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Lawyers' Professional Independence: Overrated or Undervalued?

Bruce A. Green

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LAWYERS' PROFESSIONAL INDEPENDENCE: OVERRATED OR UNDERVALUED?

*Bruce A. Green**

I.	Introduction	599
II.	Professional Self-Regulation: Lawyers' Collective "Independence from Government Domination"	602
III.	Individual Lawyers' Independence	607
	A. Independence from Clients	608
	B. Independence from Third Parties	613
IV.	Individual Lawyers' Independence from the Judiciary	619
	A. Lawyers' Extrajudicial Criticism of the Judiciary	621
	B. Lawyers' Disobedience of Court Orders	628
	C. Lawyer's Independent Resolution of Ethics Questions.....	634
V.	Conclusion	639

I. INTRODUCTION

The literature of the legal profession speaks of “professional independence” or “independence of the bar” as an important or “core” professional value or attribute, one that the bar should fight to preserve.¹

* Stein Chair and Director, Louis Stein Center for Law and Ethics, Fordham Univ. School of Law. This article grows out of a presentation on November 9, 2012, as part of the Distinguished Lecture Series of the Akron Law Joseph G. Miller and William C. Becker Center for Professional Responsibility. I am grateful to the Center; its director, Frank Quirk, and faculty director, Professor John P. Sahl; and the University of Akron School of Law, for the opportunity to make the presentation. For helpful suggestions on earlier drafts, I am grateful to Professor Sahl; to Michele DeStefano and Rebecca Roiphe; to participants in the faculty workshop at University of Georgia School of Law; and to my Fordham colleagues Aditi Bagchi, Nestor Davidson, Howard Erichson, Clare Huntington, Andrew Kent, Ethan Leib, Russ Pearce, and Ben Zipursky.

1. Peter Megargee Brown, *The Decline of Lawyers' Professional Independence*, in *THE LAWYER'S PROFESSIONAL INDEPENDENCE: PRESENT THREATS/FUTURE CHALLENGES* 23, 24 (1984) (“The professional independence of the practicing lawyer is the single most important element in providing the legal profession with its strength, character, and integrity. . . . A lawyer is independent when free to perform his or her professional obligations objectively, not only to clients,

The term has been invoked in the professional literature, including, notably, in a 1984 collection of essays by four leading practitioners, one a barrister and the others members of the U.S. bar.² The idea of “independence” has also been explored in the academic literature, including in a seminal article by Yale law professor and legal historian Robert Gordon,³ who identified “the praise of independence [and] the fear of its decline” as “one of the great epic themes of professional rhetoric.”⁴

Peter Margulies has observed that the term is amorphous.⁵ We have a much better sense of what we mean when we talk about “judicial independence,” although even there, understandings have evolved over time and leave room for debate.⁶ In contrast, it may not even be clear

but also to the court and to the public interest.”); Alfred P. Carlton Jr., *The Road Ahead: On Culture and Commitment*, 89 A.B.A. J. 8 (Aug. 2003) (“It is a time for us to hold fast to the core values of our profession and to jealously guard our professional independence.”); Robert J. Grey Jr., *Passing the Gavel, Keeping Our Purpose: Lawyers, Remember It’s Your Job to Support Rights of the Judiciary and Legal Profession*, 91 A.B.A. J. 6 (Aug. 2005) (“It is in our professional best interest, and in the best interest of our profession’s future, that we engage in meaningful work to maintain our professional independence, which is the only means by which we gain and hold the public’s trust.”).

2. THE LAWYER’S PROFESSIONAL INDEPENDENCE: PRESENT THREATS/FUTURE CHALLENGES (1984) (collecting essays by Robert S. Alexander, Peter Megargee Brown, Archibald Cox, and Robert B. McKay). See also THE LAWYER’S PROFESSIONAL INDEPENDENCE: AN IDEAL REVISITED (John B. Davidson ed. 1985); Evan A. Davis, *The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281 (2003).

3. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988). For additional academic discussions, see, for example, William T. Allen, *Corporate Governance and a Business Lawyer’s Duty of Independence*, 38 SUFFOLK U. L. REV. 1 (2004); John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 TEX. L. REV. 405 (2002); Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179 (2000); Suzanne Le Mire, *Testing Times: In-House Counsel and Independence*, 14 LEGAL ETHICS 21 (2011); Peter Margulies, *Lawyers’ Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism and Organized Crime*, 58 RUTGERS L. REV. 939, 943-47 (2006); Kevin H. Michaels, *Lawyer Independence: From Ideal to Viable Legal Standard*, 61 CASE W. RES. L. REV. 85 (2010); Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931 (2008).

4. Gordon, *supra* note 3, at 5, 6.

5. See Margulies, *supra* note 3, at 939 (“Lawyers’ independence has been much celebrated but little observed. . . . [T]he fault lies with our amorphous definition of independence.”).

6. See, e.g., Shirley S. Abrahamson, *Keynote Address: Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 3 (2003); Stephen B. Burbank, *What Do We Mean by “Judicial Independence”?*, 64 OHIO ST. L.J. 323 (2003); Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, 95 GEO. L.J. 929 (2007); Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. OF AM. LAW 497 (2009); J. Clifford Wallace, *An Essay on Independence of the Judiciary: Independence from What and Why*, 58 N.Y.U. ANN. SURV. AM. L. 241 (2001); Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L.

into what category *lawyers'* independence falls. Is it an attribute of character, like “professional integrity,” a state of mind like objectivity or detachment, or a standard of conduct like avoidance of conflicts of interest or preserving client confidences? Is it an aspiration like “professional excellence” or an obligation like “professional competence”? Is it a collective trait or an individual trait (or both)? The term turns out to be elusive, in part, because it has multiple meanings;⁷ in part, because the various meanings are vague and not well elaborated; and, in part, because the various meanings seem to be inconsistent with each other or internally contradictory.⁸ Margulies argues that it is quixotic to seek the real meaning of independence and that the term should be replaced by others.⁹ While that may be so, an exploration of the shifting meanings of professional independence may provide some insights into the evolution of bench-bar relationships and professional regulation.

This article begins with some reflections on the principal meanings

REV. 644 (1999); *see generally* Amy B. Atchison, Lawrence Tobe Liebert & Denise K. Russell, *Bibliography, Judicial Independence and Judicial Accountability: A Selected Bibliography*, 72 S. CAL. L. REV. 723 (1999). In general, judicial independence has both a negative and positive connotation. From a negative perspective, judges should be free from the improper outside influence of others, including other government officials or branches, third parties, and self-interest. From a positive one, judges act based on their own best professional judgment—that is, they should objectively interpret the law, objectively apply law to fact, and conduct proceedings in accordance with conventional expectations of fairness and impartiality. Further, we understand that judicial conduct rules are designed not so much to dictate that judges act independently in an affirmative sense but to secure their independence by protecting judges from outside pressures and influences, including those which judges themselves might invite. For example, the rules limit judges' work and relationships that might lead them to compromise their independence and require judges to recuse themselves from cases where their independence might reasonably be questioned. *See generally* Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URB. L.J. 941 (2002).

7. Gordon, *supra* note 3, at 5-6; *see also* Lawrence J. Fox, *MDPs Done Gone: The Silver Lining in the Very Black Enron Cloud*, 44 ARIZ. L. REV. 547, 553-54 (2002) (concept includes “independence from influences that would compromise our ardor for our clients,” “independence from the client,” and “lawyer self-regulation”).

8. *See, e.g.*, Gordon, *supra* note 3, at 19-20 (“In grappling with defined problems of professional obligation, lawyers differ greatly on how much stress to give each of the two basic and fundamentally conflicting ideals of political independence. One stresses loyalty to the client, even at the cost of some warping of the legal framework. The other emphasizes fidelity to the framework and its improvement, even at the cost of sometimes having to resist the pressures of clients.”); Le Mire, *supra* note 3, at 22, 30-37 (identifying four aspects of independence, but arguing that the most important is “a personal capacity to exercise independent judgment”); Margulies, *supra* note 3, at 945 (describing why “independence is a rhetorical construct that masks conflicting values”).

9. Margulies, *supra* note 3, at 981 (“Lawyers' independence is a good slogan in times when lawyers have overreached. . . . [H]owever, ultimately invocations of independence obscure more than they illuminate.”).

of professional independence, as that term is conventionally employed. Part II discusses the bar's collective independence to regulate its members. Part III discusses individual lawyers' independence in the context of professional representations, including independence from clients, on one hand, and independence from third parties, on the other. Part IV then suggests that there is a meaning of lawyers' professional independence that has largely dropped out of lawyers' discourse but that deserves more attention, namely, lawyers' independence from the *courts*. This includes at least three aspects: (1) freedom to criticize judges; (2) freedom to disobey arguably unlawful court orders; and (3) freedom to resolve certain ethical dilemmas for oneself, as a matter of professional conscience. As the bar has become strongly identified and allied with the judiciary, motivated by the interests in securing judicial protection from other government regulation and in securing the bar's own institutional influence over individual lawyers, it has ignored this understanding and redefined professional independence consistently with a strong judicial role in regulating lawyers.

II. PROFESSIONAL SELF-REGULATION: LAWYERS' COLLECTIVE "INDEPENDENCE FROM GOVERNMENT DOMINATION"

One use of the term "professional independence" refers to lawyers' collective *and (relatively) exclusive* right to make and enforce the applicable standards of conduct. In the contemporary rhetoric of the bar, the bar's power to regulate itself plays a supporting role to lawyers' individual independence in the course of their legal work, but an important role nonetheless. For example, the U.S. organized bar has sometimes come to the defense of lawyers in repressive regimes when it believes that the foreign bar's independence, in this respect, is being threatened.¹⁰

10. See, e.g., Press Release, William T. Robinson, III, President, Am. Bar Ass'n, Statement Re: Threats to the Independence of Belarus' Legal Profession (June 19, 2012):

The American Bar Association is concerned about violations of international law in Belarus that present ongoing threats to the independence of the legal profession. . . . Belarus' retaliation against lawyers for representing political opponents and human rights activists, and the country's interference with the administration of the Minsk Bar Association, contravenes fundamental human rights enshrined in the International Covenant on Civil and Political Rights. The government of Belarus has also violated the right to freedom of expression by retaliating against lawyers speaking on behalf of their clients, and it has violated the right of these lawyers to associate with colleagues and clients without undue interference. These developments are in clear breach of the legal profession's core principles, namely the independent regulation of the practice of law recognized in Europe, the United States and internationally.

The Preamble to the ABA Model Rules of Professional Conduct (“Model Rules”) focuses on the “independence” of the bar in this sense:

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession’s independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.¹¹

The Model Rules might be thought to reflect the organized bar’s principal effort at self-regulation. This codification of rules, designed for adoption by state courts, reflects the bar’s view of the optimal professional norms, mediating among the various roles lawyers play and interests they serve. Its premise is that lawyers have different roles that, in a given situation, may push in different directions, giving rise at times to difficult questions about the best way to act to resolve the tension between different professional values.¹² Resolving conflicts between lawyers’ various roles, especially between the competing obligations to the client and the public, is the central professional challenge for lawyers and for those seeking to regulate their conduct.¹³ The ABA, as the largest national representative of the organized bar, has drafted the Model Rules, in part, to “prescribe terms for resolving such conflicts” while recognizing that no set of rules is comprehensive, and that lawyers must sometimes answer hard questions based on general principles.¹⁴

11. MODEL RULES OF PROF’L CONDUCT pmb1. 11, 12 (2013).

12. *Id.* at pmb1. 1, 9:

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . . In the nature of law practice, . . . 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.

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

14. MODEL RULES OF PROF’L CONDUCT pmb1. 9 (2013) (“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.”).

It is not obvious why professionals should have the right to regulate themselves;¹⁵ for example, one would be skeptical if Wall Street brokers claimed a similar right. One might justify the value of self-regulation in various ways, including based on lawyers' superior expertise. But the bar's principal rationale is that self-regulation is necessary to secure individual lawyers' independence.¹⁶ The fear is that, if the government can make the rules for lawyers, it may make repressive rules, which undermine lawyers' ability to perform as independent professionals.

Consider, for example, the response of the ABA and the European bar in December 2011 when they perceived that the International Monetary Fund was pressuring Greece, Ireland and Portugal to subject their lawyers to non-lawyer regulation.¹⁷ A proposed law in Ireland urged by the IMF, the European Commission and the European Central Bank (the "Troika") would have established a Regulator: a regulatory body comprised mostly of non-lawyers, to regulate lawyers' conduct and handle discipline and complaints.¹⁸ When the U.S. and European bars opposed this, they invoked the rhetoric of lawyers' independence, explaining:

In our view, the establishment of the Regulator will be in clear breach of one of the core principles of the legal profession: regulation independent from the executive branch of the state—a principle recognized in Europe, the United States, and internationally. It is the cornerstone of any democratic society based on the rule of law and also necessary for the sound administration of justice.

We are convinced that without a guarantee of independence—which is fundamental to the profession—it is impossible for lawyers to fulfill their professional and legal role.

Self-regulation is characteristic for the legal profession in Europe. No

15. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 20-21 (1986).

16. See, e.g., Archibald Cox, *The Conditions of Independence for the Legal Profession*, in *THE LAWYER'S PROFESSIONAL INDEPENDENCE, PRESENT THREATS/FUTURE CHALLENGES* 53, 55 (John B. Davidson, ed., 1985) (maintaining that society is best served when lawyers are independent in the sense of "stand[ing] somewhat apart" from the client, both to better serve the client and "to serve other, larger, and more diffuse interests than the client immediately recognizes and which the client may even prefer to disregard," and that this ideal can be nurtured and pursued only "by a profession whose members are so well guided by their personal sense of professional obligation to the public that the public chooses to leave them largely free from outside regulation").

17. Letter from Georges-Albert Dal, President, Council of Bars and Law Soc'ys of Eur., and William T. Robinson, III, President, Am. Bar Ass'n, to Christine Lagarde, Managing Director, Int'l Monetary Fund (Dec. 21, 2011), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/CCBE_and_ABA_letter_1_1325686329.pdf.

18. *Id.*

country has total and unrestricted self-regulation of the legal profession. However, there is in all European countries that are members of the CCBE a significant extent of self-regulation. In the United States, there is in general regulation by the courts, which similarly satisfies the principle of independence from executive regulation.

We believe that independent regulation, conceptually, must be seen as a logical and natural consequence of the independence of the profession. It addresses the collective independence of the members of the legal profession and is nothing less than a structural defense of the independence of the individual lawyer, which requires a lawyer to be free from improper influence, especially such as may arise from his/her personal interests or external pressure (including government pressure).¹⁹

Are U.S. lawyers independent? Given the regulatory role of the U.S. courts, the U.S. bar may be overstating or mischaracterizing its “independence” to regulate its members. As the Model Rules’ Preamble concedes, lawyers’ autonomy is “relative.”²⁰ The late professor Fred Zacharias, more pointedly characterized self-regulation as a “myth.”²¹ Historically, the courts regulate U.S. lawyers. When bar associations argue for preserving lawyers’ “independence,” it is really advancing an idea of separation of powers: that the courts should have (relatively) exclusive authority to regulate lawyers as “officers of the court.”²²

Deep down, the bar might regard judicial regulation of lawyers as merely the lesser of two evils, but at least outwardly it embraces the concept. As I discussed several years ago, the ABA has a “strong historic commitment to state judicial regulation,” which it “resoundingly affirmed . . . in 2002 when it adopted multijurisdictional practice reforms.” The ABA reaffirmed its support for judicial regulation more recently when it “opposed federal administrative regulation of lawyers’ practice, in part, because federal regulation interferes with state judicial regulation.”²³ While espousing its commitment to self-regulation,

19. *Id.* at 2.

20. MODEL RULES OF PROF’L CONDUCT pmb1. 12 (2013).

21. Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1189 (2009).

22. For a discussion of lawyers’ professional identity as “officers of the court” and the significance of the role, see Deborah M. Hussey Freeland, *What is a Lawyer? A Reconstruction of the Lawyer as an Officer of the Court*, 31 ST. LOUIS U. PUB. L. REV. 425 (2012).

23. Bruce A. Green, *ABA Ethics Reform from “MDP” to “20/20”: Some Cautionary Reflections*, 2009 J. PROF. LAW. 1, 6 (2009). See also ABA, *Independence of the Legal Profession*, AM. BAR ASSOC., http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession.html (last visited Mar. 28, 2013) (“[T]he ABA

beginning in the early 20th century the ABA has in fact promoted the judiciary's expansion of its regulatory authority over lawyers. The ABA has drafted model disciplinary rules, lobbied courts to adopt them, and urged courts to establish or oversee more professional and robust disciplinary processes to enforce them.²⁴ One can reconcile judicial regulation with professional self-regulation if one regards the judiciary as a specialized branch of the legal profession. Dana Remus recently explored this concept from a different perspective in an article focusing on the legal profession's role in regulating the judiciary.²⁵ She argued that in part by reconceptualizing the judiciary as a subset of the legal profession, the bar in the 20th century asserted a role in regulating judges, thereby "increasing its own power at the expense of judicial power."²⁶ She described this as a shift from an earlier period when "[l]awyers played an important quasi-governmental role as officers of the court, but remained beholden to judiciaries as the regulators of the practice of law."²⁷ Although Remus's principal point was that lawyers' regulatory influence over the judiciary erodes judicial independence, she also envisioned the relationship as weakening the bar's independence.²⁸

Some bar leaders have acknowledged that the idea of lawyers' professional "independence" is less robust in the U.S. than in some other countries, but nonetheless see judicial regulation as far preferable to executive or legislative regulation of the bar. For example, former N.Y.C. bar president Evan Davis observed that:

[a]round the world the legal profession operates under varying degrees of independence. In a few places it is still self-regulated in the sense that it defines its own rules of ethics and disciplines its own members. In other countries the bar is heavily regulated by the political branches of government. . . . In my opinion, it is very important for the bar to be independent of the political branches of government. It has not been a problem that in the United States the bar has come to be regulated by the judiciary because of the judiciary's own neutrality; it would be a huge problem if the bar were regulated by the Department of Justice or

opposes federal legislation or rules that would undermine traditional state court regulation of lawyers, interfere with the confidential attorney-client relationship, or otherwise impose excessive new federal regulations on lawyers engaged in the practice of law.") (listing ABA policies).

24. See, e.g., James A. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2491-99 (2003); Zacharias, *supra* note 21, at 1160-63.

25. Dana Ann Remus, *Just Conduct: Regulating Bench-Bar Relationships*, 30 *YALE L. & POL'Y REV.* 123 (2012).

26. *Id.* at 145.

27. *Id.* at 134.

28. *Id.* at 151-55.

by the various elected or appointed state attorneys general. It would be much harder to resist either gentle or firm governmental pressure if the government's lawyers decided how the bar in general or you, as an attorney, in particular, should behave.²⁹

Two points should be noted here. First, if one assumes that lawyers' individual independence in the U.S. depends on judicial regulation, then lawyers have a strong stake in the preservation of judicial independence from the executive and legislative branches. If the judiciary is subject to outside pressure from other government branches, then the judiciary may not be in a position to insulate the bar and professional regulation. Consequently, in a system such as ours where courts oversee the bar, the bar has an interest in promoting not only the relative exclusivity of judicial regulation, but also judicial independence in exercising that authority. For this, among other reasons, the bar has an interest in promoting public respect for the judiciary.

Second, it is undoubtedly true that judicial regulation is preferable to regulation by the executive branch, which is often a party to litigation. The specter of executive officials regulating opposing counsel would be disquieting.³⁰ But the question to which I will later return is this: Might judicial regulation itself be problematic, albeit to a different degree? The problem is most likely to arise when the judiciary seeks to resolve tensions between lawyers' duties to the court and other obligations. The judiciary is not a disinterested arbiter in that scenario. Further, individual judges may overvalue institutional interests when they interpret and apply professional standards. Should lawyers be more independent from courts? Does the bar's endorsement of the courts' regulatory role undermine lawyers' independence?

III. INDIVIDUAL LAWYERS' INDEPENDENCE

Independence of the bar is viewed as an individual attribute, not just a collective one. But the term is conventionally used in two seemingly conflicting ways. At times, "professional independence"

29. Davis, *supra* note 2, at 1291.

30. See generally Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 *FORDHAM L. REV.* 327, 369 (1998) (noting concerns when prosecutors bring criminal prosecutions of criminal defense lawyers who represented opposing parties). Similar doubts were raised some years ago when lawyers in the executive branch sought to exempt themselves from judicial regulation and to regulate themselves. See Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 *GEO. WASH. L. REV.* 460, 469-89 (1996) (discussing DOJ's adoption of internal regulation meant to preempt courts' professional conduct rules governing its lawyers' communications with opposing parties).

means independence from clients. This can be either a state of mind, e.g., detachment or objectivity, or something more tangible. At other times, “professional independence” implies independence from the pressures and influences of others who might compromise lawyers’ loyalty to clients. That is the principal sense in which it is used in Rule 5.4 of the Model Rules.³¹

A. *Independence from Clients*

As Professor Gordon’s article explores, critics of the U.S. bar for more than a century have viewed independence from clients as an important virtue and expressed concern about lawyers’ lack of it.³² Abraham Lincoln might be identified as an exemplar of this virtue,³³ which reflects a willingness to displease clients by, for example, telling them what you believe to be true but they do not want to hear, or turning down clients seeking socially unworthy, not merely unlawful, objectives. The following story of how Lincoln advised a client was told by Lincoln’s law partner, William Herndon, and then recounted by Illinois Supreme Court Judge Orrin N. Carter in his 1915 volume on legal ethics.³⁴ Lincoln reportedly told the client:

We can doubtless gain your case for you; we can set a whole neighborhood at loggerheads; we can distress a widowed mother and her six fatherless children, and thereby get for you \$600 to which you seem to have a legal claim, but which rightfully belongs, it appears to us, as much to the woman and children as it does to you. We will not take your case, but we will give you a little advice, for which we will charge you nothing. You seem to be a sprightly, energetic man. We would advise you to try your hand at making six hundred dollars in some other way.³⁵

Lincoln could have accepted the representation; the client had a colorable legal claim and may even have won.³⁶ In turning down the

31. Rule 5.4 has also been said to insulate lawyers from outside influences that might compromise their ability to act consistently with public obligations, such as their duty of candor to the court or their pro bono obligations.

32. Gordon, *supra* note 3, at 34, 48. See also Fred C. Zacharias, *The Images of Lawyers*, 20 GEO. J. LEGAL ETHICS 73, 81-82 (2007) (“The bar as whole likes to think of lawyers as capable of exercising professional judgment independently of client desires and capable of taking moral stands that produce appropriate client behavior.”).

33. See, e.g., Brown, *supra* note 1, at 30-31.

34. ORRIN N. CARTER, *ETHICS OF THE LEGAL PROFESSION* (1915).

35. *Id.* at 52 (quoting FREDERICK TREVOR HILL, *LINCOLN, THE LAWYER* 102, 239 (1906)).

36. *Id.*

representation, Lincoln lost a fee and perhaps even a client. Acting in accordance with his sense of professional duty, however, Lincoln gave advice that he thought reflected the client's best interest as a member of the community, if not the client's optimal financial interest.³⁷

Contemporary legal ethicists have embraced the story and appropriated it to various purposes.³⁸ For example, my colleague Russell Pearce and I did so in an article describing lawyers' role as "civics teachers,"³⁹ by which we meant, in part,

that when lawyers counsel clients about their legal rights and obligations, and about how to act within the framework of the law, lawyers invariably teach clients not only about the law and legal institutions, but also, . . . about rights and obligations in a civil society that may not be established by enforceable law—including ideas about fair dealing, respect for others, and, generally, concern for the public good.⁴⁰

Additionally, we suggested, lawyers teach by example when they "address their own legal obligations in the course of a representation."⁴¹

Lincoln's story was principally about the lawyer in the role of advisor. Others who discuss lawyers' independence from clients similarly focus on the counseling function. A recurrent popular concern is that when clients act badly, it is sometimes because of their lawyers' failure to give independent advice that directs the client to broad considerations weighing against the client's preferred course of conduct—for example, advice that is not just legally or technically accurate but that takes into account the spirit or purpose of the law or broader societal concerns beyond obeying the law.⁴² William Allen has

37. *Id.*

38. See, e.g., Lorie M. Graham, *Aristotle's Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 J. LEGAL PROF. 5, 49 (1995/1996); Robert P. Lawry, *Images and Aspirations: A Call for a Return to Ethics for Lawyers*, 48 SAN DIEGO L. REV. 199, 213 (2011); David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 637; Michael S. McGinniss, *Virtue Ethics, Earnestness, and the Deciding Lawyer: Human Flourishing in a Legal Community*, 87 N. DAK. L. REV. 19, 46 (2011); Aziz Rana, *Legal Independence and the Problem of Democratic Citizenship*, 77 FORDHAM L. REV. 1665, 1700 (2009).

39. Bruce A. Green & Russell Pearce, "Public Service Must Begin at Home": *The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1212 (2009).

40. *Id.*

41. *Id.* at 1213.

42. For example, Judge Stanley Sporkin famously asked regarding wrongdoing by officials of a financial institution, "where . . . were the . . . attorneys when these transactions were effectuated?" *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990) (Sporkin, J.). See, e.g., *Symposium Transcript, After Sarbanes-Oxley: A Panel Discussion on Law and Legal*

spoken of “the duty of independence” in advising business clients about compliance with the law, by which he means “the lawyer’s duty to the legal system and to the substantive values it incorporates.”⁴³ He says that this is an “aspect of lawyer’s duty that we do not much notice and have not for a long time.”⁴⁴ Likewise, Archibald Cox suggested that “[t]he independent lawyer’ develops the capacity for taking a longer and broader view than the first look of many clients engaged in pressing immediate self-advantage.”⁴⁵ Robert Gordon referred to the exercise of this type of independence in advising clients as “purposive lawyering or public-minded counseling.”⁴⁶ One might view independence, in this sense, as being in tension with the ideal of the lawyer as the “zealous advocate.”⁴⁷

The Model Rules recognize lawyers’ independence from clients, emphasizing objectivity and broad-mindedness in advice-giving. Model Rule 2.1 (“Advisor”) provides:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.⁴⁸

The first part of the rule is framed in mandatory terms. Kevin Michels has argued that the rule demands that lawyers may not tell clients what

Ethics in the Era of Corporate Scandal, 17 GEO. J. LEGAL ETHICS 67, 68 (2003) (quoting Father Robert Drinan regarding the collapse of Enron). David Wilkins’s article about the changing nature of the corporate attorney-client relationship raises questions about the sustainability of the independent advice-giving function, assuming it ever was realistic. David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2085-89 (2010). Of course, some might question how often corporate lawyers are to blame for corporate clients’ questionable or improper conduct and posit that clients who engaged in questionable conduct may have withheld relevant information from their lawyers or ignored their lawyers’ advice. Because of attorney-client confidentiality, it is sometimes impossible to know what role lawyers’ advice played in client decision-making.

43. Allen, *supra* note 3, at 3.

44. *Id.*

45. Cox, *supra* note 16, at 59.

46. Gordon, *supra* note 3, at 33.

47. Allen, *supra* note 3, at 11, 13. See also Bruce A. Green, *Thoughts About Corporate Lawyers After Reading The Cigarette Papers: Has the “Wise Counselor” Given Way to the “Hired Gun”?*, 51 DEPAUL L. REV. 407 (2001). In contrast, Katherine Kruse has argued that the problem is not that lawyers ignore broad societal values but that they ignore clients’ own non-legal concerns. Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 154 (2010) (identifying, as a central problem of legal professionalism, “the narrow construction of client objectives in terms of legal interests and disengagement from client values”).

48. MODEL RULES OF PROF’L CONDUCT R. 2.1. (2013).

they want to hear or what will best advance their objectives, but must “employ accepted professional standards of legal interpretation and reasoning to interpret the law and apply it to the client’s facts to form the conclusions that will ground her legal advice.”⁴⁹

When the so-called “torture memos” were released, many perceived that the authors in the Justice Department’s Office of Legal Counsel flunked this test in advising that water boarding was not torture, because they told the Administration what it wanted to hear, not the conclusion dictated by conventional principles of legal interpretation.⁵⁰ Although the authors escaped both internal Justice Department discipline and bar discipline that some thought was warranted, there have been occasions (though not many) in which other lawyers have been sanctioned for failing to “exercise independent professional judgment and render candid advice.”⁵¹

In the realm of advocacy, in contrast to counseling, the professional conduct rules are less emphatic about lawyers’ independence. If one took a strong view of independence in the advocacy role, lawyers would have considerable discretion to serve public interests that may be in tension with their clients’ interests or desires. Consider, for example, the nineteenth century understanding of an advocate’s independence, as expressed by John Inglis, Lord President of the Court of Session, in *Batchelor v. Pattison & Mackersy*:⁵²

[T]he nature of the advocate’s office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgement in the conduct of the cause for his client. His legal right is to conduct the cause without any regard to the wishes of his client, so long as his mandate is unrecalled, . . .⁵³

49. Michaels, *supra* note 3, at 117. See also Bruce A. Green, *Taking Cues: Inferring Legality from Others’ Conduct*, 75 FORDHAM L. REV. 1429 (2006).

50. See, e.g., Stephen Gillers, *Tortured Reasoning*, AM. LAW., June 14, 2004, available at http://www.law.com/jsp/article.jsp?id=900005539346&Tortured_Reasoning&slreturn=20130330173309; W. Bradley Wendel, *The Torture Memos and the Demands of Legality*, 12 LEGAL ETHICS 107, 115-16 (2009) (book review); Fred C. Zacharias, *Practice, Theory, and the War on Terror*, 59 EMORY L.J. 333, 336-42 (2009).

51. See ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 287-88 (7th ed. 2011).

52. 3 R. 914, 918 (1876).

53. According to the “Guide to the Professional Conduct of Advocates” published by the Faculty of Advocates in Scotland, the decision’s “view of the powers and liabilities of an Advocate has been considerably altered by practice and case law in succeeding generations.” GUIDE TO THE PROFESSIONAL CONDUCT OF ADVOCATES 1.2.2 (4th ed. 2007).

The Model Rules provide hardly any discretion of this sort. In general, the rules do not take a stand on whether a lawyer may disregard a client's direction about how to conduct the representation, whether to serve other interests or to better serve the client's interests:

On occasion . . . a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. . . . Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer.⁵⁴

The rules timidly acknowledge one small aspect of advocacy in which a lawyer, as advocate, may disregard a client's lawful interests or instruction:

The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect. . . . A lawyer's duty to act with reasonable promptness . . . does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.⁵⁵

Additionally, lawyers have some latitude to terminate a representation when their view of the best course of action conflicts with the client's view, or when the client's direction or objectives are anti-social (but lawful) or at odds with other professional values: "If . . . efforts [to resolve disagreements with the client] are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation."⁵⁶ And, as noted below,⁵⁷ lawyers have limited

54. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 2 (2013); see David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 824-30 (2005); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 222-26 (1991); see generally CTR. FOR PROF'L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 (2006).

55. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmts. 1, 3 (2013); cf. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(B) (1980) ("In his representation of a client, a lawyer may: (1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client. (2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.").

56. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 2 (2013) (citing MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2013)) ("[A] lawyer may withdraw from representing a client if . . . the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.").

discretion to disclose client confidences to serve circumscribed public ends.⁵⁸

In the end, the idea of lawyers' independence from clients is in tension with the more compelling idea of the lawyer as agent of, or zealous advocate for, the client, and not nearly as well elaborated in the professional codes or literature. The idea is in part subjective and in part aspirational, but it is not easily translated into specific conduct or rules for behavior. In particular, the professional codes do not embody a strong commitment to the idea that a lawyer may act contrary to client interests or demands so as to serve competing professional interests. Independence seems like something that lawyers exercise in the interstices, where client interests and objectives are not in jeopardy.

B. *Independence from Third Parties*

“Professional independence” also refers to individual lawyers' independence from third parties who might cause lawyers to compromise their professional duties to the client or, to a lesser extent, the public. John Adams's defense of British soldiers after the Boston Massacre exemplifies independence in this sense.⁵⁹ In 1770, British soldiers who were pelted with stones and other objects opened fire on a crowd, killing five.⁶⁰ Adams agreed to defend the soldiers when others would not do so.⁶¹ As David McCullough's biography of Adams describes,⁶² Adams was “firm in the belief . . . that no man in a free country should be denied the right to counsel and a fair trial . . . As a lawyer, his duty was clear. That he would be hazarding his hard-earned reputation and, in [Adams'] words, ‘incurring a clamor and popular suspicions and prejudices’ against him, was obvious . . .”⁶³ Adams' “virtuoso performance” in arguing that the soldiers had acted in self-defense, won an acquittal of six of the eight soldiers put on trial and spared the lives of the other two, who had fired directly into the crowd

57. See *infra* notes 169-171 and accompanying text.

58. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2013); Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 277 (2006).

59. Robert S. Alexander, *The History of the Law as an Independent Profession and the Present English System*, in THE LAWYER'S PROFESSIONAL INDEPENDENCE: PRESENT THREATS/FUTURE CHALLENGES 1, 15 (1984).

60. *John Adams and the Boston Massacre*, ACLU, (May 8, 2008), <http://www.aclu.org/national-security/john-adams-and-boston-massacre>.

61. *Id.*

62. DAVID MCCULLOUGH, JOHN ADAMS 65, 68 (2001).

63. *Id.* at 66.

but were convicted only of manslaughter.⁶⁴ Three years later, Adams wrote in his diary:

The Part I took in Defence of Cptn. Preston and the Soldiers, procured me Anxiety, and obloquy enough. It was, however, one of the most gallant, generous, manly and disinterested Actions of my whole Life, and one of the best Pieces of Service I ever rendered my Country. Judgment of Death against those Soldiers would have been as foul a Stain upon this Country as the Executions of the Quakers or Witches, anciently. As the Evidence was, the Verdict of the Jury was exactly right.⁶⁵

Adams' defense of the British soldiers is often invoked as an example of lawyers' duty to defend unpopular causes.⁶⁶ For example, more than two centuries later, the American Civil Liberties Union and the National Association of Criminal Defense Lawyers gave the name "the John Adams Project" to their efforts to oppose the military tribunals in Guantanamo.⁶⁷ Justice Black may have had Adams's example in mind when he wrote for the Supreme Court:

Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent.⁶⁸

Atticus Finch is, of course, another popular, albeit fictional, example.⁶⁹

Adams' defense of the British soldiers reflects a muscular idea of professional independence. The idea embodies not only an expectation

64. *Id.* at 67.

65. JOHN ADAMS, DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 79 (L.H. Butterfield ed., The Belknap Press of Harvard Univ. Press 1961) (1815).

66. See, e.g., Mark Brodin, *What One Lawyer Can Do for Society: Lessons from the Remarkable Career of William P. Homans Jr.*, 46 NEW ENG. L. REV. 37, 41, 42 (2011); Laurel E. Fletcher, *Defending the Rule of Law: Reconceptualizing Guantanamo Habeas Attorneys*, 44 CONN. L. REV. 617, 626 (2012); Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 81-82 (2011).

67. *John Adams Project—American Values*, ACLU (Apr. 4, 2008), <http://www.aclu.org/national-security/john-adams-project-american-values>.

68. *Von Moltke v. Gillies*, 332 U.S. 708, 725-26 (1948).

69. See, e.g., Mary A. Lynch, *An Evaluation of Ten Concerns About Using Outcomes in Legal Education*, 38 WM. MITCHELL L. REV. 976, 991-92 (2012); Jeffrey W. Stempel, *Tending to Potted Plants: The Professional Identity Vacuum in Garcetti v. Ceballos*, 12 NEV. L.J. 703, 705 n.11 (2012). But see Monroe Freedman, *Atticus Finch, Esq., R.I.P.*, LEGAL TIMES, Feb. 24, 1992, at 20-21.

about lawyers' professional conduct but also about their professional character. The assumption is that lawyers, as a matter of professional commitment and training, have the backbone to defy self-interest and outside pressures, including from friends and members of their community, which would deter them from fulfilling their sense of professional duty to clients and to the public. Adams did not need buffeting from the public, nor did he receive it, because he had internal professional fortitude.

How weak and flabby lawyers have become, at least in the ABA's evident view, since Adams' day. In the ABA ethics rules, the only explicit reference to individual lawyers' independence is in a fairly trivial rule designed, it is said, to protect lawyers from the corrosive influence of non-lawyers and corporations.⁷⁰ The principal and most enduring discussion of professional independence over the past fifteen years has been in the context of a debate over whether the rule can be slightly liberalized to align the U.S. bar with that of other countries, in which lawyers can have non-lawyer partners and law firms can seek outside capital.⁷¹

Titled "Professional Independence Of A Lawyer," ABA Model Rule 5.4 does not affirmatively define "independence" or establish a duty to act independently.⁷² Rather, it identifies restrictions on lawyers that are presumably designed to protect or secure lawyers' independence, whatever that may mean. These include: (1) a restriction on sharing legal fees with a nonlawyer;⁷³ (2) a prohibition on practicing law in partnerships or professional corporations or associations with non-lawyers;⁷⁴ and (3) a requirement that lawyers ensure that third parties who retain them or pay for their services on behalf of a client do not interfere with their exercise of professional judgment.⁷⁵ The accompanying Comment explains that, "These limitations are to protect the lawyer's professional independence of judgment."⁷⁶

Although it is clear that lawyers are expected to be independent *from* third parties, it is less clear what lawyers are expected to do with their independence. The focus of Rule 5.4 is on preventing interference,

70. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2013).

71. See Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and the MDP Debate in America*, 78 FORDHAM L. REV. 2193, 2196-98 (2010).

72. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2013).

73. *Id.* at R. 5.4(a).

74. *Id.* at R. 5.4(b), R. 5.4(d).

75. *Id.* at R. 5.4 (c).

76. *Id.* at R. 5.4 cmt. 1.

itself an underdeveloped concept.⁷⁷ But interference with what? What is “independence of judgment”? The rules do not define this attribute in affirmative terms.

Rule 5.4 is essentially a conflict of interest rule. This was the understanding reflected in much of the rhetoric surrounding the debate in 2000 when the ABA House of Delegates rejected an ABA commission’s proposal to liberalize the rule to permit “multidisciplinary practice.”⁷⁸ Opponents argued that restrictions on alliances with non-lawyers were necessary to protect “core values,” meaning that third parties would induce lawyers to violate their agency duties to clients and their duties to the court.⁷⁹ In response to efforts of a more recent body, the ABA’s Ethics 20/20 Commission, to reexamine multidisciplinary practices particularly in light of innovations in England and Australia, critics invoked the rhetoric of professional independence as they had earlier.⁸⁰

77. See Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469, 1519-22 (2000).

78. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 01-423 at 3 & n.6 (2001):

The prohibitions in Rule 5.4 are directed mainly against entrepreneurial relationships with nonlawyers and primarily are for the purpose of protecting a lawyer’s independence in exercising professional judgment on the client’s behalf free from control by nonlawyers. . . .

The rule was developed in the ABA House of Delegates during debates on the Kutak Commission’s Proposed Rule 5.4, which the House rejected. . . . Threats to lawyer professional independence resulting from corporate ownership or public investment in law firms led the House of Delegates to substitute nearly verbatim the provisions of the disciplinary rules in the former Model Code of Professional Conduct for the Kutak Commission’s proposal. . . . In February and August 2000, concern that admission of nonlawyer professionals as partners in law firms would interfere with lawyers’ professional independence and the preservation of the core values of the profession led the House of Delegates to reject proposals to allow partnerships with nonlawyer professionals and to direct that no change be made to Rule 5.4.

79. See, e.g., Robert L. Ostertag, *Multidisciplinary Practice: Our Profession is Not for Sale*, 18 GPSOLO 22 (Jan./Feb. 2001) (“Lawyers have, among others, three core values built into our Codes of Professional Responsibility that the Big 5 want us to eliminate—our total independence from outside influence in the representation of our clients, our undivided loyalty toward our clients, and our obligation to maintain their confidences and secrets. . . . [I]f lawyer-controlled MDP firms are to function solely on behalf of our clients, how may accountants meet their publicly directed obligations when called upon to do so, without infringing on our own client-directed core values? How can lawyers function for their clients when their independence and loyalty are necessarily to be divided between their responsibilities to clients and their responsibilities to their accountant partners or employers?”).

80. In August 2012, the Illinois State Bar Association proposed a Resolution in the ABA House of Delegates designed to preempt consideration of reforms to the ABA Model Rules that might liberalize restrictions on lawyers’ alliances with non-lawyers. The proposed resolution, which was not adopted, provided:

The sharing of legal fees with non-lawyers and the ownership or control of the practice

Rule 5.4 raises doubts about whether the bar still expects lawyers to cultivate independence as a trait of character. If in an earlier day lawyers could be counted on to withstand outside pressure in order to do what they thought was right as a matter of professional duty, the premise of Rule 5.4 is that lawyers need special protection against outside influence.⁸¹

Lawyers in other countries, such as England and Australia, now have the ability to collaborate with non-lawyer professionals in ways forbidden by the U.S. rules, such as by taking in non-lawyer partners or accepting non-lawyer investors in their firms.⁸² So far, there have been no documented reports of lawyers sacrificing their independence as a consequence. Indeed, non-lawyers have been permitted to become firm partners in Washington, D.C., without evident harm.⁸³

Wholly apart from recent experience, one might be skeptical of the

of law by non-lawyers are inconsistent with the core values of the legal profession. The law governing lawyers that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring to non-lawyers ownership or control over entities practicing law should not be revised.

ILL. STATE BAR ASS'N & SENIOR LAWYERS DIV., AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 1 (2012).

The accompanying report maintained, in part:

Affirmation of these core principles and values is important now, particularly at a time when technological advances and globalization are pressuring the profession to lessen its commitment to the public and to professional independence. . . . The evils of fee sharing with nonlawyers in jurisdictions that permit nonlawyer ownership can have the same deleterious effect on lawyer independence and control as any other fee sharing with nonlawyers. The American concept and practice of lawyer independence is as important to proclaim and advocate throughout the world as is due process and the rule of law abroad.

Id. at 2, 5.

81. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2013).

82. See generally Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 *FORDHAM L. REV.* 2791, 2843 (2012); John Flood, *The Consequences of Clementi: The Global Repercussions for the Legal Profession After the Legal Services Act of 2007*, 2012 *MICH. ST. L. REV.* 537, 545-56; Stephen Gillers, *A Profession, If You Can Keep It: How Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 *HASTINGS L.J.* 953, 1008 (2012); Renee Newman Knake, *Democratizing the Delivery of Legal Services: On the First Amendment Rights of Corporations and Individuals*, 73 *OHIO ST. L.J.* 1, 7-8 (2012); Thomas D. Morgan, *The Rise of Institutional Law Practice*, 40 *HOFSTRA L. REV.* 1005, 1019-20 (2012); Ted Schneyer, *Thoughts on the Compatibility of Recent U.K. and Australian Reforms With U.S. Traditions in Regulating Law Practices*, 2009 *J. PROF. LAW.* 13, 15; Carole Silver, *What We Don't Know Can Hurt Us: The Need for Empirical Research in Regulating Lawyers and Legal Services in the Global Economy*, 43 *AKRON L. REV.* 1009 (2010); Heather A. Miller, Note, *Don't Just Check "Yes" or "No": The Need for Broader Consideration of Outside Investment in the Law*, 2010 *U. ILL. L. REV.* 311, 312.

83. See generally Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 *GEO. J. LEGAL ETHICS* 217, 245-46 (2000).

particular procedural protections codified in Rule 5.4 for at least two reasons. First, one can rationalize almost any procedural measure as a safeguard of “independence.” For example, in England, the requirement that barristers accept all cases, the “cab rank principle,” without regard to their view of the merits has been justified on this ground: “The relationship with the independence of the bar lies in the impossibility for the most part of associating certain barristers or chambers with certain causes or attitudes.”⁸⁴ In contrast, in the United States, the ability to turn down an unworthy client is regarded as an expression of independence, and lawyers are permitted to ally themselves with particular clients (as in the case of in-house counsel) and causes (as in the case of lawyers for interest groups). Likewise, in England, the requirement that barristers be individual practitioners, not members of partnerships, is thought to promote their independence.⁸⁵ In contrast, in the United States, we assume that working in a firm makes lawyers better regulated.⁸⁶

Second, as I discussed in an article at the time of the MDP debate, what passes as a protection for lawyer independence may largely be designed to protect lawyers’ monopoly.⁸⁷ Rule 5.4 originated in legislation aimed at forbidding lawyers from being employed by corporations to provide services to members of the public.⁸⁸ The proponents of the legislation had no evidence that the corporations then supplying lawyers to clients were harming the public, and the transparent motivation behind the legislation was to protect lawyers’ business.⁸⁹ Since that time, as Professor Gordon also observed in the context of the MDP debates:

84. Alexander, *supra* note 59, at 1, 14.

85. *Id.* at 14 (“The rule that barristers are individual practitioners maintains a system in which the lawyer is never committed to a sole client for work and fees but can advise impartially and objectively. It confers upon the bar a most important attribute of independence, the right to be free from any external pressure or fear of reprisals, based solely upon what the lawyer considers the law to be.”).

86. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 5.1, 5.2 (2013); see generally Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691 (2002); Thomas D. Morgan, *The Rise of Institutional Law Practice*, 40 HOFSTRA L. REV. 1005 (2012); Douglas R. Richmond, *Law Firm Partners as Their Brothers’ Keepers*, 96 KY. L.J. 231, 252 (2008); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991); Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the “Ethical Infrastructure” of Law Firms*, 39 S. TEX. L. REV. 245 (1998); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

87. Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115 (2000).

88. *Id.* at 1120-33.

89. *Id.* at 1134-35.

Historically, the sad if hardly surprising fact has been that the organized bar's resistance to new modes of practice, though often clothed in the high-minded rhetoric of protecting the ethical standards and independent judgment of the legal profession, has been to a considerable extent motivated by far less elevated desires to protect the incomes of lawyers from economic competition or their status from erosion by groups perceived as interlopers.⁹⁰

The rhetoric surrounding the opposition to liberalizing Rule 5.4 signifies one respect in which the bar has overvalued professional independence. In much of the bar's rhetoric in other contexts, the threats to the bar's independence come from the executive and legislative branches of government or the general public. In the one ethics rule with "independence" in its title, these threats are not identified; nor are lawyers encouraged to stare them down.⁹¹ Rather, the enemy at the gate of independence is envisioned as . . . accountants!⁹² The rule trivializes the ideal of professional independence as it diminishes legal professionals. Surely, the bar could project a loftier ideal of independence and express greater confidence in lawyers' fortitude.

IV. INDIVIDUAL LAWYERS' INDEPENDENCE FROM THE JUDICIARY

One aspect of "professional independence" that has largely dropped out of the professional discourse is the idea of independence not simply from clients and third parties in general, but from the judiciary in particular. Dana Remus addressed this idea to a limited extent while examining the profession's role in regulating the judiciary,⁹³ which she

90. Letter from Robert W. Gordon, Professor, Yale Law School, to Sherwin P. Simmons, Chair, ABA Comm'n on Multidisciplinary Practice (May 21, 1999). After surveying the meanings of professional independence, Professor Gordon concluded his letter: "[T]here are surely better ways of protecting professional independence than by restricting the development of forms of multidisciplinary practice that promise many benefits in innovation and cost-effective services to clients and consumers." *Id.* See also Paton, *supra* note 71.

91. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2013).

92. See, e.g., Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 MINN. L. REV. 1097 (2000); Ostertag, *supra* note 79; see generally Kathryn Lolita Yarbrough, *Multidisciplinary Practices: Are They Already among Us?*, 53 ALA. L. REV. 639 (2002); Dave Foster, Comment, *Get Off My Turf! Attorneys Fight Accountants over Whether to Allow Multidisciplinary Practice*, 31 TEX. TECH L. REV. 1353 (2000); John Paul Lucci, Note, *New York Revises Ethics Rules to Permit Limited MDPs: A Critical Analysis of the New York Approach, the Future of the MDP Debate After Enron, and Recommendations for Other Jurisdictions*, 8 FORDHAM J. CORP. & FIN. L. 151 (2003); Stuart S. Prince, Comment, *The Bar Strikes Back: The ABA's Misguided Quash of the MDP Rebellion*, 50 AM. U. L. REV. 245 (2000).

93. Remus, *supra* note 25, at 145-152.

saw as expanding the bar's institutional power vis-a-vis judges. But this turn does not necessarily mean that power also shifted to individual lawyers in relationship to judges. On the contrary, during the same period that the bar helped develop rules and regulatory institutions to govern individual judges, it helped expand the judiciary's regulatory influence over individual lawyers by drafting model professional conduct rules for the courts' adoption, and promoting more aggressive formal discipline of lawyers under the courts' ultimate oversight.⁹⁴ It might be fair to say that as institutions of the bench and the bar have increased their influence over each other's individual members, both individual judges and individual lawyers have experienced a loss of autonomy.

For lawyers, professional independence is in tension with judicial regulation of the bar. Independence from the judiciary might include freedom not only to criticize judges, but also, at times, to defy them. Notwithstanding courts' regulatory authority, freedom from the judiciary would also allow lawyers to resolve, as a matter of professional conscience, how to balance conflicting obligations to clients and the public.

Andrew Hamilton might serve as an exemplar of the independent lawyer in this respect.⁹⁵ In 1735, he agreed to defend a New York publisher, John Peter Zenger, for the seditious libel of the Governor of New York, after two other defense lawyers were disbarred for challenging the trial judge's authority to preside.⁹⁶ The defense conceded that Zenger had published the writings in question, which criticized the Governor by innuendo.⁹⁷ The truth of the criticisms was not a defense, according to the trial judge, who ultimately directed the jury to enter a special verdict of guilty.⁹⁸ Nonetheless, defying the

94. See generally Altman, *supra* note 24, at 2492; Green & Roiphe, *supra* note 6, at 525-26.

95. Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1449 (1992) (maintaining that the NACDL's references to the story exemplifies a "central and recurring theme in the profession's narratives portray[ing] the lawyer as champion, defending the client's life and liberty against the government, which is portrayed as oppressor, willing, ready and able to use its power to destroy the individual and the values society holds dear"); see also Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1314-15 (1995) ("The concept of professionalism has existed as long as the bar has been organized. Our visualization of early professionals is an idealized image: Abraham Lincoln, the repository of wisdom and model of civility; [Andrew] Hamilton and John Adams, the guardians of justice against public opinion.").

96. Zacharias, *supra* note 95, at 1315 n. 33.

97. PAUL FINKELMAN, A BRIEF NARRATIVE OF THE CASE AND TRYAL OF JOHN PETER ZENGER 39-52 (1997).

98. *Id.*

judge, Hamilton famously and successfully urged the jury to return a verdict of not guilty by arguing, contrary to the judge's instruction, that to be actionable the libelous matter had to be false and that the jury, from their own personal knowledge, knew the writings to be true.⁹⁹ Hamilton has been credited with advocating for "jury nullification, which the law forbids."¹⁰⁰

The argument below is not that lawyers should flout judicial authority other than in exceptional situations, or that the judiciary should curtail its regulatory role. But the bar should at least contemplate reviving the concept of independence from the judiciary and advocating for lawyers to exercise a greater degree of independence from the judiciary as exemplified by Hamilton.

A. *Lawyers' Extrajudicial Criticism of the Judiciary*

In the nineteenth century conception, lawyers' independence was equal in importance to judicial independence and served as a justification for limiting courts' authority to regulate lawyers.¹⁰¹ A principal aspect of lawyers' independence related to their conduct

99. See *id.*; see also Rebecca Aviel, *The Boundary Claim's Caveat: Lawyers and Confidentiality Exceptionalism*, 86 TUL. L. REV. 1055, 1090 n. 145 (2012) (citing the Zenger trial to illustrate that "the judiciary has certainly shown itself capable of the sort of reprisal and retaliation that threaten the lawyer's independence as well as basic functioning"); James F. Ianelli, *The Sound of Silence: Eligibility Qualifications and Article III*, 6 SETON HALL CIRCUIT REV. 55, 67 (2009) (discussing the effects of Hamilton's advocacy); Rebecca Love Kourlis, *Not Jury Nullification; Not a Call for Ethical Reform; But Rather a Case for Judicial Control*, 67 U. COLO. L. REV. 1109, 1110 (1996) (calling Hamilton's representation "a celebrated example").

100. See WAYNE R. LAFAYE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE 22.1(g) (4th ed. 2004) (defining jury nullification as "the power to acquit even when [the jury's] findings as to the facts, if literally applied to the law as stated by the judge, would have resulted in a conviction"); Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150 (defining jury nullification as "a jury's ability to acquit a criminal defendant despite finding facts that leave no reasonable doubt about violation of a criminal statute").

101. See, e.g., *Ex parte Secombe*, 60 U.S. 9, 13 (1857) ("[I]t has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself."); see also *Ex parte Wall*, 107 U.S. 265, 302 (1883) (Field, J., dissenting) ("What, then, are the relations between attorneys and counsellors-at-law and the courts; and what is the power which the latter possess over them; and under what circumstances can they be disbarred? There is much vagueness of thought on this subject in discussions of counsel and in opinions of courts. Doctrines are sometimes advanced upholding the most arbitrary power in the courts, utterly inconsistent with any manly independence of the bar.").

outside the courtroom and largely outside the context of legal representation, namely, their freedom to criticize the judiciary.¹⁰²

Among the influential judicial decisions on this theme was Chief Justice Gibson's 1835 decision in *In re Austin*,¹⁰³ which I previously described as follows in a foreword to a collection of articles on lawyers' role in a democracy:¹⁰⁴

The case involved the disbarment of almost the entire Fayette County, Pennsylvania bar for sending and publishing correspondence that was critical of and, in the view of the Court of Common Pleas, disrespectful of the President of that court. Underlying the question of whether the court had lawful authority to impose this sanction was a question about the lawyer's role: as an "officer of the court," did a lawyer have a duty to refrain from public criticism that the lawyer may have intended to improve judicial decision making, but that seemed

102. See generally Angela Butcher & Scott MacBeth, *Current Developments, Lawyers' Comments About Judges: A Balancing of Interests to Ensure a Sound Judiciary*, 17 GEO. J. LEGAL ETHICS 659 (2004); Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PROF. 161 (2008); Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Repetition*, 97 GEO. L. J. 1567 (2009); Caprice L. Roberts, Note, *Standing Committee on Discipline v. Yagman: Missing the Point of Ethical Restrictions on Attorney Criticism of the Judiciary*, 54 WASH. & LEE L. REV. 817 (1997).

103. 5 Rawle 191 (Pa. 1835). The Supreme Court drew on the Austin opinion in *Bradley v. Fisher*, 80 U.S. 335, 355-56 (1872), which held that judges are exempt from civil liability for their judicial acts within their jurisdiction. The holding was based significantly on concern for judicial independence, the Court reasoning:

[I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.

Id. at 347.

The civil lawsuit in question was brought by a Washington, D.C. lawyer, Joseph Bradley, who was disbarred after accosting and threatening the criminal court judge before whom he had defended John Suratt for the murder of Abraham Lincoln. In dicta, the Court took the view that, if the allegations were true, there was ample ground for Bradley's disbarment for failing to "maintain . . . the respect due to courts of justice and the judicial acts." *Id.* at 341. It reasoned that even extrajudicial conduct directed at a judge personally could be sanctioned if it interfered with judicial independence, quoting Chief Justice Gibson's observation in *Austin* that:

No one would pretend that an attempt to control the deliberation of the bench, by the apprehension of violence, and subject the judges to the power of those who are, or ought to be, subordinate to them, is compatible with professional duty, or the judicial independence so indispensable to the administration of justice.

Id. at 356.

Arguably, in a case posing a conflict between judges' and lawyers' independence, the former won out.

104. Bruce A. Green, *Foreword, The Lawyer's Role in a Contemporary Democracy*, 77 FORDHAM L. REV. 1229 (2009).

disrespectful to the court? The lower court perceived that lawyers' "office" implied an obligation of "good fidelity to the court," and that this obligation called for the "observance of that trust, courtesy, and respect, which is indispensable to the safe and orderly administration of justice." The [trial] court considered the bar's public criticism of the judge to be inconsistent with this role.

The Pennsylvania Supreme Court, however, emphasized the bar's role in protecting the public from government overreaching. It viewed lawyers' professional independence as intrinsic to this role, no doubt recognizing that the judiciary was sometimes among the government entities from which the public needed protection. "To subject the members of the profession to removal at the pleasure of the court," Chief Justice John Bannister Gibson explained,

would leave them too small a share of the independence necessary to the duties they are called to perform to their clients and to the public. As a class, they are supposed to be, and in fact have always been, the vindicators of individual rights, and the fearless asserters of the principles of civil liberty; existing where alone they can exist, in a government not of parties or men, but of laws!

The legal profession's prescribed role did not mean that lawyers were entirely free from regulation, including judicial regulation. But it did imply limits on the courts' regulatory authority. Lawyers acting outside the context of a legal representation or a judicial proceeding were entitled to engage in the same lawful conduct, such as the publication of nonlibelous criticisms of the court, that other private citizens could undertake.¹⁰⁵

A later nineteenth century decision on this theme, *Ex parte Steinman and Hensel*,¹⁰⁶ was authored by George Sharswood, the Pennsylvania Chief Justice who is regarded as the father of modern legal ethics. His published lectures on legal ethics profoundly influenced the development of the first national ethics code, the 1908 ABA Canons of Professional Ethics.¹⁰⁷ Decided in 1880, the case involved two lawyers who edited a Lancaster newspaper that published an article about a local criminal trial that ended in the acquittal of a local political figure.¹⁰⁸ The article asserted that the acquittal "was secured by a prostitution of the

105. *Id.* at 1241.

106. 95 Pa. 220 (1880).

107. See Altman, *supra* note 24, at 2421, 2426-36; Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Code*, 6 GEO. J. LEGAL ETHICS 241 (1992).

108. 95 Pa 220.

machinery of justice to serve the exigencies of the Republican Party,” to which the trial judge belonged.¹⁰⁹ Regarding the publication as a breach of the lawyers’ professional fidelity as sworn officers of the court, the trial court disbarred them. But the state high court, drawing significantly on the *Austin* opinion, concluded that doing so was an abuse of the court’s discretion.¹¹⁰ Justice Sharwood observed:

No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar. They have the best opportunities of observing and forming a correct judgment. They are in constant attendance on the courts. Hundreds of those who are called on to vote never enter a court-house, or if they do, it is only at intervals as jurors, witnesses or parties. To say that an attorney can only act or speak on this subject under liability to be called to account and to be deprived of his profession and livelihood by the very judge or judges whom he may consider it his duty to attack and expose, is a position too monstrous to be entertained for a moment under our present system.¹¹¹

The Canons of Professional Ethics, adopted in 1908 by the ABA, alluded to lawyers’ independence from judges. The very first Canon said that lawyers should “maintain toward the Courts a respectful attitude,” but lawyers have the right and duty to submit “grievances to the proper authorities” when “there is proper ground for serious complaint of a judicial officer,” and “such charges should be encouraged and the person making them should be protected.”¹¹² Another Canon stated: “No fear of judicial disfavor or public unpopularity should restrain [the lawyer] from the full discharge of his duty” to support the client’s cause.¹¹³ Orrin Carter, the early twentieth century judge and legal ethicist, drawing heavily on Justice Sharwood’s opinion, discussed lawyers’ freedom to take issue with judges, at least outside the courtroom.¹¹⁴ He wrote:

After the case is finished, any fair comment is justifiable. The unwritten law of the profession is that a lawyer, when defeated, has a right to cuss’ the court, and this privilege is often taken advantage of, many times for the purpose of relieving the lawyer himself of the

109. *Id.* at 236.

110. *Id.* at 239.

111. *Id.* at 238-39.

112. ABA CANONS OF PROFESSIONAL ETHICS Canon 1 (1963).

113. *Id.* at Canon 15 (emphasis added).

114. See CARTER, *supra* note 34, at 68.

responsibility for the loss of the case.¹¹⁵

A Minnesota state supreme court decision held in 1908 that a lawyer who personally criticized a judge in a letter to the press was immune from sanction for expressing his opinion, no matter how reprehensible.¹¹⁶ The court distinguished the situation from one where the lawyer writes directly to the judge. After surveying the relevant case law, including the *Austin* and *Steinman* decisions, the court noted the tension between the interest in judicial independence, which warranted protecting the courts from unfair criticism, and lawyers' independence:

Few acts could be more disgraceful than the deliberate publication by an attorney capable of correct reasoning of such baseless insinuations. The case is of that sort which, considered of itself, might easily make bad law. But the question presented is vitally important to the entire bench and bar of the state, and even more so to its people, whose servants we are. It concerns not merely the power of the court to protect itself from undeserved censure, but involves in its determination that independence of the bar, upon the preservation of which civil liberty itself in large degree depends¹¹⁷

The court concluded that there were sufficient extrajudicial incentives against unfairly maligning judges and courts, and that the lawyer had the right like any citizen to publicly criticize the court.¹¹⁸

Today, in contrast, the organized bar's mission, in significant part, has been to defend the judiciary from attack, in order to protect the independence of the judiciary.¹¹⁹ The bar has not cultivated or encouraged lawyers' criticism of judges, has not defended it, and has

115. *Id.* See also Hon. Robert H. Jackson, *A Testimony to Our Faith in the Rule of Law*, 40 ABA J. 19, 20 (Jan. 1954) ("We maintain our right respectfully to criticize what we may think errors of honest judgment by our courts and judges, but we can show no leniency toward judicial partisanship, faithlessness, carelessness or irresponsibility.").

116. *State Bd. of Law Examiners v. Hart*, 116 N.W. 212 (Minn. 1908).

117. *Id.* at 216.

118. *Id.* ("[W]e adopt as our conclusion here these words of Justice Brewer: 'After a case is disposed of, a court or judge has no power to compel the public, or any individual thereof, attorney or otherwise, to consider his rulings correct, his conduct proper, or even his integrity free from stain.'" (quoting *In re Pryor*, 18 Kan. 72, 76 (1877)); see also *id.* at 215 ("In the terse, but comprehensive, language of Mr. Justice Holmes: 'When a case is finished, courts are subject to the same criticism as other people.'" (quoting *Patterson v. Colorado*, 205 U.S. 454, 463 (1907)). See also *In re Hickey*, 258 S.W. 417 (Tenn. 1923) (overturning contempt sanction against lawyer for publishing article unjustifiably criticizing the court).

119. See, e.g., *Resolutions and Reports*, ABA, http://www.americanbar.org/groups/justice_center/judicial_independence/resources/resolutions_reports.html (last visited Apr. 30, 2013) (collecting ABA reports and resolutions on judicial independence).

discouraged it by subjecting some criticism to professional sanction. ABA Model Rule 8.2 provides:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.¹²⁰

This and other rules have sometimes been read very broadly, in a manner likely to chill legitimate criticism; however, the bar has not protested.

For example, in 2010, David Soares, the District Attorney of Albany County, New York, was disciplined for publicly criticizing a judicial opinion.¹²¹ The factual background is that a defendant under criminal investigation sued Soares in Florida, alleging that the prosecutor and his office were engaged in wrongful conduct in New York.¹²² The defendant then successfully moved to disqualify Soares from prosecuting him and to dismiss the indictment that grew out of the investigation by persuading the trial judge that the prosecutor had a fatal conflict of interest arising out of his role as a party in a civil litigation brought by the accused.¹²³ Regarding this outcome as absurd, the district attorney wrote to a reporter:

Judge Herrick's decision is a get-out-of-jail-free card for every criminal defendant in New York State. His message to defendants is: "if your DA is being too tough on you, sue him, and you can get a new one." The Court's decision undermines the criminal justice system and the DA's who represent the interest of the people they serve. We are seeking immediate relief from Judge Herrick's decision and to close this dangerous loophole that he created.¹²⁴

Soares's assessment of the trial court's decision was correct, and the appellate court reversed it.¹²⁵ His rhetoric was unexceptional.¹²⁶

120. MODEL RULES OF PROF'L CONDUCT R 8.2 (2013).

121. *In re Soares*, 947 N.Y.S.2d 233 (App. Div. 4th Dep't 2012).

122. *Id.* at 243.

123. *Id.* at 243-44.

124. *Id.* at 235.

125. *Soares v. Herrick*, 928 N.Y.S.2d 386 (App. Div. 3d Dep't 2011), *aff'd*, 20 N.Y.3d 139 (2012).

126. *See, e.g., United States v. Hayes*, 555 U.S. 415, 426 (2009) (law's purpose was to close a "dangerous loophole"); *Hudson v. Michigan*, 547 U.S. 586, 595 (2006) (regarding potential application of the exclusionary rule to no-knock entries of residences: "The cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many

Nonetheless, the appellate court sanctioned Soares for making a public comment that, in its view, was prejudicial to the administration of justice.¹²⁷

As both a lawyer and a public official, the District Attorney might have criticized the trial court decision, even in strong language, to let the public know his office's view of the ruling and the steps it would take. He did not have to stand by silently until appellate proceedings were commenced and were resolved.¹²⁸ But even if Soares's comments to the press were excessive, imprudent or publicly undesirable, or his motivations were impure, self-serving or illegitimate, one might perceive the court's sanction as an encroachment on lawyers' professional independence from the judiciary, and particularly, an encroachment on lawyers' liberty to publicly criticize judicial decisions. Soares did not confront the judge either in or out of court or otherwise threaten the judge or disrupt proceedings.¹²⁹ Nor did he libel the judge or impugn the judge's integrity; he simply took issue with the decision.¹³⁰ Notably, the appellate court did not apply Rule 8.2, nor could it.¹³¹ While preserving a traditional restriction against libeling judges, the rule does not forbid lawyers, outside the context of court proceedings or judicial filings, from expressing highly critical, insulting or unmerited opinions about judges' performance and decisions. Instead, the court invoked a vague catch-all rule against conduct prejudicial to the administration of justice, without regard to the license implicitly granted by Rule 8.2 to express negative and unfounded opinions.¹³² The fact that an appellate court sanctioned the prosecutor without a moment's reflection about the implications for lawyers' independence, or, for that matter, prosecutors' independence as public officials, suggests one significant respect in

cases to a get-out-of-jail-free card").

127. *In re Soares*, 947 N.Y.S.2d 233. Another decision along similar lines is *Matter of Westfall*, 808 S.W. 2d 829 (Mo. 1991). Westfall, the St. Louis prosecutor, criticized the trial judge for dismissing a prosecution on double jeopardy grounds. At a televised press conference, Westfall characterized the trial judge's reasons as "somewhat illogical, and I think even a little less than honest," said that the judge "really distorted the statute and I think convoluted logic to arrive at a decision that he personally likes," and accused the judge of having "made up his mind before he wrote the decision, and just reached the conclusion that he wanted to reach." A divided court held that these statements amounted to sanctionable misconduct and reprimanded Westfall. *Id.* at 831-32. By way of contrast, see *Berry v. Schmitt*, 688 F.3d 290 (6th Cir. 2012) (permitting a cause of action for attorneys who were threatened with discipline for criticizing the judiciary).

128. See, e.g., *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (recognizing the First Amendment's application to attorney's public comments about a pending criminal case).

129. *In re Soares*, 947 N.Y.S.2d 233.

130. *Id.*

131. See *id.*

132. *Id.* at 244.

which the idea of professional independence *from the judiciary* has diminished in significance since Gibson's and Sharswood's day.

B. *Lawyers' Disobedience of Court Orders*

Questions of lawyers' independence may also arise in the courtroom: How should a lawyer respond to a ruling that the lawyer believes to be erroneous? The ordinary rule is that the lawyer must comply, out of respect for the court's authority and as a matter of orderly judicial procedure.¹³³ But are there situations where, in the exercise of independent judgment, it is ethical, even if not necessarily lawful, for a lawyer to refuse? In such situations, should the bar support and encourage lawyers who act on "professional conscience," as a matter of independence? Even more so than the question of whether lawyers may criticize judges, this question poses a tension between lawyers' duties as officer of the court and the concept of lawyers' independence.¹³⁴

In *Maness v. Meyers*,¹³⁵ the Supreme Court addressed this issue in the context of deciding whether a lawyer could be held in contempt of court for advising a client to disobey a court order for the production of documents, where the lawyer believed that the order violated the client's right against self-incrimination. The Court began by stating the general principle that people must obey court orders:

We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect. . . . The orderly and expeditious administration of justice by the courts requires that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." . . . This principle is especially applicable to orders issued during trial. . . . Such orders must be complied with promptly and completely, for the alternative would be to frustrate and disrupt the progress of the trial with issues collateral to the central questions in

133. John R.B. Palmer, *Collateral Bar and Contempt: Challenging a Court Order After Disobeying It*, 88 CORNELL L. REV. 215, 238 (2002).

134. See generally Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 ST. JOHN'S L. REV. 337 (1998); Palmer, *supra* note 133.

135. 419 U.S. 449 (1975).

litigation.¹³⁶

The Court then acknowledged one context where disobedience of a court order is considered ethically proper, namely, when the party has a good faith belief that the court order violates a legal or constitutional privilege, e.g., the attorney-client privilege or the right against self-incrimination.¹³⁷

The Court recognized that a person directed to produce information has “a choice between compliance with a trial court’s order to produce [information] prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.”¹³⁸ In that situation, “[c]ompliance could cause irreparable injury because appellate courts cannot always ‘unring the bell’ once the information has been released.”¹³⁹ The Court held that where the lawyer advised a client in good faith to test the trial court’s ruling by defying it, even though the appellate court subsequently upheld the trial court’s ruling, sanctioning the lawyer personally would encroach upon lawyers’ professional independence as a counselor:

The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. . . . If performance of a lawyer’s duty to advise a client that a privilege is available exposes a lawyer to the threat of contempt for giving honest advice it is hardly debatable that some advocates may lose their zeal for forthrightness and independence.¹⁴⁰

The Court quoted a 1903 opinion similarly holding that a lawyer could not be punished for erroneously advising a client:

In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow the application of any other general rule.¹⁴¹

136. *Id.* at 458-459. *See also In re Schofield*, 66 A.2d 675, 679 (Pa. 1949) (quoting *Scouten’s Appeal*, 40 A. 481 (1898) and citing other authority).

137. *Maness v. Meyers*, 419 U.S. 449, 460 (1975).

138. *Id.*

139. *Id.*

140. *Id.* at 466.

141. *Id.* at 467 (quoting *In re Watts*, 190 U.S. 1, 29 (1903)). In a recent case involving similar

Ethics rules recognize that, at least from a disciplinary perspective, lawyers have some leeway to test court rules that they believe are wrong. Rule 3.4 (“Fairness To Opposing Party And Counsel”) provides that: “A lawyer shall not: . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.”¹⁴² But a judge may hold a lawyer in contempt of court for willfully disobeying its order. Sometimes courts impose civil contempt orders merely pro forma, designed to permit the lawyer who has disobeyed in good faith immediately to appeal the court’s ruling;¹⁴³ if the lawyer’s appeal is unsuccessful, the lawyer presumably will then comply with the order and the order will be vacated. There is a tradition of refusing to answer questions and going into contempt in order to preserve a claim that noncompliance is justified by the attorney-client privilege or the right against self-incrimination. But not all unlawful court orders are subject to challenge in this manner.¹⁴⁴ Moreover, even if appellate review is available, a court may also elect to impose a harsh criminal contempt sanction designed to discourage the lawyer from appealing unless the lawyer is certain that he or she will be vindicated and that the matter is important.¹⁴⁵ Further, a court may leave a contempt sanction in place, or even pursue additional sanctions if a good faith appeal is unsuccessful, and particularly if the lawyer persists in disobeying the court after exhausting opportunities for review.¹⁴⁶

One might view a lawyer’s willingness to stand up to the court, notwithstanding a threat of judicial sanction, as an exercise of professional independence. At the same time, one might argue that courts should give lawyers latitude to do so. Some courts have done so, as in two Ohio cases involving lawyers named Jones.¹⁴⁷ In one case,

issues, a Michigan state trial judge held a defense lawyer in contempt for defying the judge’s direction to remain silent and advising his client not to answer questions based on the right against self-incrimination. Ultimately, the contempt order was reversed and a disciplinary complaint was filed against the judge. Complaint Against Kenneth D. Post, *available at* <http://jtc.courts.mi.gov/downloads/FC90.formalcomplaint.pdf>.

142. MODEL RULES OF PROF’L CONDUCT R. 3.4 (2013).

143. *See, e.g.*, Seventh Elect Church in *Isr. v. Rogers*, 688 P.2d 506, 512 (Wash. 1984) (“When an attorney makes a claim of privilege in good faith, the proper course is for the trial court to stay all sanctions for contempt pending appellate review of the issue.”).

144. *See Pennsylvania v. Int’l. Union of Operating Eng’rs*, 552 F.2d 498 (3d Cir. 1977).

145. *Cf. In re Grand Jury*, 680 F.3d 328 (3d Cir. 2012).

146. *See, e.g.*, Florida Bar v. Rubin, 549 So. 2d 1000 (Fla. 1989) (lawyer held in contempt and disciplined where the lawyer refused to represent a criminal defendant who planned to commit perjury); *see also* *People v. Stewart*, 656 N.Y.S.2d 210 (1st Dep’t 1997) (upholding criminal contempt prosecution of lawyer for violating court order to testify regarding a former client).

147. *State v. Jones*, No. 2008-P-0018, 2008 WL 5428009 (Ohio Ct. App. Dec. 31, 2008) (vacating contempt order where a lawyer assigned to represent a defendant in the morning refused

Brian Jones, was assigned to represent a criminal defendant named Scott in connection with a misdemeanor assault charge.¹⁴⁸ Although Scott had been referred to the county public defender's office after his initial appearance two months earlier, because of the way the appointment system is structured in Ohio, it was evidently Scott's responsibility to initiate contact with that office, and he did not do so until the day before the scheduled trial date.¹⁴⁹ Jones had been with the public defender's office, and indeed out of law school, for only a few months. The next morning, Jones informed Judge Plough, the trial judge, that he was completely unprepared because he had been assigned to the case the day before.¹⁵⁰ Noting that three prosecution witnesses were present, Judge Plough instructed Jones to take the next two hours to prepare for a trial that would begin after lunch.¹⁵¹ At the afternoon session, Jones informed the court that he had not interviewed the state's witnesses during the lunch break and again stated that he was unprepared for trial.¹⁵² Judge Plough found Jones in direct contempt of court and had him taken into custody until the end of the day, when the judge ordered Jones released on bond and set a sentencing date for one week later.¹⁵³ Judge Plough admonished Jones for failing to file a written request for a continuance after he was assigned to the case the day before, and expressed his view that Jones should not have refused to follow the court's order because if Scott had been convicted at trial, any unconstitutional ineffectiveness of counsel could have been remedied on direct appeal.¹⁵⁴

Jones's conduct, although in willful disobedience of a court order, might be viewed as a significant expression of professional independence by a lawyer who stood up to judicial authority, at considerable personal risk, in good faith, to promote his own sense of professional responsibility.¹⁵⁵ Significantly, this was not in the context of an assertion of an evidentiary or constitutional privilege, where disobeying court orders in good faith is generally considered legitimate

to proceed to trial the same afternoon); *In re Jones*, 724 N.E.2d 839 (Ohio Ct. App. 1998) (vacating criminal contempt sanction where a lawyer refused court order to turn over tape recording received from the police, finding that the discovery order was erroneous).

148. *State v. Jones*, No. 2008-P-0018, 2008 WL 5428009 ¶2 (Ohio Ct. App. Dec. 31, 2008).

149. *Id.* at ¶ 2.

150. *Id.* at ¶ 3.

151. *Id.*

152. *Id.* at ¶ 4.

153. *Id.*

154. *Id.*

155. *See id.*

and contempt orders are often pro forma. Representatives of the criminal defense bar supported Jones in his appeal, and ultimately, the intermediate appellate court reversed the contempt conviction.¹⁵⁶ It found that the trial court abused its discretion in denying a continuance where defense counsel feared violating the defendant's right to effective representation and the ethical duties of competence and zealous representation, and that "[d]efense counsel should not be required to violate his duty to his client as the price of avoiding punishment for contempt."¹⁵⁷ But it was not a foregone conclusion that the court would do so.

This illustrates an aspect of professional independence that is rarely discussed, explained, analyzed, taught, or theorized. It is addressed mostly in the context of criminal defense.¹⁵⁸ The literature of the legal profession generally assumes that lawyers must obey judges, except when court orders are stayed to allow for appellate review, and that is undoubtedly true as a general proposition.¹⁵⁹ Perhaps this is invariably true as a legal matter, in the sense that judges, if they choose, can exercise contempt power to compel lawyers to comply with their orders. But from the legal profession's perspective, this does not have to be true as an ethics matter. Sometimes, disobeying a court order is considered professionally tolerable or even laudatory, as where the lawyer goes into contempt to challenge an order erroneously calling for disclosures of privileged information.¹⁶⁰ Sometimes, though, disobedience is considered professionally improper even if, in hindsight, the court order was invalid. And then there are cases in between involving a lawyer who in good faith, but unsuccessfully, challenges a disclosure order, and the lawyer may be punished afterward for contempt but perhaps not sanctioned for a disciplinary violation.¹⁶¹

156. *See id.*

157. *Id.* at ¶ 24.

158. *See, e.g.,* Randolph N. Stone, *Between a Rock and a Hard Place: Responding to the Judge or Supervisor Demanding Unethical Representation*, in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER* 5, 13 (Rodney J. Uphoff, ed. 1995) (discussing *State v. Lennon*, 454 N.Y.S.2d 621 (1982)).

159. *Id.*

160. *See, e.g.,* *Dike v. Dike*, 448 P.2d 490, 498-99 (Wash. 1968) ("[I]f the attorney follows his conscience and chooses the second alternative [namely, disobeying the court], and if this court agrees that the desired information was privileged, then the contempt citation is dismissed and the attorney vindicated. But in that second 'if' lies the attorney's dilemma, as the contempt citation stands if this court holds with the lower court. Such a procedure might be justified if the application of the attorney-client privilege to any set of facts were clear and definite; but certainly not when, as here, the application of the privilege is rather obscure.").

161. *See, e.g.,* *In re Isserman*, 345 U.S. 286, 292-94 (1953):

The question of when a lawyer ethically should or may stand up to the court and when the lawyer should stand down is one that courts, as regulators, have the least objectivity to resolve. In general, courts' institutional interests are at stake. When the issue arises in a particular case, the judge whose authority is questioned may perceive a personal as well as institutional threat to judicial authority. Courts are in a position similar to that of executive agencies when placed in the dual role as parties and regulators, that is, the role that the bar fears most from a perspective of professional independence. Lawyers collectively should hesitate to cede this question to courts. But the bar has not made an effort to delineate lawyers' proper function or to press their position. The absence of robust discussion may reflect, in part, the bar's reluctance to alienate judges by calling attention to their fallibility and the occasional legitimacy of defying them. That is, the bar's stake in the courts' status and independence may undermine the bar's willingness to assert lawyers' individual independence from the judiciary.

We think this Court should not accept for itself a doctrine that conviction of contempt per se is ground for a disbarment. . . . We do not recall any previous instance, though not venturing to assert that there is none, where a lawyer has been disbarred by any court of the United States or of a state merely because he had been convicted of a contempt. But we do know of occasions when members of the bar have been found guilty of serious contempt without their standing at the bar being brought into question. It will sufficiently illustrate the point to refer to the tactics of counsel for the defense of William M. Tweed. Those eminent lawyers deliberately and in concert made an attack upon the qualifications of Presiding Judge Noah Davis, charging him with bias and prejudice. At the end of that trial, after he had pronounced sentence on Tweed, Judge Davis declared several defense counsel guilty of contempt. Not one of these lawyers, apparently, was subjected to disciplinary proceedings in consequence of that judgment. Among them were Elihu Root, later to become one of the most respected of American lawyer-statesmen, and Willard Bartlett, destined to become Chief Judge of the New York Court of Appeals. These two were excused from any penalty, beyond a lecture on their ethics, on the ground of youth and domination by their seniors—a rebuke perhaps more humiliating than a sentence. One of the seniors who participated in the contempt, and certainly one of its chief architects, was David Dudley Field. He later was elected president of the American Bar Association.

C. *Lawyer's Independent Resolution of Ethics Questions*

As exemplars of professional independence, one might say of Lincoln, Adams and Hamilton, that they not only stood up to outside pressures but that they did so in furtherance of their own understanding of their professional role and obligations.¹⁶² They exemplified independence in a negative sense, resisting outside pressures, but also a positive sense, exercising independent professional judgment about appropriate professional conduct. They benefitted, of course, from the limited amount of regulation at the time.¹⁶³

Today, in contrast, lawyers' latitude to exercise independent professional judgment when it comes to the profession's tough questions is arguably quite limited. The courts adopt rules, generally based on the ABA Model Rules, designed to dictate lawyers' response.¹⁶⁴ Naturally, the ABA endorses lawyers' conformity with the rules. But one might argue that it is a further aspect of lawyers' professional independence that lawyers decide hard ethics questions for themselves, in good faith and as a matter of independent professional judgment, even, at times, in contravention of applicable rules.¹⁶⁵ If so, this is a further aspect of lawyers' professional independence that the bar fails to recognize.

In the rule making process, the bar has not recognized that professional independence is promoted by maximizing lawyers' discretion to resolve hard questions for themselves. Consider, for example, the highly debated issue of how lawyers should react when a client who testified in a judicial proceeding later admits to the lawyer that he or she has lied.¹⁶⁶ At one time the ABA rule was that the lawyer had to keep the client's confidences.¹⁶⁷ Later, the rule became that the

162. See *supra* text accompanying notes 32-37 (discussing Abraham Lincoln), 59-68 (discussing John Adams), and 95-100 (discussing Andrew Hamilton).

163. See Robert B. McKay, *The Future of Professional Independence for Lawyers*, in *THE LAWYER'S PROFESSIONAL INDEPENDENCE, PRESENT THREATS/FUTURE CHALLENGES* 41 (1984) (before the twentieth century, "lawyers were truly independent [T]he legal profession was subject to no effective regulation except such limited restrictions as might be imposed by individual judges upon individual lawyers who appeared before them").

164. See *supra* text accompanying notes 12-15.

165. Cf. Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 336-39 (1987).

166. See Bruce A. Green, *Lying Clients: An Age-Old Problem*, 26 No. 1 LITIGATION 19, 20-23 (Fall 1999) (discussing evolution of the rule); see also Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939 (1988); Bruce A. Green, *Ethically Representing a Lying Cooperator: Disclosure as the Nuclear Deterrent*, 7 OHIO ST. J. OF CRIM. L. 639 (2010); Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339 (1994).

167. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B)(1) (1980).

lawyer must correct the client's perjury.¹⁶⁸ Obviously, the question is a hard one. Arguably, there is no right answer, certainly, no answer that is right for all situations. Given reasonable arguments on both sides of the question, an obvious approach would be to give lawyers freedom to implement their individual intuitions and philosophies. But the bar, despite emphasizing the rhetoric of lawyer independence, does not regard questions such as this one as significantly implicating professional independence.

This is not to say that rules afford lawyers no discretion. In some situations, when lawyers have to resolve the tension between client and public interests, the rules afford lawyers some leeway.¹⁶⁹ The assumption is that lawyers will not exercise discretion self-interestedly or arbitrarily,¹⁷⁰ but that they will exercise professional judgment on an ad hoc basis in light of the relevant facts and applicable professional values.¹⁷¹ One set of provisions that operate in this way allows lawyers to prevent or rectify client frauds that made use of the lawyer's services.¹⁷² But the ABA adopted these much-debated limitations on the confidentiality obligation only under pressure from the SEC in the wake of the Enron corporate scandal.¹⁷³ The SEC threatened to make disclosure rules of its own for securities lawyers if the ABA did not act.¹⁷⁴ The ABA regarded the SEC's proposal as a threat to the bar's independence, and although the ABA's permissive rules ultimately expand lawyers' independence, the bar did not recognize that as a positive feature.¹⁷⁵

The rules' generally constricted approach to resolving professional conduct problems undermines the interest in promoting independence in other aspects of lawyers' work. For example, one of the themes of the literature on professional independence is that, in counseling clients,

168. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2013).

169. See Green & Zacharias, *supra* note 58, at 285-86.

170. Professional conduct rules leave latitude in other areas for lawyers to act in their own interests or based on their own values, such as in deciding whether to accept a private client. See Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. OF LEGAL ETHICS 19, 25-26 (1997).

171. See generally Green & Zacharias, *supra* note 58.

172. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) & (3) (2013); see also DANIEL R. COUILLETTE, REAL ETHICS FOR REAL LAWYERS 182 (2005); Elisia M. Klinka & Russell G. Pearce, *Confidentiality Explained: The Dialogue Approach to Discussing Confidentiality with Clients*, 48 SAN DIEGO L. REV. 157, 162-66 (2011); see generally Green & Zacharias, *supra* note 58, at 296-97.

173. See generally, Green & Zacharias, *supra* note 58, at 271-72.

174. See *id.*

175. See, e.g., Davis, *supra* note 2.

lawyers have become technocrats: lawyers tell clients what the law allows them to do or help clients figure out how to get around the law to achieve their objectives, but lawyers do not take a page from Abraham Lincoln, telling clients when their objectives are socially unworthy.¹⁷⁶ But when it comes to lawyers' own professional conduct, when lawyers are called upon to advise themselves how to comply with their own legal and ethical obligations, the bar's rules encourage lawyers to become technocratic. The question for lawyers is not how to balance competing professional values, but what do the rules require.¹⁷⁷

The fact that the rules constrain lawyers' discretion might signify that the bar does not trust its lawyers to reach the right resolution of what the Model Rules refer to as "difficult ethical problems."¹⁷⁸ Or it might mean that the bar has greater confidence in its members' collective ability to make general rules covering a range of situations *ex ante* than in individual lawyers' ability to reach right answers on an *ad hoc* basis in particular cases.¹⁷⁹ Or the bar's reluctance to develop rules privileging lawyers' professional independence might reflect that the bar gives greater priority to other professional values, such as client confidentiality.

The limited discretion afforded lawyers might also reflect the paradoxical nature of "professional independence." What I mean is this: Professional independence, in the sense of self-regulation, is increasingly under attack from executive agencies, legislatures and members of the public who do not believe that together the bar and judiciary adequately police lawyers.¹⁸⁰ The bar's claimed authority to

176. See Rutheford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9, 61-69 (2003) (discussing earlier versions of the rules that allowed lawyers to deny conduct "unworthy of lawyer assistance" and arguing the present limitation obstructs better lawyering); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090, 1113 (1988).

177. The analogy is not perfect. One might constrain lawyers' discretion regarding their own conduct, because, in resolving their own ethical questions, lawyers cannot bring to bear the same objectivity that they would employ in counseling a client. See Geoffrey C. Hazard, Jr., *Foreword: The Legal Profession: The Impact of Law and Legal Theory*, 67 FORDHAM L. REV. 239, 245-47 (1998).

178. MODEL RULES OF PROF'L CONDUCT pmb1. 9 (2013).

179. Rather than developing rules to be adopted by courts and made enforceable, the bar could develop unenforceable guidelines that reflected the bar's collective judgment while still giving lawyers discretion. The ABA does that in the criminal prosecution and defense contexts, for example. See generally Bruce A. Green, *Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers*, 62 HASTINGS L.J. 1093 (2011).

180. See Jonathan Macey, *Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession*, 74 FORDHAM L. REV. 1079, 1094-99 (2005); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 714-20 (1981);

regulate its members depends on the perceived efficacy of lawyer regulation. The persuasiveness of the bar's claim depends in part on limiting lawyers' discretion. That is, lawyers must be well regulated, not necessarily prudently regulated, but in the sense of amply regulated. Even if we were to trust lawyers to reach correct decisions on their own, the public would not share this confidence and would likely seek to have other institutions fill the perceived vacuum. In other words, the more independence the profession affords lawyers individually, the more the bar's collective independence will be threatened.

Just as lawyers must occasionally address whether to violate a seemingly unfair court order, they must sometimes decide whether to disregard a professional conduct rule that, in context, appears unfair or inapt.¹⁸¹ Generally speaking, the bar takes a dim view when lawyers disregard disciplinary rules, and understandably, given the bar's interest in a well-regulated profession. But there may be situations overlooked by the bar where transgressions can be seen as laudatory expressions of professional independence.

An example was a possible confidentiality violation by Staples Hughes, a North Carolina lawyer, who, in the mid-1980s, defended a man named Cashwell, who was one of three co-defendants on murder charges.¹⁸² Cashwell repeatedly and convincingly told Hughes in the course of the representation that Cashwell was solely responsible for the two murders.¹⁸³ After Cashwell was convicted and sentenced to life imprisonment, one of the co-defendants, Hunt, sought to call Cashwell to testify on his behalf, but on Hughes's advice, Cashwell asserted the Fifth Amendment privilege, and Hunt was convicted.¹⁸⁴ Many years later, after Cashwell committed suicide in prison, Hughes spoke up about his client's admissions.¹⁸⁵ Hunt's lawyers sought a new trial based on Hughes' testimony and other new evidence, including new forensic evidence; however, the state judge who presided over the proceedings believed that Hughes was violating his confidentiality duty

William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 *FORDHAM L. REV.* 1453, 1453-54 (2006).

181. See Bruce A. Green, *Lawyer Discipline: Conscientious Noncompliance, Conscious Avoidance, and Prosecutorial Discretion*, 66 *FORDHAM L. REV.* 1307 (1998).

182. The following facts are taken from Professor Nancy Moore's affidavit in support of Hughes and from newspaper accounts, including Titan Barksdale, *Lawyer's Revelation of Confession May Ruin Him*, *NEWS & OBSERVER* (Raleigh, N.C.), Jan. 2, 2011, at 1A, 14A.

183. Adam Liptak, "When Law Prevents Righting a Wrong," *N.Y. TIMES*, May 4, 2008, available at http://www.nytimes.com/2008/05/04/weekinreview/04liptak.html?pagewanted=all&_r=0.

184. *Id.*

185. *Id.*

to the deceased client and threatened to refer Hughes to the disciplinary authorities if Hughes testified.¹⁸⁶ Only two states have an explicit exception to their confidentiality rules allowing disclosures to prevent a wrongful conviction or punishment,¹⁸⁷ and North Carolina is not one of them. There are strong competing interests on both sides of the question.¹⁸⁸ Hughes resolved the question on his own and testified, arguably in defiance of the applicable ethics rule, and certainly in disregard of the judge's threat.¹⁸⁹ After studying the matter, the state disciplinary authority ultimately decided not to institute charges.¹⁹⁰

Arguably, the bar should encourage lawyers like Hughes to risk violating a rule to implement a good faith and considered judgment about the optimal resolution of a professional conduct question that the rule's drafters did not closely consider. Obviously, lawyers should be circumspect about testing rules. Lawyers should be law abiding. Beyond that, the professional conduct rules reflect a judicial consensus, based on the collective views of lawyers who have studied a question, and the rules are generally worthy of respect. Lawyers addressing their own conduct in context are less objective and detached than rule makers. But rules are not perfect and have limitations. They do not necessarily anticipate every problem lawyers face or may lead to unfair results for unanticipated reasons. If the bar took a strong view of professional independence, it might open a conversation about when lawyers might legitimately violate professional conduct rules. But that is an inconvenient conversation for the bar, which sponsors the professional conduct rules and promotes their enforcement while currying favor with the judiciary.

186. *Id.*

187. See ALASKA RULES OF PROF'L CONDUCT R. 1.6(b)(1)(C) (2009); MASS. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2013); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 (2000).

188. See, e.g., Peter A. Joy & Kevin C. McMunigal, *Confidentiality and Wrongful Incarceration*, 23 CRIM. JUST. 46, 46-49 (2008) (supporting an expansion of the exceptions to confidentiality); Colin Miller, *Ordeal By Innocence: Why There Should Be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. 391, 395-403 (same); Inbal Hasbani, Comment, *When the Law Preserves Injustice: Issues Raised by a Wrongful Incarceration Exception to Attorney-Client Privilege*, 100 J. CRIM. L. & CRIMINOLOGY 277 (2010) (arguing an expansion of the exception is dangerous).

189. See James E. Moliterno, *Rectifying Wrongful Convictions: May a Lawyer Reveal Her Client's Confidences to Rectify the Wrongful Conviction of Another*, 38 HASTINGS CONST. L.Q. 811, 820-21 (2011).

190. Academic literature suggests that it is rare for lawyers publicly to violate ethics rules as a matter of professional conscience, i.e., to act in "civil disobedience" of the rules. See Robert B. Palumbo, Comment, *Within Each Lawyer's Conscience a Touchstone: Law, Morality, and Attorney Civil Disobedience*, 153 U. PA. L. REV. 1057, 1068 & n.59 (2005).

V. CONCLUSION

The ABA sees professional independence as an important value. But some uses of the term tend to trivialize the concept. The ABA is right to react when the professional independence of a foreign bar is threatened by an oppressive government abroad.¹⁹¹ But the ABA has expressed similar concern that the U.S. bar's professional independence is threatened by accountants at home.¹⁹² One might be skeptical of both the ABA's use of the term in the title of a professional conduct rule that is essentially a conflict of interest rule and the bar's invocation of the concept in the context of debates over whether to liberalize that rule to permit multidisciplinary practices.¹⁹³

At the same time, both the bar's rules and its rhetoric tend to undervalue an aspect of professional independence that may have been taken more seriously in the nineteenth century, namely, independence from the judiciary.¹⁹⁴ Perhaps, as the bar has succeeded in one of its early projects, raising judicial standards,¹⁹⁵ the need to be able to criticize or challenge judges has diminished. But the bar may also be motivated by its recognition that its influence over the regulation of lawyers derives from the judiciary. To implement its vision of the optimal professional norms, the bar must persuade courts to adopt and enforce its model rules. Model rules that encouraged lawyer criticism of judges or lawyer defiance of judges' rules and rulings would undermine the courts' institutional self-interest and ultimately hold little appeal for the courts.

Although the bar portrays a symbiotic relationship between the profession's institutional independence (in the sense of self-regulation) and the independence of individual lawyers,¹⁹⁶ there is also a tension between these two concepts, insofar as individual lawyers might seek independence from the judiciary. Promoting lawyers' institutional independence from other government agencies requires encouraging judicial independence and public respect for the judiciary, which would in turn be undermined by a robust idea of professional independence from the judiciary.

191. *See supra* note 11 and accompanying text.

192. *See supra* note 92 and accompanying text.

193. *See supra* notes 72-92 and accompanying text.

194. *See supra* part IV.

195. *See* note 94 and accompanying text; Remus, *supra* note 25, at 130-39.

196. *See supra* part II.