we all hope we will never have to face.
phone. The sheriff and Neal began a three-and-a-half-hour, recorded conversation. The sheriff encouraged Neal to surrender himself. In addition, Neal’s cell phone location could not be determined. Neal, initially, requested attorney Daniel Plattner, but he later requested a public defender. Neal would not surrender without legal representation present.

D.A. Pautler called Attorney Plattner’s office number at approximately midnight, but he received a message that the phone number was no longer in service. D.A. Pautler believed that Attorney Plattner retired from the practice of law, so no further attempts were made to contact, or locate, Attorney Plattner. The sheriff told Neal that he would receive a public defender, but the sheriff made no attempt to secure a public defender. Instead, D.A. Pautler impersonated a public defender with the law enforcement’s acquiescence. Introducing himself as Mark Palmer, D.A. Pautler then recorded his conversation with Neal while discussing Neal’s demands. One of Neal’s demands was that counsel be present when he surrendered. After Neal believed D.A. Pautler was a public defender, he peacefully surrendered to the police. When he surrendered, he was told by law enforcement that his lawyer was present. This ruse was not subsequently revealed to Neal. It was discovered two weeks later when Neal’s real public defender reviewed the tape recordings.

Neal, eventually, dismissed the public defender as his attorney and represented himself pro se with advisory counsel appointed by the court. Neal was convicted of the murders, and he received the death penalty. The Attorney Regulation Counsel then accused D.A. Pautler of violating Rules 8.4 and 4.3 of the Colorado Rules of Professional Conduct (Rules) for engaging in conduct involving dishonesty, fraud, or misrepresentation and for dealing with a person not represented by counsel.

D.A. Pautler defended the allegations with justification, an imminent, public-harm exception, duress, and choice of evils. He testified during his hearing that under the same circumstances, he would not act differently, apart from informing Neal’s defense counsel about the ruse earlier in the court proceedings.

In the end, D.A. Pautler was found to have violated the Rules. He was sanctioned with a stayed three-month suspension and twelve-month probation. He also had to retake the MPRE, take twenty
What do the Model Rules say about D.A. Pautler’s action? D.A. Pautler was charged with violating Rule 8.4. D.A. Pautler clearly violated Rule 8.4 by using deceit and misrepresenting himself as a public defender. Additionally, D.A. Pautler violated Rule 4.3, which governs a lawyer’s conduct with unrepresented persons. Not only did D.A. Pautler fail to correct the misunderstanding about his role as counsel, but he deliberately misled Neal. Prosecutors are held to a higher standard than other advocates because they represent the government and could easily abuse authority. The Comments to Rule 8.4 imply that offenses should relate to their relevance to the practice of law and that offenses involving dishonesty are relevant to the practice of law.

Secondary sources support the prohibition of false communications with non-clients. Undoubtedly, D.A. Pautler’s position as an

---

160 COLO. RULES OF PROF’L CONDUCT R 8.4 ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation[."]").

161 COLO. RULES OF PROF’L CONDUCT R. 4.3 ("When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.").

162 14 COLO. PRAC., CRIM. PRAC. AND PROC. § 1.65 ("[T]he prosecutor’s duty is to seek justice, not merely to convict . . . . Prosecutors are held to higher ethical duties than other lawyers ‘because they are ministers of justice, not just advocates’ and must be ‘forever vigilant that their conduct as attorneys not only meets the minimum standards of (professional) conduct’ but ‘must strive to exceed those requirements.’") (citing Colorado v. Trujillo, 624 P.2d 924, 926 (Colo. App. 1980) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

163 COLO. RULES OF PROF’L CONDUCT R. 8.4 cmt. ("Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to the practice of law. Offenses involving violence, dishonesty, . . . breach of trust, or serious interference with the administration of justice are in that category.").

164 RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 98 (2000) ("A lawyer communicating on behalf of a client with a nonclient may not . . . knowingly make a false statement of material fact or law to the nonclient[,] . . . make other statements prohibited by law[,]

 . . . or . . . fail to make a disclosure of information.
assistant district attorney, rather than a public defender, was a material fact during communications with Neal. The Reporter Notes indicate that the prohibitions of Rule 8.4 are broader than those of civil liability (for example, under theories of agency or tort) or criminal law.

The decision and opinion from both the presiding disciplinary judge and hearing board, who sanctioned D.A. Pautler, is instructive.165 The decision was 2-1, with a dissent by board member Linda S. Kato.166 The majority’s rejection of a model for making the right decision is troubling. In discussing D.A. Pautler’s lack of remorse as an aggravating factor, the majority noted that D.A. Pautler testified “with a substantial measure of conviction,”167 and that “given the same or similar circumstances again,”168 he would “make the same decisions and engage in the same deceitful conduct.”169

The majority stated that attorneys have no discretion to do the right thing:

Pautler interprets the Rules of Professional Conduct to be ethical guidelines applicable to his professional conduct unless, in his judgment, circumstances dictate conduct at variance with those Rules to achieve what he perceives to be a desirable end. Such an interpretation reduces the Rules of Professional Conduct to meaningless expressions of aspirational goals forever subject to the situational whims of lawyers seeking to do the right thing as they see it.170

In her dissent, Ms. Kato rejected the majority view that D.A. Pautler’s action “poses a risk to the Rules of Professional Conduct.”171 She noted that D.A. Pautler had no prior disciplinary

---

166 Id. at 586.
167 Id.
168 Id.
169 Id.
170 Id.
171 Id. at 588.
history, and he had a reputation for integrity within the Bar. She recognized that the vast majority of attorneys comport with the Model Rules, except in extraordinary circumstances. Ms. Kato implicitly recognized that extraordinary circumstances may require deviation from the Rules and merit by a case-by-case review. “If he is again struck by lightning, and placed in this extraordinary circumstance, his actions can be judged accordingly at that time.”

Ms. Kato did not agree with D.A. Pautler’s conduct; however, she did not agree with D.A. Pautler’s sanction or the weight accorded to D.A. Pautler’s lack of remorse as an aggravating factor.

The Colorado Supreme Court rejected D.A. Pautler’s defenses of justification, imminent public harm, duress, choice of evils, and the role of the district attorney as a peace officer. The court held that “even a noble motive does not warrant departure from the Rules of Professional Conduct.” Moreover, we applied the prohibition against deception a fortiori to prosecutors. D.A. Pautler’s motives did not excuse his ethical violations, but the court found the motives to be “mitigating factors [that should] be taken into account in assessing the appropriate discipline.”

In addressing the imminent, public-harm argument, the court noted that D.A. Pautler had alternatives to violating the Code of Professional Conduct. The court stated that “[W]e are adamant that when presented with choices, at least one of which conforms to the Rules, an attorney must not select an option that involves deceit or misrepresentation.” Therefore, in utilizing this proposed Model,
the court would give great weight to question four (what are your alternatives?). The court did not reject the imminent, public-harm defense outright, but the court found that the defense did not apply to the circumstances.

In addressing the duress and choice of evil defenses, the court and the hearing board noted that both COLO. RULES OF PROF’L CONDUCT 4.1 and 8.4(c) are “imperative, not permissive in application.” The court further noted that neither rule contains, in its Comments, an exception based upon such defenses. The court rejected such defenses.

Therefore, the model rules and secondary sources do not support D.A. Pautler’s actions. In determining the right decision, each prosecutor, in similar circumstances, must accord what weight to give this question. Clearly, D.A. Pautler decided that other factors outweighed the ethical rules. D.A. Pautler’s actions seem to imply that he gave greater weight to question two (Belief System/Moral Code) than to question one (Model Rules). It may also be inferred that D.A. Pautler gave greater weight to question three (Consequences) than to question one (Model Rules). D.A. Pautler focused on consequences to the public and other potential victims. He did not focus on consequences he faced personally (such as disciplinary sanctions) or consequences facing the legal system. Other prosecutors in a similar situation may give greater weight to question one (Model Rules). Also, they may consider the consequences to themselves and the legal system more than D.A. Pautler did.

What does D.A. Pautler’s belief system or moral code say about his proposed action? The moral or religious beliefs of D.A. Pautler were not revealed or discussed in the written opinions in either the

---

182 Id. at 1181.
183 Id.
184 But see Livingston Keithley, Comment, Should a Lawyer Ever Be Allowed to Lie? People v. Pautler and a Proposed Duress Exception, 75 U. COLO. L. REV. 301 (2004) (advocating the adoption of a duress defense). First, the court would determine if duress existed: that is, did the attorney act under compulsion or threat. If not, there is no defense. If it did exist, the court would then require three conditions for it to apply: immediate and imminent risk of death or serious injury, no peaceful alternative, and lying only to the extent necessary to dissipate the harm.
hearing board or the Colorado Supreme Court; therefore, they will be minimally discussed. D.A. Pautler’s moral code and belief system are speculatively based upon his actions. D.A. Pautler’s primary concern was preventing Neal from harming, or killing, more people. D.A. Pautler’s concern for the public’s safety overrode his concern for personal consequences, the consequences to the legal system, and his adherence to the Colorado Rules of Professional Conduct. From this, we may infer that D.A. Pautler has a strong belief in the sanctity of human life. We may also infer that D.A. Pautler has a strong religious belief and a strong belief in honesty based upon his reputation for integrity. Given the unique circumstances, it seems as if D.A. Pautler placed his belief in the sanctity of human life above his belief in being an honest person. As previously noted, Ms. Kato did not agree with D.A. Pautler’s conduct, but empathized with D.A. Pautler’s moral dilemma.

What are the consequences of D.A. Pautler’s action? The consequences to the client (the people of the State of Colorado) are particularly important. D.A. Pautler probably believed he was protecting the people from Neal. These consequences are closely related to consequences to the legal system. D.A. Pautler’s conduct affected the public’s perception of the legal system. Denver Post editors supported D.A. Pautler’s conduct and offered “the respect and gratitude of the citizens of Colorado whom you have served so well.”

---

185 John Ingold, Jeffco Deputy DA Censured, DENV. POST, Apr. 4, 2001, at B02, available at http://extras.denverpost.com/news/news0404m.htm (“I like to think that I have a fairly keen sense of conscience . . . . And what I find most troubling is that I don’t think I did anything wrong . . . . I don’t regret it . . . . All those proceedings haven’t been a great deal of joy. But I will always be able to look back and say I did the right thing for public safety and that I saved lives.”).

186 See People v. Pautler, 35 P.3d 571, 583 (2001). However, as the hearing board noted in their opinion, a strong argument could be made that Neal became D.A. Pautler’s client as a result of D.A. Pautler’s actions. The board chose not to address that issue because it did not affect their ability to arrive at a decision.

187 Editorial, Don’t Save Any More Lives!, DENV. POST, May 14, 2002, at B06 (“Don’t save any more lives for the balance of this year, D.A. Pautler, and you will be restored to the ranks of the brain-dead pettifoggers for whom the letter of the law is all and the spirit nothing. Until then, you are sentenced to receive the respect and
supported the Colorado Supreme Court’s decision and criticized the Denver Post’s editorial.188 “The system in which we work depends on the trust and confidence of the public in our words and our deeds. Any deviation from the standards of truth and honesty and any deception, in which we engage, however slight, erode[s] the public trust and threaten[s] the very underpinnings of our profession.”189 Mr. Moye listed three lessons to be learned from D.A. Pautler’s experience: (1) the pressures faced by prosecutors and peace officers do not justify a departure from the core values of the legal profession; (2) if exceptions are made to the code of honesty as lawyers, then the exception must be extended to all lawyers; and (3) ethical rules that permit deception in any context hurts the image of the legal profession.190 “Our clients and the public can only benefit from lawyers who set, and observe, their own moral compass and who know, at the end of the day, they were truthful and honest in everything they did that day. Even if the media’s perceptions of what we do are critical, we can always know that we have done the right thing.”191

Mr. Moye stated some erroneous assumptions: he believes that a lawyer’s own moral compass will always lead to truth and honesty. Mr. Moye also assumes that truth and honesty equate to doing the right thing. D.A. Pautler followed his own moral compass when he lied to Neal. D.A. Pautler did not believe that being truthful with Neal was the right decision. Therefore, Mr. Moye’s editorial does not seem to recognize the complexity of making the right decision.

The prosecutor’s Bar supported D.A. Pautler’s actions while the defense Bar objected to his actions. Jefferson County District Attorney Dave Thomas (D.A. Pautler’s boss) testified, “I did not direct him to do that. But I did not object to it . . . . My conclusion

---

189 Id.
190 Id. at 36.
191 Id.
was that this was the only course of action that could be pursued."  Denver District Attorney Bill Ritter testified that there are “extraordinary circumstance where a prosecutor is left with no choice” but to use deception. The Colorado Criminal Defense Bar’s President, Phil Cherner, said the ruling was an “emphatic statement that we are held to the highest responsibility, and we have to tell the truth. The rules apply to everybody, including prosecutors. I’m glad she (Kourlis) put a stop to this nonsense.”

In addition, there were consequences to the legal system as a result of D.A. Pautler’s conduct. Neal developed distrust for lawyers and, of particular consequence to his legal proceedings, for his public defender. He discharged his public defender, represented himself against three, first-degree murder charges, pled guilty, and was sentenced to death. It is uncertain if Neal would have discharged his attorneys without D.A. Pautler’s conduct. It is also uncertain that Neal would have been convicted of all charges and sentenced to death without D.A. Pautler’s conduct. It is certain, however, that D.A. Pautler’s actions negatively impacted the legal system.

The effects of the public’s perception of lawyers and the legal system is based on letters to the editor in the Denver Post. Some letters supported D.A. Pautler while some letters did not. Anthony

---

193 Id.
194 Howard Pankratz, Deception by Lawyers Ruled Out, Decision Stems from Attempt to Get Murder Suspect’s Surrender, DENV. POST, May 14, 2002, at B01.
195 Ingold, supra note 185 (“This was detrimental to justice and to the legal profession. It’s not splitting hairs to tell people that they can’t lie, and it’s not splitting hairs for prosecutors to misrepresent themselves to people.”).
197 Reggie Rivers, Op-Ed, Pautler Ruling Right, DENV. POST, May 16, 2002, at B07 (“I understand that the stakes were high and that Neal needed to be apprehended, but this ruse is too much to accept.”); Bradford Geiger, Op-Ed, Dangerously Wrong, DENV. POST, May 27, 2002, at B07 (“Your support of Mark Pautler, the lawyer who admitted (indeed, bragged about) being dishonest to a criminal suspect is not only wrong but dangerously so.”); Bud Markos, Op-Ed, Judge’s Failure, DENV. POST, May 27, 2002, at B07 (“The justices provided a paltry return for the trust placed in them when they condemned prosecutor Pautler . . . .”); Chas Clements, Op-Ed, Lack of Trust, DENV. POST, May 27, 2002, at B07 (“How can we
C. Checco of Highlands Ranch condemned the Colorado Supreme Court’s decision to uphold disciplinary action against D.A. Pautler as unconscionable: “‘Rabbit’s clever,’ said Pooh thoughtfully. ‘Yes,’ said Piglet, ‘Rabbit’s clever. And he has Brain.’ ‘Yes,’ said Piglet, ‘Rabbit has Brain.’ There was a long silence. ‘I suppose,’ said Pooh, ‘that that’s why he never understands anything.’”\textsuperscript{198}

D.A. Pautler’s consequences are a subset of the third question. His consequences include disciplinary proceedings and the possibility of litigation. It is unlikely that Neal would be in a position to sue D.A. Pautler. What if, after being misled, Neal failed to surrender and subsequently injured, or murdered, someone? Such a scenario could have led to litigation against D.A. Pautler by those injured or the estate of those killed. They could argue that D.A. Pautler’s failed attempt to trick Neil, and Neil’s failure to surrender resulted in injuries or death.

Because D.A. Pautler is a state employee, he did not have to consider loss of business or income.\textsuperscript{199} The real question is how D.A. Pautler’s actions affected his public reputation within the public and his reputation within the legal community. D.A. Pautler had an excellent reputation among his peers before the disciplinary proceedings.\textsuperscript{200} D.A. Pautler may have believed that his actions would affect his reputation in differing ways within the legal community. He may have believed that his actions would not hurt his reputation within the law enforcement community, including the District Attorney’s Office and Jefferson County Sheriff’s Department. In contrast, he may have believed that his actions would hurt his

---


\textsuperscript{199} See \textit{Pautler}, 35 P.3d at 576 (2001). This is especially true since D.A. Pautler contacted his superior, District Attorney Davis Thomas, and was told “to do what he thought was necessary.”

\textsuperscript{200} \textit{Id.} at 577 (“With the exception of this event, Pautler enjoys a reputation as a lawyer of character and integrity, opinions which are shared by even those who originally filed requests for investigation against him in this case.”); \textit{In re Pautler}, 47 P.3d 1175, 1178 (2002) (“Also, all parties acknowledged Pautler’s reputation for honesty and high ethical standards.”).
reputation among criminal defense attorneys, particularly the Public Defender’s Office.

One consideration of his proposed action might be how it would affect his ability to interact with defense counsel in future cases. In particular, D.A. Pautler might be concerned with his ability to be trusted by defense counsel to enter into future plea agreements. D.A. Pautler also may have believed that his actions would create a mixed reaction among other attorneys and judges. Without knowing anything about D.A. Pautler’s family and friends, I would imagine that he would think that they would support him in his decision with the understanding that he was placed in a difficult situation, even if they did not agree with his action. Thus, given the gravity of the situation, his reputation among family and friends was probably not a strong factor in his decision. However, the consequences to the legal system and D.A. Pautler’s future interactions with defense counsel should have given someone of his integrity pause.

What were D.A. Pautler’s alternatives? The first option is to do nothing. Was this option available to D.A. Pautler? Probably not: he was there to observe and to provide advice to the police. As a district attorney, he was representing the people of the State of Colorado. D.A. Pautler could not withdraw.

Could D.A. Pautler restructure the situation to avoid a conflict with the ethical rules? Neal, initially, asked to speak with Attorney Plattner. Only one attempt was made to call his office number at midnight. After receiving a message that the number was no longer in service, no further attempts were made to contact Attorney Plattner. What other alternatives were available to D.A. Pautler? Perhaps Attorney Plattner’s home address could have been found through LEADS (or Colorado’s equivalent) and a police cruiser

---

201 Pautler, 35 P.3d at 576 (“Pautler observed the situation, read notes made by Deputy Sheriff Zimmerman, passed suggestions to her and, with another phone, kept others informed of events as they transpired.”).

202 Id.

203 “LEADS” is an acronym for the “Law Enforcement Agencies Data System.” Most state law enforcement agencies either use this system or have a similar system for sharing information among law enforcement agencies.
sent to his home so that Attorney Plattner could represent Neal during surrender negotiations.

Although Neal requested a public defender, no attempt was made to contact a public defender. D.A. Pautler believed that “any defense lawyer would advise Neal not to talk with law enforcement about his activities.”

In formulating a plan to pose as a public defender, D.A. Pautler discussed it with his superior, District Attorney David Thomas, who “expressed some reservations about the plan[,] but deferred to [D.A.] Pautler’s judgment because he was at the scene.” Another alternative (considered but rejected) was to have a police officer pose as a public defender. A police officer does not have the same ethical concerns as D.A. Pautler (although an officer may have moral concerns). The United States Supreme Court has upheld a police officer’s deceit, subject to limitations.

Clearly, D.A. Pautler knew before he engaged in his deceit that there were ethical considerations and that his superior had concerns about them. From D.A. Pautler’s comments at his disciplinary hearing, his primary concern was to keep Neal talking. While D.A. Pautler is correct that a public defender would probably not have allowed Neal to continue to speak directly with law enforcement, it is also just as probable that the public defender would have continued the dialogue on behalf of, and in close consultation with, Neal. A public defender acceptable to D.A. Pautler probably could have been located, and contacted, with law-enforcement assistance. The answer to question four is that D.A. Pautler may have had the opportunity to restructure the situation to avoid violating the ethical rules. While D.A. Pautler could not do nothing or withdraw, he did have

---

204 Pautler, 35 P.3d at 576.
205 Id.
206 Id.
207 Id. (“Pautler discussed with the sheriff’s deputies whether another law enforcement officer could pose as a public defender. Deputy Sheriff Zimmerman perceived Neal as ‘bright’ and feared that he might realize that the person he was speaking to was not a lawyer.”).
209 Pautler, 35 P.3d at 582.
alternatives that he chose not to take. For example, he could have tried harder to locate Attorney Plattner or a real public defender. D.A. Pautler cited public safety concerns as the reason for not pursuing any alternatives. However, acting upon those alternatives would have avoided the ethical conflict and may have successfully resolved the situation.

In summary, D.A. Pautler’s actions were clearly not ethical under Colorado ethical rules. From what we can infer from his actions and reputation, he is a moral person who held the sanctity of human life in high regard. In addition, there were potentially adverse consequences to D.A. Pautler, Mr. Neal, and the legal system. Also, there existed possible, but risky, alternatives to his actions. D.A. Pautler apparently believed that the higher moral imperative was to try to save human lives rather than to be honest, and that the possible alternatives presented a greater risk to human life than he was willing to take.

CONCLUSION

Lawyers make decisions every day about what actions to take or not to take. For the most part, these decisions are fairly routine or, even if complex, do not pose severe ethical, moral, or justice dilemmas. However, almost every lawyer, at some time, in his or her career will face a difficult decision involving an ethical and moral conundrum that challenges the lawyer’s sense of justice. While perhaps infrequent, these decisions are powerful and may have far-reaching effects and consequences. Most states have ethics hotlines or opinions available online, but the information provided through those mediums only address professional ethical obligations.\footnote{Illinois State Bar Association provides, ISBA Ethics opinions home page, available at http://www.isba.org/EthicsOpinions (last visited May 23, 2008).} So how do lawyers decide what the right decision is while there is very little guidance in the literature? Hopefully, this article will provide a valuable tool for assisting the difficult decision-making process.

The model presented gives lawyers a tool to use in making difficult decisions about what action to take, or to not take, by incorporating ethical obligations under professional codes of conduct.
and a lawyer’s moral reasoning and values. It allows lawyers to
decide in a reasoned, methodical manner. At times, lawyers may be
faced with exigent circumstances that do not allow for extensive
reflective thought and consideration, such as those faced by D.A.
Pautler. However, lawyers do have time, in most instances, to make
reasoned, reflective choices about the action they are considering
taking. In most instances, lawyers will have time to utilize a model
such as the one I propose in this article. I had adequate time to
decide how to respond to the grand jury subpoena, as did the law
students in Scenario Two.

The model allows lawyers to make decisions at the post-
conventional stage of moral development. The model allows for
moral decisions at the social contract and principled conscience level
using reasoning based upon principles that underlie rules and norms
rather than a knee-jerk application of those rules and norms.

As illustrated by the three scenarios presented in this article, the
correct ethical choice may be clear under the applicable professional
and ethical rules; however, the right choice is not nearly so clear.
While you may not agree with the actions taken by the law students,
D.A. Pautler, or myself, the model does provide a structured,
reasoned approach to make these decisions.