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Tabor Lecture

ARE WE MOVING IN THE RIGHT DIMENSION? SADDUCEES, TWO KINGDOMS, LAWYERS, AND THE REVISED MODEL RULES OF PROFESSIONAL CONDUCT

Susan R. Martyn*

I. THE SADDUCEES

I understand the purpose of this series of lectures, thoughtfully endowed by Glenn Tabor, to include the bringing together of religion and law, the discovery of intersections between morality and public life, and the unifying of concepts of personal and public conscience. Because I intend to say something about religion, I need to begin with a religious text that speaks to my task. And because I am speaking to a Lutheran gathering and am myself a Lutheran, I have chosen the text from last Reformation Sunday,¹ *Luke 20:27-38*:²

Some Sadducees, those who say there is no resurrection, came to Jesus and asked him a question, "Teacher, Moses wrote for us that if a man's brother dies, leaving a wife but no children, the man shall marry the widow and raise up children for his brother. Now there were seven brothers; the first married, and died childless; then the second and the third married her, and so in the same way all seven died childless. Finally the woman also died. In the resurrection, therefore, whose wife will the woman be?"

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¹ This text is recommended for the twenty-third Sunday after Pentecost by the Revised Common Lectionary (Consultation on Common Texts, 1992). See generally HOYT L. HICKMAN ET. AL., *THE NEW HANDBOOK OF THE CHRISTIAN YEAR: BASED ON THE REVISED COMMON LECTIONARY* (1992).

² This and all biblical citations are from the *NEW REVISED STANDARD VERSION BIBLE WITH APOCRYPHA* (1995).

Jesus said to them, "Those who belong to this age marry and are given in marriage; but those who are considered worthy of a place in that age and in the resurrection from the dead neither marry nor are given in marriage. Indeed they cannot die anymore, because they are like angels and are children of God, being children of the resurrection. And the fact that the dead are raised Moses himself showed, in the story about the bush, where he speaks of the Lord as the God of Abraham, the God of Isaac, and the God of Jacob. Now he is God not of the dead, but of the living; for to him all of them are alive.

When I heard this text read on Reformation Sunday, I immediately thought of lawyers and of Luther's Doctrine of the Two Kingdoms.

Why lawyers? Because the Sadducees, like the Pharisees, were religious lawyers of sorts in their day who, like us, carefully labored in their own earthly kingdom.³ Up to this point in Luke's gospel, the Pharisees had been presented as the religious leaders who interacted with Jesus.⁴ This text, the last in *Luke* where Jesus speaks to the religious leaders of his day, is the only one where the Sadducees rather than the Pharisees question Jesus.⁵

The gospels may concentrate more on the Pharisees because they were larger in number and more popular with the people than were the Sadducees. The Sadducees formed a much smaller Jewish priestly sect in charge of maintaining the Temple in Jerusalem.⁶ They were also, like some modern lawyers, wealthier and more traditional than the Pharisees.⁷ The Sadducees rejected the oral tradition and the prophets, and like some lawyers, often compromised with secular authorities, which earned them the hatred of the Jewish people.⁸ Like many modern lawyers, the Sadducees also were part of the ruling class who cared deeply about maintaining their own status quo.⁹

³ See generally John Richer, *Sadducees*, in OXFORD COMPANION TO THE BIBLE 667-68 (Bruce M. Metzger & Michael D. Coogan eds., 1993).

⁴ See, e.g., *Luke* 5:17, 7:36-50, 11:37-53, 13:31, 14:1, 16:14, 17:20, 18:9-14.

⁵ See Richer, *supra* note 3, at 667.

⁶ *Id.*

⁷ *Id.* at 667-68.

⁸ WILLIAM BARCLAY, *THE GOSPEL OF LUKE* 250 (rev. ed. 1975).

⁹ *Id.*

Luke begins his series of stories about Jesus' interactions with the religious authorities of his day with the Pharisees, today's rough equivalent of parish pastors.¹⁰ He ends these encounters with the Sadducees, or priestly religious rulers, today's very rough equivalent of Bishops.¹¹ Now we all know that Bishops know their Bible. And these Sadducees, thoroughly familiar with the Torah, were arguing (as modern lawyers often do) about who is inside or outside legal limits.¹² Like modern lawyers (who have learned from modern law professors), they invented a hypothetical to confound Jesus.¹³

If Moses said that the brothers all should marry the widow,¹⁴ how could God sort out the chaos that would result in heaven? This must be proof that heaven or life after death does not exist, and therefore that the idea of resurrection from the dead was equally ridiculous.

Jesus responded to this apparent conundrum with a dramatic paradigm shift that illustrated the very reality the Sadducees were trying to deny.¹⁵ He said, in effect, "there is much more you do not understand beyond this earthly kingdom where your rules govern."¹⁶ In fact, because Moses heard God say, *I am* the God of Abraham, Isaac and Jacob, he spoke of them as living, proving that the Torah attests to the resurrection of the body.¹⁷ Jesus met the Sadducees on their own theological and legal ground, the Torah, and defeated them.¹⁸

II. TWO KINGDOMS

Of course, the gospels call this "much more" of which Jesus spoke "the Kingdom of God."¹⁹ And Luther painted a vivid portrait of our human condition when he described us as simultaneously in the human and the Godly Kingdom.²⁰ We stand with one leg in each, joined in the

¹⁰ See, e.g., *Luke* 5:17-26 (showing Jesus' first interaction with the Pharisees).

¹¹ See, e.g., *Luke* 17:20, 18:9-14.

¹² See *supra* note 3.

¹³ See *supra* note 4.

¹⁴ See *Deuteronomy* 25:5.

¹⁵ See BARCLAY, *supra* note 8, at 250.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 251.

¹⁹ See, e.g., *Luke* 1:33; 9:60; 17:20-21; *Matthew* 5:20; 6:32; 13:10.

²⁰ HEINRICH BORNKAMM, *LUTHER'S DOCTRINE OF THE TWO KINGDOMS* 8 (1966).

middle.²¹ We live in the world but are not of the world.²² As Luther himself put it:

There are two kingdoms, one the kingdom of God, and the other the kingdom of the world.... God's kingdom is a kingdom of grace and mercy, not of wrath and punishment. In it there is only forgiveness, consideration for one another, love, service, and the doing of good, peace, joy, etc. But the kingdom of the world is a kingdom of wrath and severity. In it there is only punishment, repression, judgment, and condemnation, for the suppressing of the wicked and the protection of the good.²³

We recognize the left-hand kingdom of the world in our present daily life. God the creator gave us this good world, but the brokenness of sin necessitates the reality of institutions of governance that seek justice through the administration of law and the preservation of order. We less often recognize the right-hand kingdom of God, which represents God's promise for our present life and for our future. God the redeemer, revealed through the incarnation of Jesus, promises a kingdom governed by the gospel of unconditional love and personal sacrifice. Each of us is a united kingdom; a perfect blend of God's infinite purpose planted in feet of clay.

What does this have to do with lawyers? Jesus treats the Sadducees the way he might treat modern lawyers. He sees us as if we are tadpoles; swimming around the bottom of a murky pond completely unaware that the life that waits for us outside of the water has already begun.²⁴ We lawyers, like the Sadducees, swim in the darkness of human life, arguing in the earthly kingdom over the details of human rights and responsibilities. Our secular work often blinds us to the kingdom of God in and beyond these murky waters. We too easily forget that we reside in the kingdom of God as well as the kingdom of the world, and that we

²¹ *Id.*

²² *Id.*

²³ See *An Open Letter Concerning the Hard Book Against the Peasants*, in A COMPEND OF LUTHER'S THEOLOGY 213 (Hugh Thomson Kerr, Jr., Ph.D. ed., 1966) [hereinafter *An Open Letter*].

²⁴ I owe this insightful analogy to Gregory P. Sammons, rector at St. Michael's in the Hills Episcopal Church, Toledo, Ohio.

have a responsibility to trust God to reveal the promise of that kingdom as well.

Jesus called the Sadducees and he calls us to understand that God gives us "fresh eyes" to see and reveal God's kingdom as we live out our earthly existence in the kingdom of the world.²⁵ But how do we do this? How do we recognize the light of God's kingdom in the midst of the darkness of human sin?

Of course, the idea that it is possible, though not easy, to appreciate the kingdom of God while living in the earthly realm is an ancient one, directly traceable to our Jewish roots, especially to the Hebrew prophets. Micah in particular reminds us:

He has told you, o mortal, what is good; and what does the Lord require of you but to do justice, and to love kindness, and to walk humbly with your God?²⁶

The Sadducees did not believe in the prophets.²⁷ They viewed their Hebrew tradition as encompassed by the Torah and nothing else.²⁸ They therefore missed, as we often do, the prophetic voice that calls us to learn the lesson of God's kingdom.

Luther explained that God's kingdom "comes to us in two ways."²⁹ It is already here, in time among us, as well as coming, with the return of Christ.³⁰ Christians live in both kingdoms simultaneously, and owe allegiance to the power of both.³¹ God's kingdom comes to us first "of itself," because it already reigns in the kingdom of the world as a temporal present reality.³² We therefore should not shirk power and responsibility in the secular world, because that kingdom also has been given by God to serve creation.³³ In this sense, our prayer that God's

²⁵ See Stanley Hauerwas, *Christian Practice and the Practice of Law in a World Without Foundations*, 44 *MERCER L. REV.* 743, 749 (1993).

²⁶ *Micah* 6:8.

²⁷ See *supra* note 3.

²⁸ *Id.*

²⁹ See *The Second Petition*, in *THE BOOK OF CONCORD: THE CONFESSIONS OF THE EVANGELICAL LUTHERAN CHURCH* 427 (Theodore G. Tappert trans. & ed., 1959).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ CARL E. BRAATEN, *THE FUTURE OF GOD: THE REVOLUTIONARY DYNAMICS OF HOPE* 148 (1969).

kingdom should come³⁴ becomes a plea for resuscitation and transformation of our own life and work.

At the same time, because we have been created and redeemed by God, we are called to more than a secular purpose. We reside in this kingdom of God, but it also represents a hidden realm, known only through the eye of faith. It redeems the world by bringing grace and forgiveness and calls us to the power of God's rule. Living in God's kingdom means expecting "an eternal priceless treasure,"³⁵ that is "like an eternal inexhaustible fountain, which, the more it gushes forth and overflows, the more it continues to give."³⁶ Luther describes God as angry if we do not ask for enough and demand it confidently.³⁷

What does this mean for us, as we lawyers labor with the details of human dilemmas, and daily encounter the reality of human potential and human deceit? Put more simply, how do we discover, in the midst of daily life, if we are moving in the right direction?

III. THE RIGHT DIMENSION

Asking this question suggests the need to rethink it. To ask whether we are moving in the right *direction* implies that these kingdoms are two dimensional, and that they are located in separate places. It also suggests that we possess the redemptive power that God alone deploys. This is exactly the mistake behind the Sadducees' question that got them into so much trouble with Jesus and eventually silenced them. They thought categorically and two-dimensionally, and their thinking limited the source of their belief. But Jesus answered them in a completely different dimension, far beyond their circumscribed imaginations. He showed them that they spoke, reasoned, and thought like children; that they knew in part but certainly did not understand fully.³⁸

If we are to follow the lead of Jesus, we should avoid the trap of asking the wrong question. We should attempt to start in the right place by questioning the categories we have created and the dimension we are thinking about. We should not ask whether we are moving in the right *direction*, but, in attempting to follow the lead of Jesus, we should ask

³⁴ *Matthew* 6:10.

³⁵ See THE BOOK OF CONCORD: THE CONFESSIONS OF THE EVANGELICAL LUTHERAN CHURCH, 427 (Theodore G. Tappert trans. & ed., 1959).

³⁶ *Id.*

³⁷ *Id.* at 428; see also *supra* note 23.

³⁸ *I Corinthians* 13:11-12.

whether we are moving in the right *dimension*.³⁹ Put another way, we should ask whether we are aware of and responding to the promise of the kingdom of God as we pursue the details of the kingdom on earth.

This responsibility creates an unrelenting tension and paradox, acknowledged by Luther.⁴⁰ We are to live in the world but not be of it. We need to keep getting further and further involved in the details of life, but we also need to continually fear losing meaning by failing to trust God's presence. How do we live with the reality of law and order and the demands of understanding and advising where the legal lines are drawn, while simultaneously responding to the radical call of the gospels to love the Lord our God with all our mind and our neighbors as ourselves?⁴¹ Without understanding the right dimension, we risk either asking too little of the world or relying on it to provide too much.

H. Richard Niebuhr called the Lutheran method of handling the dynamic between the two kingdoms "Christ and Culture in Paradox."⁴² Lutherans recognize the obligation to obey the commands of both kingdoms, even though their norms may conflict, because the question about the relationship between Christ and Culture is not one we put to ourselves, but one God puts to us.⁴³ All social arrangements need to use reason and power to control evil, but this same secular power also enables the strong and powerful to maintain and perpetuate their sinful state.⁴⁴

The culture to which we belong, though a gift of God to restrain sin, also is "godless and sick unto death."⁴⁵ But the miracle of God's grace forgives us and sustains us in this same secular world, calling us not to escape it. God has blessed us with both political institutions in the left-

³⁹ See Robert Benne, *Lutheran Ethics: Perennial Themes and Contemporary Challenges*, in *THE PROMISE OF LUTHERAN ETHICS* 11, 23 (Karen L. Bloomquist & John R. Stumme eds., 1998).

⁴⁰ See *supra* note 23 and accompanying text.

⁴¹ *Matthew* 22:37-41. In *Matthew*, this is the second admonition to the Sadducees, immediately following the question about the resurrection in *Matthew* 22:23-33. In the parallel text in *Mark*, this answer is given to a "scribe," again immediately after the Sadducee's question about the resurrection. *Mark* 12:28-31. In the *Luke* parallel, a "lawyer" asks Jesus the question about eternal life that elicits this response. *Luke* 10:25-28.

⁴² H. RICHARD NIEBUHR, *CHRIST AND CULTURE* 149-89 (1951).

⁴³ *Id.* at 185.

⁴⁴ Roger Cramton makes this same observation about the value system implicit in Legal Education. See Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL ED. 247 (1978); see also Roger C. Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL ED. 509 (1987).

⁴⁵ NIEBUHR, *supra* note 42, at 156.

hand kingdom that promote order and peace and punish wrongdoing, and grace on the right hand that enables us to recognize our own sin and obey secular law that serves the love of neighbor. The reality of our daily life is a continuing dynamic struggle with God, with "divine victories that look like defeats" and "human defeats that turn into victories."⁴⁶

This is why Lutherans are not bothered by working in the world, because we tend to think about law and social institutions as "dykes against sin."⁴⁷ Niebuhr praised Luther's brutal honesty about the reality of our daily life because "it mirrors the actual struggles of Christians who live 'between the times,' and who in the midst of this dynamic must live by a secular ethic while ardently hoping for the new ethic of the kingdom of God."⁴⁸

At the same time, however, Niebuhr criticized the Lutheran model for being too culturally conservative.⁴⁹ Though responsible to work in the left-hand kingdom, we can become too comfortable in it and therefore see little need to change the world we live in. Karl Barth agreed, and criticized Lutherans in the 1930's, because their theology seemed to justify complete unthinking adherence to tyrannical secular authority.⁵⁰ As Lutheran theologian Carl Braaten puts it, the Achilles' heel of the two kingdoms doctrine is its failure to recognize an eschatological dynamic of the gospels: "The problem with the two-kingdom doctrine is that the revolutionary dynamic discharged by the kingdom on the right hand did not set off any explosion in the kingdom on the left hand."⁵¹

It is true that Lutherans have not always responded well to this challenge. Professor Benne calls this view that the secular world and the spiritual are two different spheres a "Lutheran heresy,"⁵² because it treats the two kingdoms as entirely separate realms. Yet, Luther himself seemed to insist on such a view in some of his work.⁵³ Perhaps this is

⁴⁶ *Id.* at 158.

⁴⁷ *Id.* at 188.

⁴⁸ *Id.* at 185.

⁴⁹ *Id.* at 187-89.

⁵⁰ NIEBUHR, *supra* note 42, at 187-89.

⁵¹ BRAATEN, *supra* note 33, at 147.

⁵² Benne, *supra* note 39, at 22.

⁵³ PAUL ALTHAUS, *THE ETHICS OF MARTIN LUTHER* 51 (Robert C. Schultz trans., 1972) (describing Augustine's influence). See also *Gospel Sermon, Twenty-third Sunday After Trinity in A COMPEND OF LUTHER'S THEOLOGY* 214 (Hugh Thomson Kerr, Jr., Ph.D. ed., 1966) ("The

because Luther was principally concerned in the sixteenth century with emphasizing the need to put the church back under the rule of God's gospel.⁵⁴ To do this, he needed to emphasize the distinctions between the earthly and godly realm. But at the same time, Luther maintained that distinguishing the two kingdoms served primarily as a reminder that God "rules the world in a two-fold way."⁵⁵

While there is no doubt Luther was less than perfect like the rest of us, he was correct that we need to clarify and distinguish the two kingdoms so that we do not confuse them. If we confuse the two kingdoms, we risk characterizing political machinery designed to curb human sinfulness as a structure of the kingdom of God. If we do this, we blind ourselves, as the Sadducees did, to the brilliant reality of the kingdom discerned by faith, and fail to challenge our society to serve others.⁵⁶ Luther himself fell into this trap near the end of his life, when he advocated violence against the Jews of his day.⁵⁷ The magnitude of his mistake has only recently been acknowledged by Lutherans who have publicly apologized and recognized Luther's anti-Semitism as "a contradiction and an affront to the Gospel, [and] a violation of our hope and calling."⁵⁸

two powers or governments, God's and Caesar's, or spiritual and temporal kingdoms, must be kept apart, as Christ does here . . ."); A similar sermon states:

We have often said that the Gospel or kingdom of God is nothing else than a state or government, in which there is nothing but forgiveness of sins. And wherever there is a state or government in which sins are not forgiven, no Gospel or kingdom of God is found there. Therefore we must clearly distinguish these two kingdoms from each other . . .

Gospel Sermon, Twenty-second Sunday After Trinity, in A COMPEND OF LUTHER'S THEOLOGY 207 (Hugh Thomson Kerr, Jr., Ph.D. ed., 1966).

⁵⁴ William H. Lazareth, *Sentinels for the Tricentennial, in THE LEFT HAND OF GOD: ESSAYS ON DISCIPLESHIP AND PATRIOTISM* 113, 128 (William H. Lazareth ed., 1976).

⁵⁵ ALTHAUS, *supra* note 53, at 45.

⁵⁶ Niebuhr may have succumbed to this temptation in his chapter entitled *Christ the Transformer of Culture*. See NIEBUHR, *supra* note 42, at 190-229.

⁵⁷ For an account of Luther's attitude toward the Jews, see ROLAND BAINTON, *HERE I STAND: A LIFE OF MARTIN LUTHER* 379-80 (1950).

⁵⁸ Declaration of the Evangelical Lutheran Church in America to the Jewish Community (April 18, 1994) (on file with the author). The full text of the statement reads:

**DECLARATION OF THE EVANGELICAL LUTHERAN CHURCH
IN AMERICA TO THE JEWISH COMMUNITY**

The Church Council of the Evangelical Lutheran Church in America on April 18, 1994, adopted the following document as a statement on Lutheran-Jewish relations:

In the long history of Christianity there exists no more tragic development than the treatment accorded the Jewish people on the

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But in distinguishing the two kingdoms, we also must guard against separating them, or we may become tempted to segment our lives as well. One ethic at work, another at home.⁵⁹ To do this would be to deny the Jesus of history who dwelt among us, and who revealed the kingdom of God in his everyday existence. Segmenting the kingdoms deprives

part of Christian believers. Very few Christian communities of faith were able to escape the contagion of anti-Judaism and its modern successor, anti-Semitism. Lutherans belonging to the Lutheran World Federation and the Evangelical Lutheran Church in America feel a special burden in this regard because of certain elements in the legacy of the reformer Martin Luther and the catastrophes, including the Holocaust of the twentieth century, suffered by Jews in places where the Lutheran churches were strongly represented.

The Lutheran communion of faith is linked by name and heritage to the memory of Martin Luther, teacher and reformer. Honoring his name in our own, we recall his bold stand for truth, his earthy and sublime words of wisdom, and above all his witness to God's saving Word. Luther proclaimed a gospel for people as we really are, bidding us to trust a grace sufficient to reach our deepest shames and address the most tragic truths.

In the spirit of that truth-telling, we who bear his name and heritage must with pain acknowledge also Luther's anti-Judaic diatribes and the violent recommendations of his later writings against the Jews. As did many of Luther's own companions in the sixteenth century, we reject this violent invective, and yet more do we express our deep and abiding sorrow over its tragic effects on subsequent generations. In concert with the Lutheran World Federation, we particularly deplore the appropriation of Luther's words by modern anti-Semites for the teaching of hatred toward Judaism or toward the Jewish people in our day.

Grieving the complicity of our own tradition within this history of hatred, moreover, we express our urgent desire to live out our faith in Jesus Christ with love and respect for the Jewish people. We recognize in anti-Semitism a contradiction and an affront to the Gospel, a violation of our hope and calling, and we pledge this church to oppose the deadly working of such bigotry, both within our own circles and in the society around us. Finally, we pray for the continued blessing of the Blessed One upon the increasing cooperation and understanding between Lutheran Christians and the Jewish community.

Id.

⁵⁹ Niebuhr labeled this dilemma "Christ Against Culture." See generally NIEBUHR, *supra* note 42, at 45-82. As applied to modern lawyers, Joseph Allegretti incorrectly envisions the Lutheran lawyer as one who "hopes that it is possible to be both [a good lawyer and a good Christian] but fears that it is not." JOSEPH G. ALLEGRETTI, J.D., M. DIV., THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE 18 (1996) (emphasis in original). He believes that the duty to obey the now and the not yet leaves the Lutheran lawyer psychologically uneasy. *Id.* Maintaining a moral equilibrium between the two kingdoms is difficult at best, and often tempts the lawyer to segment them. *Id.* Cf. Thomas L. Shaffer, *On Living One Way in Town and Another Way at Home*, 31 VAL. U. L. REV. 879 (1997).

the secular world of another perspective and encourages us to escape rather than wrestle with the moral complexity of the kingdom of the world.

We need to heed the words of another prominent twentieth-century theologian, Dietrich Bonhoeffer, who understood the need for this radical dynamic and, consequently, was executed by the Nazis for his role in attempting to undermine the secular order. While imprisoned, he said, "it is only by living completely in this world that one learns to have faith.... By this-worldliness I mean living unreservedly in life's duties, problems, successes and failures, experiences and perplexities."⁶⁰

Luther should be credited for advocating that "responsible Christian life means participation in all difficult and controversial areas of human existence.... Christians... are warned not to abandon the power structure but to infiltrate it."⁶¹ This means, first, that we should "study where [our] influence can make a difference," and, second, that we should "manifest Christian love and genuine good works in our station in life."⁶² Calling government to be true to its God-given purpose, the pursuit of justice, may even include active resistance to a law or a government, as Bonhoeffer and Martin Luther King, Jr. believed.⁶³

Luther's insight calls me to reflect on my own presence in both kingdoms in the twentieth and soon to be twenty-first centuries.⁶⁴ Understanding that I live in both kingdoms calls me to recognize and articulate in the earthly kingdom its God-given eschatological potential. "Moving in the right dimension" means recognizing that my secular tasks are human but that, at the same time, my vocation is God-driven. It also means being accountable to God and relying on God's forgiveness in both kingdoms.

⁶⁰ DIETRICH BONHOEFFER, *LETTERS AND PAPERS FROM PRISON 193* (Eberhard Bethge ed., rev. ed. 1953).

⁶¹ GEORGE W. FORELL, *THE AUGSBURG CONFESSION: A CONTEMPORARY COMMENTARY* 70 (1968).

⁶² *Id.* (quoting part of Article XVI (On Civil Government) of the Augsburg Confession).

⁶³ See *Thinking in Terms of Two Spheres*, in DIETRICH BONHOEFFER, *ETHICS* 196-207 (Eberhard Bethge ed., 1965); Martin Luther King, Jr., *LETTER FROM THE BIRMINGHAM JAIL* (1994). See also James M. Childs, Jr., *Ethics and the Promise of God: Moral Authority and the Church's Witness*, in *THE PROMISE OF LUTHERAN ETHICS* 101 (Karen L. Bloomquist & John R. Stumme eds., 1998).

⁶⁴ In the twentieth century, unlike the sixteenth, our chief emphasis may not be calling the church back to God's gospel on the right hand, but calling society back to God's law on the left. See generally Lazareth, *supra* note 54.

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We Lutheran Christians know that we are not justified by good works, that faith alone makes them possible.⁶⁵ At the same time, we know that faith calls us into the world, to serve others and glorify God in our ordinary places of responsibility. We need more courage to voice the truths we recognize, not just with fellow Christians in the biblical language of God's kingdom, but also to all in a secular tongue. The laws I advocate or administer are simultaneously a testimony to the goodness of creation and the depravity of human selfishness. Jesus' encounter with the Sadducees and Luther's doctrine of the two kingdoms calls me to question, in the midst of this process, whether I am moving in the right dimension.

IV. LAWYERS

I propose this question about the right dimension and a tentative answer to it as the means to examine my own work in legal ethics, generally, and, more specifically, my work as part of a thirteen-member commission called "Ethics 2000."

In April 1997, the American Bar Association's President, N. Lee Cooper, President-elect, Jerome J. Shestack, and President-elect Nominee, Philip S. Anderson, created a Special Commission to Evaluate the Model Rules of Professional Conduct. We were instructed to "(1) conduct a comprehensive study and evaluation of the ethical and professionalism precepts of the legal profession; (2) examine and evaluate the ABA Model Rules of Professional Conduct and the rules governing professional conduct in the state and federal jurisdictions; (3) conduct [original] research, surveys and hearings; and (4) formulate recommendations for action."⁶⁶ We also were told that our recommendations "will have a far reaching impact on the legal profession into the year 2000 and beyond."⁶⁷

To date, we have defined our mission as maximal consideration, minimal change. That is, we are fairly happy with the current organization and much of the content of the Model Rules of Professional Conduct. We are in the process of examining the range of rules adopted by the various jurisdictions, cleaning up meaning and reorganizing

⁶⁵ FORELL, *supra* note 61, at 86.

⁶⁶ Memorandum from the Office of the President to the ABA Board of Governors (April 15, 1997) (on file with author).

⁶⁷ Letter from N. Lee Cooper, Jerome J. Shestack and Philip Anderson (June 9, 1997) (on file with the author).

where necessary. We plan to offer a new code with clearer language, better explanation and a few new rules not considered before. But I am also happy to report that despite, or perhaps because of, our minimalist tendencies, we also are in the process of suggesting some major changes in the substance of some of the rules that govern lawyer conduct. I invite you to join me in assessing whether these changes suggest a move in the right dimension, a move toward realizing the love of God present in both kingdoms.

I find help in understanding the answer to the question whether we are moving in the right dimension in the *Micah* text that I mentioned earlier. The prophet insisted that we do justice, love kindness and walk humbly with our God. Each of these admonitions adds another dimension to my search for guideposts that help me understand the meaning of my life in both kingdoms.

V. "DO JUSTICE"

The *Matthew* parallel text to the story of the Sadducees is immediately followed by another question from a "lawyer": "Teacher, which commandment in the law is the greatest?" Jesus' answer provides the ethic of the kingdom of God: "You shall love the Lord your God with all your heart, and with all your soul, and with all your mind . . . [and] . . . your neighbor as yourself."⁶⁸ This love commandment governs and encompasses both kingdoms.⁶⁹ But it is expressed differently in each kingdom. In the right hand kingdom of God, it means sacrifice and suffering. In the left hand kingdom of the world, love means protecting the weak and using coercion to restore order and justice.

Of course, volumes have been written in both theological and secular texts about justice. For example, John Rawls tells us that justice is fairness, and then takes 500 pages to describe it.⁷⁰ For Luther, the answer was easier: God is synonymous with justice. Luther pointed out that "anyone who knows the Ten Commandments perfectly knows the entire

⁶⁸ *Matthew* 22:37-41. In the parallel text in *Mark*, this answer is given to a "scribe," again immediately after the Sadducee's question about the resurrection. *Mark* 12:28-31. In the *Luke* parallel, a "lawyer" asks Jesus the question about eternal life that elicits this response. *Luke* 10:25-28.

⁶⁹ BORNKAMM, *supra* note 20, at 9.

⁷⁰ See JOHN RAWLS, *A THEORY OF JUSTICE* (1971). See also *READING RAWLS: CRITICAL STUDIES ON RAWLS' A THEORY OF JUSTICE* (Normal Daniels ed., 1974).

Scriptures."⁷¹ He also believed that human reason naturally understands these commandments because God has created us with them "naturally written in the mind."⁷² In particular, the first commandment, "You shall have no other gods," means to trust only in God and to boast of no other god, be it great learning, wisdom, power, prestige, family or honor. Seeking help or comfort in our own works "presumes to wrest heaven from God."⁷³ Each of us must fight the temptation to trust or flaunt our earthly talents and seek rather to put them to God's service.

In the left-hand kingdom of the world, doing justice means curbing destructive and unfair behavior. Here, Luther believed that Christians could and should learn in this world from those skilled in administering secular realms. Administering justice means first learning its secular language, and then seeing its deeper purpose within the kingdom of God. The world of law demands persons of integrity and also requires that we be "wise, sagacious, brave and fearless."⁷⁴ We need these characteristics because administering justice often will "offend good friends, relatives, neighbors and the rich and powerful."

There can be no doubt that Christians, Lutherans, lawyers and citizens also agree that justice is the goal, and often agree about the values that should count. We often disagree, however, about which principle of justice or morality or legal policy best serves a particular group of persons. Take liberty, in the sense of freedom from governmental interference, and life. We likely agree that both are important, perhaps even fundamental. But in both the abortion and right to die debates, conscientious disagreement has produced real line drawing dilemmas.⁷⁵

Similar debates have occurred before the Ethics 2000 Commission and have made us wrestle with the same tough policy and line drawing issues. I invite you to assess whether we are drawing better lines than

⁷¹ *Preface to the Large Catechism*, in THE BOOK OF CONCORD: THE CONFESSIONS OF THE EVANGELICAL LUTHERAN CHURCH 361 (Theodore G. Tappert trans. & ed., 1959).

⁷² *Apology to the Augsburg Confession*, in THE BOOK OF CONCORD: THE CONFESSIONS OF THE EVANGELICAL LUTHERAN CHURCH 108 (Theodore G. Tappert trans. & ed., 1959) [hereinafter *Apology*].

⁷³ *The First Commandment*, in THE BOOK OF CONCORD: THE CONFESSIONS OF THE EVANGELICAL LUTHERAN CHURCH 367 (Theodore G. Tappert trans. & ed., 1959).

⁷⁴ *The Eighth Commandment*, in THE BOOK OF CONCORD: THE CONFESSIONS OF THE EVANGELICAL LUTHERAN CHURCH 400 (Theodore G. Tappert trans. & ed., 1959).

⁷⁵ See, e.g., Susan R. Martyn & Henry J. Bourguignon, *Physician-Assisted Suicide: The Lethal Flaws of the Ninth and Second Circuit Decisions*, 85 CAL. L. REV. 371 (1997).

previous rule drafters have proposed, lines that promote client service but at the same time curb unfair and destructive behavior.

To start, consider the long cherished ethic of client confidentiality. Most lawyers consider it gospel that client confidences be kept. Why? Two reasons usually are given. First, it works. That is, the assurance of confidentiality encourages otherwise hesitant or reluctant clients to tell all. This enables lawyers to counsel about legal limits (i.e., prevent illegal acts) and to prepare adequate defenses concerning past misbehavior. Without the assurance of confidentiality, clients would not speak freely and lawyers would lack the facts we need to do our job.⁷⁶ A second, less consequentialist justification is not as often articulated, but in the minds of many, is at least as significant. Confidentiality is important because it is essential to the trust required by the client-lawyer relationship. Without trust, a client never will be able to rely on the advice or services of a lawyer because the client always will fear that the lawyer acts in someone else's best interest.⁷⁷

The duty of confidentiality has been recognized formally in all lawyer codes since 1908.⁷⁸ Prior to that, the obligation to keep

⁷⁶ See, e.g., *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998).

⁷⁷ Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191 (1978).

⁷⁸ The original ABA Canons of Professional Ethics, first adopted by the American Bar Association in 1908, included one terse off-handed reference to confidences in Canon 6, which concerned adverse influences and conflicting interests:

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

AMERICAN BAR ASSOCIATION: OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES WITH THE CANONS OF PROFESSIONAL ETHICS AND THE CANONS OF JUDICIAL ETHICS 3 (rev. ed. 1957) [hereinafter ABA CANONS]. Canon 37, added in 1923, made the obligation explicit:

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

Id. at 36.

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confidences was recognized in the attorney-client privilege.⁷⁹ In 1969, the American Bar Association's Model Code of Professional Responsibility made clear that the confidentiality obligation encompassed both the attorney-client privilege and "other information gained in the professional relationship."⁸⁰ Lawyers were told they could be disciplined if they revealed either kind of client confidences; in addition, they could be disciplined if they used them to the disadvantage of the client or for the advantage of someone else.⁸¹ Since 1981, the American Bar Association's Model Rules of Professional Conduct have prohibited a lawyer from revealing "information relating to the representation,"⁸² and from using it to the disadvantage of the client.⁸³

What ethical principles can ever justify breaching such a trust, one at the heart of the client-lawyer relationship? Three come to mind: life, fraud, and self-defense. All three justify current exceptions, and all three justifications have formed the foundation for expanding exceptions to confidentiality in the Commission's work.

A. *Life*

The first ethical principle, life, has justified breaches of confidentiality in many professions.⁸⁴ For lawyers, this was first officially recognized in Canon 37, which provided that "[t]he announced intention of a client to commit a crime is not included within the confidences which he is bound to respect."⁸⁵ Known as the "future crime" exception, this provision granted a lawyer whose client confided an intention to kill the power to warn the victim or the police. The Code of Professional Responsibility restated this exception by allowing, but not requiring, the lawyer to disclose "the intention of the client to commit a crime and the information necessary to prevent the crime."⁸⁶ The Model Rules narrowed this exception, granting a lawyer discretion to disclose client confidences only for a "criminal act that the lawyer

⁷⁹ See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 242-43 (1986).

⁸⁰ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1969) [hereinafter ABA CODE].

⁸¹ See *id.* at DR 4-101(B).

⁸² MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1981) [hereinafter ABA MODEL RULES].

⁸³ See *id.* at Rule 1.8(b).

⁸⁴ Psychiatrists have received the most attention. See, e.g., *Tarasoff v. Board of Regents*, 551 P.2d 334 (Cal. 1976).

⁸⁵ ABA CANONS, *supra* note 78, at 36.

⁸⁶ ABA CODE, *supra* note 80, at DR 4-101(C)(3).

believes is likely to result in death or serious bodily harm."⁸⁷ This sharpened the focus but left out other client acts such as torts, which might cause death or serious bodily harm, but were not criminal.

After a long debate over the past ten years, the American Law Institute's Restatement of the Law Governing Lawyers adopted a broader view: that lawyers who receive any information from clients indicating a reasonably certain threat of serious bodily harm or death may disclose or use the information to prevent the harm.⁸⁸ The rationale for this exception, long advocated by Professor Monroe Friedman,⁸⁹ "is based on the overriding value of life and physical integrity."⁹⁰ The Restatement takes this position despite the fact that only three current lawyer codes allow such broad discretion,⁹¹ and only a few judicial decisions even mention the issue.⁹² The drafters were persuaded that

⁸⁷ ABA MODEL RULES, *supra* note 82, at Rule 1.6(b)(1).

⁸⁸ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §117A (Proposed Final Draft No. 2, 1998) [hereinafter RESTATEMENT OF THE LAW GOVERNING LAWYERS 1998]. Section 117A, *Using or Disclosing Information to Prevent Death or Serious Bodily Harm*, provides:

- (1) A lawyer may use or disclose confidential client information when the lawyer reasonably believes such use or disclosure is necessary to prevent reasonably certain death or serious bodily harm to a person.
- (2) Before using or disclosing information pursuant to this Section, the lawyer must, if feasible, make a good faith effort to persuade the client either not to act or, if the client or another person has already acted, to warn the victim or take other action to prevent the harm and, if relevant, to advise the client of the lawyer's ability to use or disclose pursuant to this Section and the consequences thereof.
- (3) A lawyer who . . . takes action or decides not to take action permitted under this Section is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third person, or barred from recovery against a client or third person

Id.

⁸⁹ *Id.*; see also MONROE H. FREEDMAN, UNDERSTANDING LAWYER'S ETHICS 102-04 (1990)

⁹⁰ RESTATEMENT OF THE LAW GOVERNING LAWYERS 1998, *supra* note 88, at § 117A cmt. b.

⁹¹ See FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-1.6(b)(2) (West 1999) (providing that a lawyer shall reveal information relating to the representation of a client "to prevent death or substantial bodily harm to another"); ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (West 1999) ("A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm."); NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (West 1999) (providing that revelation or use of client information is "required to the extent the lawyer believes necessary to prevent the client from committing an act that the lawyer believes is likely to result in imminent death or imminent substantial bodily harm").

⁹² See, e.g., *People v. Fentress*, 425 N.Y.S.2d 485 (1980); *Hawkins v. King County*, 602 P.2d 361 (Wash. Ct. App 1979).

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this is the "better view" because "it seems highly unlikely that a court would impose discipline or other liability on a lawyer in [such] an instance, should the lawyer act reasonably, even in a way that prejudices the client, to remove the threat to life or body."⁹³ Thus, there is no requirement that the act be one of the client, or that the threatened act be criminal, as long as the lawyer has a reasonable basis for believing disclosure of client information is necessary to prevent the harm.⁹⁴

The first example used to illustrate this rule is based on *Spaulding v. Zimmerman*,⁹⁵ a case where opposing counsel in a personal injury case learns from his expert witness that the injured party unknowingly suffers from a life-threatening aortic aneurysm. No one was about to commit a crime, but a human life could be saved if the opposing lawyer breached client confidentiality.⁹⁶ The Minnesota Supreme Court granted a motion to reopen the judgment after these facts later came to light, but only because the plaintiff was a minor at the time of the settlement.⁹⁷ The Restatement provision would allow disclosure whether or not the person is a minor, even though current rules do not.

The second example, taken from a more recent case, *Purcell v. District Attorney*,⁹⁸ involves a client who does intend a crime. He seeks legal advice about an eviction, and in the process discloses that he intends to burn down the apartment building. The Massachusetts Court found that the lawyer clearly had discretion to disclose to prevent the crime. It also decided that the same lawyer might be able to quash a subpoena seeking his testimony in a subsequent criminal proceeding.⁹⁹

The other two examples are not taken from cases, but were often referred to in debates during the drafting process. The first envisions a lawyer who learns from engineers of a client corporation that a toxic substance has just been released into the city's water supply. The lawyer

⁹³ RESTATEMENT OF THE LAW GOVERNING LAWYERS 1998, *supra* note 88, at § 117A cmt. b.

⁹⁴ *Id.* at § 117A cmt. c.

⁹⁵ 116 N.W.2d 704 (Minn. 1962).

⁹⁶ *Id.*

⁹⁷ *Id.* For a complete discussion of the *Spaulding* case, see Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63 (1998).

⁹⁸ 676 N.E.2d 436 (Mass. 1997).

⁹⁹ See Susan R. Martyn, *The Restatement of the Law Governing Lawyers and the Courts*, 1997 PROFESSIONAL LAWYER, 115, 124 (symposium issue).

may disclose to prevent harm, even if the authorized agents of the corporation refuse to release the information.¹⁰⁰

When the Ethics 2000 Commission took up this rule, we were persuaded by the rationale of the Restatement, even though few jurisdictions had yet adopted such a rule in their lawyer code.¹⁰¹ Our proposed exception to Model Rule 1.6 provides: "A lawyer may reveal information relating to the representation of a client or former client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm."¹⁰²

¹⁰⁰ RESTATEMENT OF THE LAW GOVERNING LAWYERS 1998, *supra* note 88, at § 117A cmt. c, illus. 3.

¹⁰¹ Ten jurisdictions *require* disclosure if the client intends to commit a crime that would result in serious bodily harm or death. *Id.* at § 117B reporter's note at 192-93. *See also supra* notes 91-93 and accompanying text.

¹⁰² MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (Public Discussion Draft Mar. 23, 1999). [hereinafter Ethics 2000 Public Discussion Draft]. The entire rule reads:

CONFIDENTIALITY OF INFORMATION

- (a) A lawyer shall not reveal information relating to the representation of a client or a former client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).
- (b) A lawyer may reveal information relating to the representation of a client or a former client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime or fraud that is likely to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
 - (3) to rectify or mitigate substantial injury to the financial interests or property of another resulting from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
 - (4) to secure legal advice about the lawyer's compliance with these Rules; or
 - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.
- (c) A lawyer shall reveal information relating to the representation of a client or a former client to the extent required by law or court order or when necessary to comply with these Rules.

Id.

Our discussion of this exception to the general obligation of confidentiality also encompassed another example, raised some time ago by Professor Friedman: the innocent person on death row.¹⁰³ What should a lawyer do if a client confesses to a crime that another has been convicted of? As drafted, this exception would allow the lawyer to disclose to save a life, or even to free an innocent person, if that person's incarceration threatens substantial bodily harm.

This extension of a narrow exception to confidentiality moves in the right dimension, for two reasons. First, it elevates a truly important principle, life, over another not quite so important one, trust. There can be no doubt that the kingdom of the right hand brings life; that is the point of Jesus' response to the Sadducees. Nor can there be any doubt that this message is central to the Gospels. Further, the occasions when a lawyer might be in the position to save life and cannot convince a client to do something about it probably are few. As a profession, we have moved from narrow-minded categories (the client must intend a future crime) to responsible premises (life matters more than client trust). Finally, to the extent that society encourages dangerous people to seek legal advice, lawyers may actually be in the best position to counsel, and if that fails, to warn about serious harm. The license society has given us puts us in this position and certainly can be read to allow us to breach confidentiality responsibly if serious harm likely will occur.¹⁰⁴

B. Fraud

The idea that client fraud might justify a departure from client confidentiality first was articulated in the attorney-client privilege.¹⁰⁵ A client who sought legal advice for the purpose of committing a crime or fraud was not deserving of the privilege if her lawyer later were asked to testify about the matter. The official lawyer codes first recognized this notion in Canon 15 in 1908.¹⁰⁶ The original ABA Canons also recognized

¹⁰³ *Id.* See also Freedman, *supra* note 77, at 103.

¹⁰⁴ This may be one justification for the view of psychotherapists, at the time of *Tarasoff*, that they could warn of dangerous behavior by a patient if "it bec[ame] necessary in order to protect the welfare of the individual or of the community." See *Tarasoff v. Board of Regents*, 551 P.2d 334, 347 (Cal. 1976).

¹⁰⁵ See generally WOLFRAM, *supra* note 79, at 279.

¹⁰⁶ ABA CANONS, *supra* note 78, at 13. Canon 15, entitled *How Far a Lawyer May Go in Supporting a Client's Cause*, warned against frivolous law suits and admonished lawyers to perform their duties within the bounds of the law. It provided in part:

The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of

a specific kind of client fraud that would justify disclosure: a fraud on the court that amounted to perjury.¹⁰⁷ Canon 41, added in 1951, went further. If a lawyer "discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party," the lawyer should seek to rectify it, first by encouraging the client to do so, and if that proves unsuccessful, by "promptly inform[ing] the injured person or his counsel, so that they may take appropriate steps."¹⁰⁸

These provisions have continued to provoke heated controversy for at least the past half-century.¹⁰⁹ The original provision in the ABA Code followed Canon 41.¹¹⁰ In 1974, DR 7-102 (B)(1) was amended by adding a clause that reversed the duty to disclose.¹¹¹ But most jurisdictions did not adopt this amendment.

When the Model Rules were debated, this issue received extended attention. The Kutak Commission recommended that lawyers be required to rectify frauds on courts as well as frauds on third parties outside of court proceedings, even if disclosure of client confidences was necessitated. Proposed Model Rule 3.3 required lawyers to take

his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied.

Id.

¹⁰⁷ See *id.* at 26. Canon 29, entitled *Upholding the Honor of the Profession*, provided in part: "The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities." *Id.*

¹⁰⁸ *Id.* at 39.

¹⁰⁹ See, e.g., *Hinds v. State Bar of California*, 119 P.2d 134, 137 (Cal. 1941); ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-353 (1987).

¹¹⁰ See ABA Code, *supra* note 80, at DR 7-102(B). As originally promulgated in 1969, DR 7-102(B) provided:

A lawyer who receives information clearly establishing that: (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal. (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Id.

¹¹¹ The clause read: "except when the information is protected as a privileged communication." See ABA CODE, *supra* note 80, at DR 7-102(B)(1). The ABA Ethics Committee later construed "privileged communication" to include all client confidences protected by DR 4-101, whether or not protected by the attorney-client privilege. ABA Comm. On Ethics and Professional Responsibility, Formal Op. 341 (1953).

"reasonable remedial measures" to rectify frauds on tribunals,¹¹² and proposed Model Rule 4.1 required disclosure of client confidences if "necessary to avoid assisting a criminal or fraudulent act by a client."¹¹³ The ABA House of Delegates accepted the first duty to tribunals but rejected the second.¹¹⁴ The result was Model Rule 3.3 that requires a duty to rectify, including the duty to disclose fraud on tribunals.¹¹⁵ In all other situations, Model Rule 4.1 subordinates the duty of candor to the obligation of confidentiality.¹¹⁶

Responding to a number of amendments that were offered to circumscribe the duty to rectify frauds on tribunals, Robert W. Meserve, chairman of the Commission, said: "The shield of confidentiality cannot become a sword by which a client accomplishes through a lawyer what the law would forbid the client himself, nor must it be a shackle hopelessly entwining a lawyer as co-conspirator in a seriously criminal scheme."¹¹⁷ This argument carried the day in the context of public frauds on tribunals, where participants and press alike might notice.¹¹⁸ Similar arguments did not persuade the same lawyers, however, in private contexts away from public view, such as negotiation and counseling clients.¹¹⁹ The Kutak Commission recommended that a lawyer could reveal client confidences to prevent "substantial injury to the financial interests or property of another,"¹²⁰ and "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used."¹²¹ Both exceptions were defeated by the House of Delegates.¹²²

This left a huge problem for the Commission and for lawyers. Even if some kind of public interest could be served by protecting client confidences outside of litigation (like encouraging clients to be frank and fully communicate with their lawyers), lawyers still had a long

¹¹² LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 121-22 (1987) [hereinafter LEGISLATIVE HISTORY].

¹¹³ *Id.* at 145.

¹¹⁴ *Id.* at 123-24, 147.

¹¹⁵ *Id.* at 123-24.

¹¹⁶ *Id.* at 147.

¹¹⁷ LEGISLATIVE HISTORY, *supra* note 112, at 122.

¹¹⁸ *Id.* at 122-23.

¹¹⁹ *Id.* at 146.

¹²⁰ *Id.* at 48 (discussing Rule 1.6(b)(1)).

¹²¹ *Id.* at 49 (discussing Rule 1.6(b)(2)).

¹²² See LEGISLATIVE HISTORY, *supra* note 112, at 48-49, 51.

recognized obligation not to counsel or assist illegal or fraudulent activity.¹²³ The Commission recommended that this rule be maintained, and the ABA House of Delegates agreed.¹²⁴ What should a lawyer do in a situation where she discovers ongoing client fraud during the course of the representation?¹²⁵

The anti-counseling/assisting provisions meant that the lawyer either must withdraw from the representation to avoid assisting the fraud, or convince the client to stop the ongoing fraudulent activity.¹²⁶ If the lawyer chooses to withdraw, knowing that third parties may still be relying on prior services that unwittingly aided the client fraud, can the lawyer warn those persons? The debates suggest that the lawyer could never allow duties of candor to trump duties of confidentiality, except

¹²³ See ABA CANONS, *supra* note 78, at 28. Canon 32, entitled *The Lawyer's Duty in Its Last Analysis*, provided in part:

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public.

Id.

See also ABA CODE, *supra* note 80, at DR 7-102(A)(7) ("[I]n his representation of a client, a lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.").

¹²⁴ Model Rule 1.2 (d), as recommended by the Kutak commission, provided:

A lawyer shall not counsel or assist a client in conduct that the lawyer knows is criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.

LEGISLATIVE HISTORY, *supra* note 112, at 31. As adopted by the ABA House of Delegates, current Model Rule 1.2 (d) provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Id. at 33.

¹²⁵ GEOFFREY C. HAZARD JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* §§ 4.1: 302, 4.1: 303 (1998).

¹²⁶ See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (1992).

before a tribunal. Yet, a “noisy withdrawal” comment was added to Model Rule 1.6 to allow just that.¹²⁷

A number of jurisdictions were not satisfied with this compromise. They have adopted their own version of Rules 1.6 and 4.1 that parallel the original Kutak formulation. These rules allow or require disclosure of client confidences to prevent¹²⁸ or rectify¹²⁹ a client fraud.

All of this background is necessary to understand the current discussion of these issues by the Ethics 2000 Commission. In addition, the heated and long Restatement debates on these issues had just produced black letter that agreed with the original Kutak proposals.¹³⁰

¹²⁷ See Ronald D. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 OR. L. REV. 455 (1984). See also ABA MODEL RULES, *supra* note 82, at Rule 1.6 cmts. 14-15. Comments 14 and 15 to Model Rule 1.6 provide:

- [14] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16 (a)(1).
- [15] After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Id.

¹²⁸ See, e.g., TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT 1.05(c)(7) (West 1999) (“[A lawyer may reveal confidential information] when the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.”).

¹²⁹ See, e.g., MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(3) (West 1999) (“[A lawyer may reveal] confidences or secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used.”).

¹³⁰ RESTATEMENT OF THE LAW GOVERNING LAWYERS 1998, *supra* note 88, at § 117B. Section 117B, entitled *Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss*, provides:

- (1) A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes use or disclosure is necessary to prevent a crime or fraud, and:
 - (a) the crime or fraud threatens substantial financial loss to a person;
 - (b) the loss has not yet occurred;
 - (c) the lawyer's client intends to commit the crime or fraud either directly or through a third person;
 - (d) the client has employed or is employing the lawyer's services in committing the crime or fraud.

The Restatement debate was no doubt influenced and educated by the recent travail of several large law firms who forgot their obligations to steer clear of client fraud. Both Jones Day's representation of Lincoln Savings and Loan¹³¹ and Kaye Schoeler's representation of OPM, Inc.¹³² resulted in allegations of complicity in client fraud that eventually were settled when the law firms agreed to pay millions of dollars in damages.

In Ethics 2000, we have picked up on these issues, and decided to follow the Restatement, albeit with much less verbosity. We understand that past ABA attempts to amend confidentiality rules to allow for disclosure to prevent or mitigate fraud have fallen on deaf ears, as recently as 1991.¹³³ But we believe that they make sense. We also understand that we are not alone. A majority of states (36) already allow disclosure to prevent a fraud if it is criminal.¹³⁴ A significant minority of the states (16) allow disclosure to rectify or mitigate harm caused by a client fraud, whether or not a crime.¹³⁵ A few require disclosure to prevent substantial financial harm.¹³⁶

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- (2) If the loss has already occurred, a lawyer may use or disclose confidential client information when the lawyer reasonably believes its use or disclosure is necessary to rectify or mitigate the loss.
 - (3) Before using or disclosing information under this Section, the lawyer must, if feasible, make a good faith effort to persuade the client to act. If the client has already acted, the lawyer may warn the victim or take other action to prevent, rectify, or mitigate the loss and, if relevant, advise the client of the lawyer's ability to use or disclose information under this Section and the consequences.
 - (4) A lawyer, who takes action or decides not to take action permitted under this Section is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third person, or barred from recovery against a client or third person.

Id.

¹³¹ See *In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation*, 794 F. Supp. 1424 (D. Ariz. 1992).

¹³² For a general account of the OPM scandal, see STEPHEN FENICHELL, *OTHER PEOPLE'S MONEY: THE RISE AND FALL OF OPM LEASING SERVICES* (1985).

¹³³ In August, 1991, the ABA House of Delegates rejected a proposal of the ABA Standing Committee on Ethics and Professional Responsibility that would have allowed for disclosure of client confidences to rectify, but not to prevent "a client's criminal or fraudulent act in the commission of which the lawyer's services had been used." *RESTATEMENT OF THE LAW GOVERNING LAWYERS 1998*, *supra* note 88, at § 117B reporter's note at 195.

¹³⁴ *Id.* at § 117B reporter's note at 193.

¹³⁵ *Id.*

¹³⁶ Florida, New Jersey, Virginia and Wisconsin have such provisions. *Id.*

The Ethics 2000's version of this exception allows but does not require disclosure, both to prevent and to mitigate the effects of a client fraud, irrespective of whether or not the fraud constitutes a crime. Our proposed exception to Model Rule 1.6 provides: "A lawyer may reveal information relating to the representation of a client or a former client to the extent the lawyer reasonably believes necessary to prevent the client from committing a crime or fraud that is likely to result in substantial injury to the financial interest or property of another and in furtherance of which the client has used or is using the lawyer's services; or to rectify or mitigate substantial injury to the financial interest or property of another resulting from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."¹³⁷

We believe this rule is right for three reasons. First, telling lawyers they may but are not required to rectify puts them on notice that they should, at a minimum, dissociate themselves from client fraud. Second, telling them they have the discretion to do something about it allows them the moral freedom to weigh whether the breach of trust, which has already occurred by the client's misuse of the client-lawyer relationship, should count more than the avoidance of harm to innocent participants. Third, allowing lawyers to disclose may protect them from later recrimination when third parties learn the truth.¹³⁸ This may be especially important if third parties are continuing to rely on documents or past statements of the lawyer, now known by that lawyer to be false.¹³⁹

VI. "LOVE KINDNESS"

Generally, we think about kindness as an attitude combined with actions. But kindness in God's kingdom of love requires that we first remove the mask of self-interest before we can properly respond to the needs of others. The Sadducees asked Jesus the question about the resurrection not only because they wanted to confound him, but also to prove to the people and probably to the Pharisees that their attitude and action properly reflected God's purpose. Jesus taught them to discard

¹³⁷ Ethics 2000 Public Discussion Draft, *supra* note 102, at Rule 1.6(b)(2)-(3).

¹³⁸ See, e.g., *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190 (2d Cir. 1974).

¹³⁹ The Restatement uses an illustration roughly based on the OPM case to make this point. A lawyer has prepared an opinion letter as part of a business transaction and later learns that the transaction is a fraudulent one. If the letter has been used to help perpetrate the fraud, the lawyer has discretion to warn the victim not to rely on it. RESTATEMENT OF THE LAW GOVERNING LAWYERS 1998, *supra* note 88, at § 117B cmt. e, *illus.* 1.

their own needs before coming to any conclusions about whether they were right. Standing in the kingdom of God, replete with its grace and forgiveness, how do we justify our own self-interest? These are good questions for lawyers and those of us who draft lawyer codes.

A. Self-Defense

The lawyer codes that require confidentiality have long recognized self-defense as a competing principle. Initially, a lawyer was allowed to respond to accusations by her client.¹⁴⁰ The ABA Code extended this prerogative to defense of employees and associates and to collect a fee.¹⁴¹ The Model Rules went even further. The lawyer now is allowed to disclose information relating to the representation of a client "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client."¹⁴²

To date, the Ethics 2000 Commission has left this rule alone. Most jurisdictions have adopted it as recommended by the ABA, and it does not seem to cause lawyers much trouble. Whether it causes clients unnecessary trouble is another story. This may be why the Restatement narrows the lawyer's discretion somewhat:

A lawyer may use or disclose confidential client information when and to the extent the lawyer reasonably believes it necessary to defend the lawyer or the lawyer's associate or agent against a charge or threatened charge by any person that the lawyer or such associate or agent acted wrongfully in the course of representing a client and the information concerns a representation whose circumstances are in dispute.¹⁴³

You might conclude that we just ran out of steam when it came to lawyer self-defense. After all, we have provided lawyers with a lot to

¹⁴⁰ See ABA CANONS, *supra* note 78, at 36. Canon 37 provided in part: "If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation." *Id.*

¹⁴¹ ABA CODE, *supra* note 80, at DR 4-101(C)(4).

¹⁴² ABA MODEL RULES, *supra* note 82, at Rule 1.6(b)(2).

¹⁴³ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116 (Proposed Final Draft No. 1, 1996) [hereinafter RESTATEMENT OF THE LAW GOVERNING LAWYERS 1996].

consider about the value of life and the evil of fraud. But, we did manage to add one more exception to confidentiality that we hope most lawyers will find sensible and necessary. A lawyer is allowed to reveal information relating to the representation "to secure legal advice about the lawyer's compliance with these Rules."¹⁴⁴ This exception makes explicit that a lawyer has a personal obligation to comply with professional rules, and discretion to seek assistance in doing so.

Of course, this is a practice of long standing.¹⁴⁵ Under current rules, it is justified by the client's "implied authorization."¹⁴⁶ However, when the lawyer and client are at odds, it is not reasonable to imply that the client authorizes the lawyer to disclose confidential information for the lawyer's own sake.¹⁴⁷ This exception makes clear that the lawyer may do so. We hope it will encourage lawyers to seek help when they need it, and to advise clients in accordance with legitimate boundaries on both the lawyer's and the client's behavior.

Are these exceptions in the service of self-interest justified? I think they are. The purpose of the self-defense justification generally is to allow a falsely accused lawyer to explain her behavior. While the kingdom of God may require sacrifice, the lawyer in the worldly kingdom should not have to serve jail time or pay a huge judgment if innocent or not involved in a client's unlawful schemes.¹⁴⁸ Further, clients should not be protected from "honest claims for legal fees."¹⁴⁹

The new exception to seek legal advice is justified for a different reason. Often, this advice will be sought so that the lawyer can better serve the client, by keeping confidences or avoiding conflicts of interest. To that extent, the lawyer's self-interest in avoiding discipline (or a malpractice suit) serves the client's. To the extent that the lawyer seeks advice to learn more about the appropriate limits to advocacy, the client's interests may not served. But when this occurs, the client may be threatening harm to a third party that either the lawyer should advise

¹⁴⁴ Ethics 2000 Public Discussion Draft, *supra* note 102, at Rule 1.6(b)(4).

¹⁴⁵ See, e.g., Drew G. Kershen, *The Ethics of Ethics Consultation*, PROFESSIONAL LAWYER, MAY 1995, at 1.

¹⁴⁶ See ABA MODEL RULES, *supra* note 82, at Rule 1.6(a). Kershen argues that lawyer self-defense also justifies the practice. See Drew Kershen, *Further Thoughts on the Ethics of Ethics Consultation*, PROFESSIONAL LAWYER, 1997 Symposium, at 7.

¹⁴⁷ See Lee A. Pizzimenti, *Ethical Consultation From a Client Perspective*, PROFESSIONAL LAWYER, 1997 Symposium, at 21.

¹⁴⁸ See RESTATEMENT OF THE LAW GOVERNING LAWYERS 1996, *supra* note 143, at § 116.

¹⁴⁹ See *id.* at § 117 cmt. b.

against, or at a minimum, stay out of. Seeking advice may help the client realize his better self, just as it may spur the lawyer to recognize appropriate fiduciary duty.

B. *Fiduciary Duty*

The law has long provided remedies and rules to help those in positions of trust to avoid self-interest. Those who, like lawyers, serve as agents for another, have what the law calls fiduciary duties of obedience, confidentiality, and loyalty to the principals or clients they serve.¹⁵⁰ The agent who faces any conflicting interest that might dilute loyalty must disclose that interest to the principal, who can decide whether to continue the relationship monitoring the interest or find a new agent.¹⁵¹

The lawyer codes have recognized these duties to inform and seek the consent of a client. The Canons labeled the representation of conflicting interests "unprofessional" and required "express consent of all concerned given after a full disclosure of the facts."¹⁵² Canon 37 likewise recognized a client consent exception to confidentiality.¹⁵³ The Code of Professional Responsibility enlarged on this duty, by requiring consent of a client "after full disclosure" before a lawyer could disclose confidential information or undertake a representation despite a conflict of interest.¹⁵⁴ The Model Rules translated this consent after full disclosure obligation into "consent after consultation."¹⁵⁵ The latter term means that the lawyer has communicated "information reasonably sufficient to permit the client to appreciate the significance of the matter in question."¹⁵⁶

The Model Rules also added a more general black letter provision, entitled *Communication*, that generally protected the interests of clients "in knowing what was happening."¹⁵⁷ The new rule (Model Rule 1.4) responded to the fact that disciplinary complaints often involved a

¹⁵⁰ See, e.g., RESTATEMENT (SECOND) OF AGENCY §§ 376-409 (1958).

¹⁵¹ See *id.* at § 387; RESTATEMENT OF THE LAW GOVERNING LAWYERS 1996, *supra* note 143, at § 202.

¹⁵² See ABA CANONS, *supra* note 78, at 3.

¹⁵³ See *id.* at 36.

¹⁵⁴ See ABA CODE, *supra* note 80, at DR 4-101(C)(1), DR 5-101(A), DR 5-104(A), DR 5-105(C), DR 5-107(A).

¹⁵⁵ See ABA MODEL RULES, *supra* note 82, at Rules 1.6(a), 1.7(a)-(b), 1.8(b), (f), (g), (i), 1.9(a)-(b).

¹⁵⁶ *Id.* at terminology [2] (defining consult or consultation).

¹⁵⁷ LEGISLATIVE HISTORY, *supra* note 112, at 37.

lawyer's failure to communicate and the imposition of such fiduciary duties by courts.¹⁵⁸ It also paralleled the developing law of informed consent in another profession, medicine.¹⁵⁹

The Restatement expands on this notion, by including in the lawyer's obligation a duty to keep a client reasonably informed, a duty to "consult with a client to a reasonable extent" about important decisions, and a duty to explain a "matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."¹⁶⁰

The Ethics 2000 Commission, attempting to provide a uniform definition that accurately describes all of these developments, has proposed the following definition of "Informed Consent", which is intended to replace the "consent after consultation" language of the Model Rules.

"Informed Consent" denotes the agreement of a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation regarding the material risks of and reasonably available alternatives to the proposed course of conduct.¹⁶¹

This requirement of informed consent will appear throughout the revised model rules. It will take on special prominence when required to legitimate disclosure of confidential information relating to the representation of a client,¹⁶² and to legitimate representations by lawyers where certain conflicts of interest exist.

With respect to conflicts of interest, Canon 6, entitled *Adverse Influences and Conflicting Interests*, initially provided that "It is the duty of a lawyer at the time of the retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the

¹⁵⁸ *Id.* Model Rule 1.4 (a) provides: "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." ABA MODEL RULES, *supra* note 82, at Rule 1.4(a).

¹⁵⁹ See Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307, 333-40 (1980).

¹⁶⁰ RESTATEMENT OF THE LAW GOVERNING LAWYERS 1996, *supra* note 143, at § 31.

¹⁶¹ Ethics 2000 Public Discussion Draft, *supra* note 102.

¹⁶² See, e.g., *id.* at Rule 1.6.

selection of counsel.”¹⁶³ It went on to require “express consent of all concerned given after a full disclosure of the facts” to validate the representation of conflicting interests.¹⁶⁴

The ABA Code collected conflict of interest rules in Canon 5. DR5-101 (regulating personal conflicts of interest), 5-105 (joint representations), and 5-107 (third party conflicts) all required the consent of a client “after full disclosure” to validate a representation affected by a conflicting interest. Model Rule 1.7 translated this requirement to “consent after consultation.”¹⁶⁵

In addressing conflicts of interest, Ethics 2000 has taken two additional steps. First, we have tried to make clear that consents to conflicts of interests only validate a representation when they are legally allowed. In other words, some conflicts so affect the lawyer’s judgment and role that courts have found them non-consentable. Second, we recommend that the rest of the country follow the lead of California, Washington and Wisconsin, where client consents to conflicts of interest,

¹⁶³ ABA CANONS, *supra* note 78, at 3.

¹⁶⁴ *Id.* Canon 38 also regulated conflicts due to the interests of third party non-clients. It provided: “A lawyer should accept no compensation, commissions, rebates or other advantages from others without the knowledge and consent of his client after full disclosure.” *Id.* at 38.

¹⁶⁵ See ABA MODEL RULES, *supra* note 82, at Rule 1.7(a)(2), (b)(2). Rule 1.7 provides:

Conflict of Interest: General Rule

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Id. at Rule 1.7.

when allowed, it must be reduced to a writing.¹⁶⁶ Our recommended language provides:

Rule 1.7 Conflict of Interest: General Rule

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a conflict of interest. A conflict of interest exists if
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by that lawyer's duties to another client or to a former client or by the lawyer's own interest or duties to a third person.
- (b) Notwithstanding the existence of a conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent in writing and
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law; and
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation.

Note that proposed Rule 1.7, unlike any of its predecessors,¹⁶⁷ separates the issue of consentability from the issue of consent. This clarifies the three-step process courts require for all conflicts. First, a lawyer must recognize, categorize and describe the conflict. Second, the lawyer must determine whether or not the conflict is consentable. And

¹⁶⁶ See, e.g., RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Rule 3-310 (West 1999); WASHINGTON RULES OF PROFESSIONAL CONDUCT Rules 1.7(a)(2), (b)(2) (West 1999); WISCONSIN RULES OF PROFESSIONAL CONDUCT Rules 1.7(a)-(b) (West 1999).

¹⁶⁷ See *supra* notes 162-64 and accompanying text.

finally, if client consent is allowed, the lawyer must obtain it competently.¹⁶⁸

The most obvious example of a non-consentable conflict is any attempt to represent opposing parties in litigation, because the lawyer's duty to contend for one point of view directly conflicts with her responsibility to the opposing party. This rule extends to contested divorces in nearly every jurisdiction, as well as uncontested dissolution of marriage actions in most. In the latter situation, courts have been concerned with the personal animosity that accompanies most marriage breakups. Other family relationships also prevent joint representation. For example, the American Bar Association Committee on Professional Ethics recommends that lawyers decline to represent both biological and adoptive parents in an adoption proceeding.¹⁶⁹

¹⁶⁸ This organization follows from Section 202 of the RESTATEMENT OF THE LAW GOVERNING LAWYERS, entitled *Client Consent to a Conflict of Interest*, which provides:

- (1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 201 if each affected client or former client gives informed consent to the lawyer's representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.
- (2) Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if:
 - (a) the representation is prohibited by law;
 - (b) one client will assert a claim against the other in the same litigation and if the lawyer will represent both clients with respect to that claim; or
 - (c) in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.

RESTATEMENT OF THE LAW GOVERNING LAWYERS 1996, *supra* note 143, at § 202; see also Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L. J. 407 (1998).

¹⁶⁹ ABA Comm. on Ethics and Professional Responsibility, Informal Op. 87-1523 (1987); see also ALABAMA RULES OF PROFESSIONAL CONDUCT Rule 1.8(k) (1999). Alabama Rule 1.8(k) provides:

In no event shall a lawyer represent both parties in a divorce or domestic relations proceeding, or in matters involving custody of children, alimony or child support, whether or not contested. In an uncontested proceeding of this nature a lawyer may have contact with the non-represented party and shall be deemed to have complied with this prohibition if the non-represented party knowingly executes a document that is filed in such proceeding acknowledging:

- (1) that the lawyer does not and cannot appear or serve as the lawyer for the non-represented party;

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Some courts have added some non-litigational representations to the list of non-consentable conflicts. These include the joint representation of parties to a complex real estate transaction.¹⁷⁰ In all of these situations, a lawyer must recognize the conflict and decline any joint representation. In all others, the nature of the conflict must be reduced to a writing that adequately explains the matter to the client, followed by the client's agreement before the representation can continue.

We have added the requirement that, where allowed, consents to conflicts be in writing to protect both clients and lawyers. Clients benefit because the writing requirement forces lawyers to articulate the nature of the conflict with some degree of specificity. The client also gains a copy of the writing as a reminder of the conflict throughout the course of the representation. Understanding how the conflict may affect the representation also helps a client monitor the lawyer's service throughout. As the representation evolves, the client can raise additional questions about the effect of new factual or legal developments that may diminish or exacerbate the conflict. In short, a writing provides the client with a continual reminder of information that allows the client to monitor and control the ongoing course of the representation.

Some concern has been expressed to the Ethics 2000 Commission that a writing requirement might be too onerous for lawyers. In particular, the Commission has questioned whether it might unduly burden lawyers in small firms or solo practitioners. Some of the California lawyers who have testified in public hearings deny that this has occurred under their rule. They indicate that, although the requirement initially required some amount of drafting by lawyers, eventually they crafted language for typically recurring conflicts.¹⁷¹ The issue boils down to whether the increased disclosure to clients mandated

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- (2) that the lawyer represents only the client and will use the lawyer's best efforts to protect the client's best interests;
 - (3) that the non-represented party has the right to employ counsel of the party's own choosing and has been advised that it may be in the party's best interest to do so; and
 - (4) that having been advised of the foregoing, the non-represented party has requested the lawyer to prepare an answer and waiver under which the cause may be submitted without notice and such other pleadings and agreements as may be appropriate.

Id.

¹⁷⁰ *Petrillo v. Bachenberg*, 655 A.2d 1354, 1357-60 (N.J. 1995).

¹⁷¹ See RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Rule 3-310 (West 1999). Of course, the fact sensitive nature of many conflicts will necessitate continued customization of some client consent forms.

by a writing requirement outweighs the danger of discipline where a writing has not been provided but adequate disclosure and consent has otherwise occurred.

Further, the process of reducing a client consent to a conflict to a writing has created an unintended positive consequence. Being forced to articulate the nature of a conflict has encouraged lawyers to be diligent in recognizing and responding to conflicts, some of which may have been ignored in the past. If properly executed, written consent also gives an extra measure of protection to lawyers when clients decide to continue the representation. A client's inquiry about the conflict may remind the lawyer about avoiding the competing interest, thereby preventing harm to client interests and obviating subsequent disciplinary complaints¹⁷² or malpractice suits.¹⁷³ Written consents also serve as continual reminders to clients that the issue was discussed previously, especially when a conflict continues throughout the representation.

Ethics 2000 also recommends that written consents be required for some specific personal conflicts of lawyers. Courts have been especially concerned about lawyers who engage in business deals with clients, because the client expects the lawyer to protect his interests at exactly the time the lawyer is most tempted to serve her own. This danger has long been recognized. Initially, Canon 11, although titled *Dealing with Trust Property*, actually provided more generally that a "lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client."¹⁷⁴

The ABA Code explicitly extended this prohibition to business transactions with clients. DR5-104(A), entitled *Limiting Business Relations with a Client*, prohibited lawyers from entering into business transactions with clients "if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure."¹⁷⁵ Cases construing this section made clear that full

¹⁷² See, e.g., *In re Horine*, 661 N.E.2d 1206 (Ind. 1996); *In re Humen*, 586 A.2d 237 (N.J. 1991); *Florida Bar v. Clark*, 513 So. 2d 1052 (Fla. 1986).

¹⁷³ For two cases where consent was properly obtained, see *Stroud v. Beck*, 742 P.2d 735, 738-39 (Wash. Ct. App. 1987), and *Dillard v. Broyles*, 633 S.W.2d 636 (Tex. Ct. App. 1982). For a case where consent was not properly obtained, see *Hill v. Okay Constr. Co.*, 252 N.W.2d 107, 113 (Minn. 1977).

¹⁷⁴ ABA CANONS, *supra* note 78, at 10.

¹⁷⁵ ABA CODE, *supra* note 80, at DR5-104(A).

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disclosure required informing the client of the advisability of seeking independent legal advice concerning the transaction, as well as full disclosure of the details of the deal and the lawyer's interest in it.¹⁷⁶

The Model Rules codified these developments in Rule 1.8(a), which required that three criteria be met before the transaction could pass muster. First, the terms of the transaction had to be objectively "fair and reasonable" to the client and fully disclosed in writing "in a manner which can be reasonably understood by the client."¹⁷⁷ Second, the client must be afforded "a reasonable opportunity to seek the advice of independent counsel in the transaction."¹⁷⁸ Finally, the client must give written consent to the transaction and its terms.¹⁷⁹

The Restatement re-articulated these three obligations, clarifying that the client must be informed of both the terms of the transaction and the lawyer's role in it, and that the client's consent must be to the "lawyer's role in the transaction."¹⁸⁰

When Ethics 2000 addressed this matter, we were warned that this rule continues to evade lawyer comprehension. We were urged to clarify further the exact requirements of disclosure, fairness of the transaction, and client consent. The problem is this. Lawyers who spot a "too good to be true" opportunity suddenly become reluctant or unable to protect client interests in the transaction. Lawyers who loan or borrow money to or from a client or who obtain an interest in a client's business enterprise need to understand that their potential gain must be

¹⁷⁶ See, e.g., *Monco v. Janus*, 583 N.E.2d 575, 581-82 (Ill. Ct. App. 1991).

¹⁷⁷ ABA MODEL RULES, *supra* note 82, at Rule 1.8(a)(1).

¹⁷⁸ *Id.* at Rule 1.8(a)(2).

¹⁷⁹ *Id.* at Rule 1.8(a)(3).

¹⁸⁰ RESTATEMENT OF THE LAW GOVERNING LAWYERS 1996, *supra* note 143, at § 207. Section 207, entitled *Business Transaction Between Lawyer and Client*, provides:

A lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction in which the lawyer does not render legal services, unless:

- (1) the Client has adequate information about the terms of the transaction and the risks presented by the lawyer's involvement in it;
- (2) the terms and circumstances of the transaction are fair and reasonable to the Client; and
- (3) the client consents to the lawyer's role in the transaction under the limitations and conditions provided in § 202 after being encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.

Id.

fully understood by the client. To make this crystal clear to lawyers, we therefore recommend a further clarification of Rule 1.8, designed to give lawyers even better notice about their fiduciary obligations in this situation:

RULE 1.8 Concurrent Conflict of Interest: Specific Rules

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory or other pecuniary interest adverse to a client unless:
- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
 - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
 - (3) the client gives informed consent in writing to the essential terms of the transaction and the lawyer's role in the transaction.¹⁸¹

We hope that this level of specificity reminds lawyers that self-interest often blinds us to client service. If the client refuses a deal after learning of the lawyer's opportunity for gain, then the lawyer will have two choices. He can modify the terms of the transaction to make it more advantageous to the client. Or, the lawyer can change her role in the transaction by representing her own interests while the (now former) client gets a new independent lawyer. Essentially, the lawyer must either cut the client a better deal or lose the business to a less self-interested lawyer. Given the number of situations where lawyers have been disciplined, sued for malpractice or have lost the ability to enforce a

¹⁸¹ Ethics 2000 Public Discussion Draft, *supra* note 102, at Rule 1.8.

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business transaction with a client, this rule also should help lawyers steer clear of subsequent trouble.¹⁸²

If business opportunity has been known to blind a lawyer to a client's interests, another personal interest, sex, also has been increasingly problematic. No ABA recommended lawyer code has yet specifically addressed this problem. Yet, sexual interests, because they are personal interests, have been generally regulated by personal conflict of interest rules. These general provisions admonish a lawyer to consider whether any personal interest (including a sexual interest in a client) would abuse or take advantage of a confidence reposed by the client¹⁸³ or reasonably would affect the lawyer's professional judgment on behalf of the client¹⁸⁴ or reasonably would adversely affect the representation.¹⁸⁵

At the time the ABA Model Rules were promulgated, ethics rules drafted by other groups of lawyers urged more specific regulation of lawyer-client sexual relationships. The American Trial Lawyers, for example, recommended a rule that forbade lawyers from commencing sexual relation with clients during the lawyer-client relationship.¹⁸⁶ Similarly, the American Academy of Matrimonial Lawyers expressed its view that "an attorney should never have a sexual relationship with a client or opposing counsel during the time of the representation."¹⁸⁷

¹⁸² See, e.g., *Sugarman v. State Bar*, 798 P.2d 843 (Cal. 1990) (professional discipline); *Monco v. Janus*, 583 N.E.2d 575 (Ill. App. 1991) (lawyer-client business transaction voided due to undue influence); *Duvall v. Laws, Swain & Murdoch, P.A.*, 797 S.W.2d 474 (Ark. Ct. App. 1990) (civil liability).

¹⁸³ ABA CANONS, *supra* note 78, at 10.

¹⁸⁴ ABA CODE, *supra* note 80, at DR5-101(A).

¹⁸⁵ ABA MODEL RULES, *supra* note 82, at Rule 1.7(b)(1).

¹⁸⁶ See THE ROSCOE POUND FOUNDATION, AMERICAN LAWYER'S CODE OF CONDUCT Rule 8.8 (Revised Draft 1982). Rule 8.8 provides that "[a] lawyer shall not commence having sexual relations with a client during the lawyer-client relationship." *Id.* The official comment adds:

Rule 8.8 forbids a lawyer to commence having sexual relations with a client during the lawyer-client relationship. This rule . . . recognizes the dependency of a client upon a lawyer, the high degree of trust that a client is entitled to place in a lawyer, and the potential for unfair advantage in such a relationship. Other professionals, such as psychiatrists, have begun to face up to analogous problems.

Id.

¹⁸⁷ See AMERICAN ACADEMY OF MATRIMONIAL LAWYERS BOUNDS OF ADVOCACY Rule 2.16 (1985). The official comment to this rule provides:

California was the first jurisdiction to officially regulate lawyer-client sexual relations. Responding to cases where lawyers took serious advantage of the emotional vulnerability of clients,¹⁸⁸ the California legislature commanded the Bar to propose a rule to the California Supreme Court. The court amended and adopted the proposal on June 13, 1992.¹⁸⁹

Since then, a number of other jurisdictions have followed suit. They recognize that other rules of general applicability give neither adequate warning to lawyers nor adequate protection to clients. Most of these new rules go further than California's regulatory approach by absolutely

Persons in need of a matrimonial lawyer are often in a highly vulnerable emotional state. Some degree of social contact (particularly if a social relationship existed prior to the events that occasioned the representation) may be desirable, but a more intimate relationship may endanger both the client's welfare and the lawyer's objectivity.

Attorneys are expected to maintain personal relationships with other attorneys, but must be sensitive to the threat to independent judgment and the appearance of impropriety when an intimate relationship exists with opposing counsel or others involved in the proceedings.

Id.

¹⁸⁸ See, e.g., *McDaniel v. Gile*, 230 Cal. App. 3d 363 (1991); *Barbara A. v. John G.*, 145 Cal. App. 3d 369 (1983).

¹⁸⁹ See RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Rule 3-120 (West 1999). The rule provides:

Sexual Relations with Client

- (A) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.
- (B) A member shall not:
 - (1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or
 - (2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or
 - (3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.
- (C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual lawyer-client sexual relations which predate the initiation of the lawyer-client relationship.
- (D) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.

Id. See also CAL. BUS. & PROF. CODE § 6106.9 (West 1992).

prohibiting lawyer-client sexual relationships in some or all representations.¹⁹⁰

Consider, for example, a recent Delaware malpractice case where the client alleged that her divorce lawyer repeatedly subjected her to unwanted sexual touching and propositions.¹⁹¹ She also offered to prove that this conduct occurred with dozens of other clients of the same lawyer.¹⁹² The Supreme Court of Delaware found these to be "troubling allegations," and suggested disciplinary action.¹⁹³ They then realized that the lawyer might not have violated their current rules.¹⁹⁴

Our debate concerning this matter in Ethics 2000 was extensive and vigorous. Some argued that prohibitory rules such as Minnesota's and Utah's sweep too broadly into the private lives of clients and lawyers and that existing rules are adequate to punish severe misconduct.¹⁹⁵ Because not all clients are emotionally vulnerable, they argued that lawyer-client sex should not be presumed to stem from undue influence or cause incompetence or lack of diligent representation. Others argued that a specific rule is needed because general rules neither warn lawyers of the danger of subrogating professional judgment to personal interest, nor protect clients from blatant lawyer undue influence and abuse.

Eventually, we agreed to a rule that clearly singles out and regulates the issue.¹⁹⁶ We did so in part to encourage additional public debate and to inform lawyers that we dare not ignore this matter any longer, especially when other professional groups severely restrict professional autonomy in order to protect client rights.

The last area where lawyer self-interest has generated a great deal of controversy concerns whether or not a law firm implicated by an

¹⁹⁰ See, e.g., FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-8.4(i) (West 1999); NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(a)(7) (1999); MINNESOTA RULES OF PROFESSIONAL CONDUCT Rule 1.8(k) (West 1994).

¹⁹¹ Brett v. Berkowitz, 706 A.2d 509 (1998).

¹⁹² *Id.* at 515.

¹⁹³ *Id.* at 515 n.23.

¹⁹⁴ *Id.*

¹⁹⁵ See, e.g., *In re Hawkins*, 695 N.E.2d 109 (Ind. 1998); *In re Heard*, 963 P.2d 818 (Wash. 1998).

¹⁹⁶ See Ethics 2000 Public Discussion Draft, *supra* note 102, at Rule 1.8. Proposed Rule 1.8(h) provides: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced." *Id.* See also STEVEN B. BISBING ET AL., *SEXUAL ABUSE BY PROFESSIONALS: A LEGAL GUIDE* (1995); Robert I. Simon, *Sexual Misconduct of Therapists*, 21 TRIAL 46 (1985).

individual lawyer's conflict of interest may screen the affected lawyer to avoid the conflict. Screens first appeared as a judicially created remedy for law firms affected by the conflicts of former government lawyers.¹⁹⁷ Courts recognized that screening the lawyer with a conflict from the rest of the firm could prevent the current firm client from losing another firm lawyer. They also recognized that failing to legitimate screens might create Typhoid Mary status for lawyers who leave government service for private practice.¹⁹⁸

The Model Rules codified this judicial remedy by distinguishing between the former government lawyer and her law firm and allowing the former to be "screened from any participation" in "a matter in which the lawyer participated personally and substantially as a public officer or employee."¹⁹⁹

¹⁹⁷ See *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980).

¹⁹⁸ *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977); *Kadish v. Commodity Futures Trading Comm'n*, 548 F. Supp. 1020 (N.D. Ill. 1982).

¹⁹⁹ See ABA MODEL RULES, *supra* note 82, at Rule 1.11. Rule 1.11, entitled *Successive Government and Private Employment*, provides:

- (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
 - (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
- (b) except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.
- (c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:
 - (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or

Subsequently, law firms began to argue that a similar rule should enable lawyers who move between private firms to screen off lawyers affected by various conflicts. A few jurisdictions have amended their lawyer codes to provide for such an exception to a lawyer's disqualification that would otherwise be imputed to the rest of the firm.²⁰⁰

The Restatement debate over this issue overshadowed much of its other work. Not surprisingly, advocates for screens often practiced in larger law firms where implementing them seemed more often necessary.²⁰¹ Eventually, a compromise provision was struck. Affected lawyers could be screened, but only when slightly or negligibly tainted by a conflict. Screens were allowed, but only as a last resort and only where whatever confidential client information the personally-prohibited lawyer has learned is "unlikely to be significant in the

nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

- (2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).
- (d) As used in this rule, the term "matter" includes:
 - (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and
 - (2) any other matter covered by the conflict of interest rules of the appropriate government agency.
- (e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Id.

²⁰⁰ See, e.g., ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.10(e) (1990); MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT Rule 1.10(d)(e) (1998).

²⁰¹ See Susan R. Martyn, *Conflict About Conflicts: The Controversy Concerning Law Firm Screens*, 46 OKLA. L. REV. 53 (1993).

subsequent matter."²⁰² Former government lawyers, on the other hand, may be screened regardless of the significance of the information.²⁰³

The debate over screens continues before courts²⁰⁴ and has been repeated in Ethics 2000.²⁰⁵ Our current recommendation allows screens only for former government lawyers²⁰⁶ or as part of a client's informed consent to the representation.²⁰⁷

VII. "WALK HUMBLY WITH YOUR GOD"

Jesus' encounter with the Sadducees forced some humility on them. They were told to rethink the meaning of the Law of Moses as well as their own theology. We too need to avoid legalistic and moralistic self-righteousness. Everything we do, whether we do it poorly or well, affects some other person whom God loves, at least as much as God

²⁰² RESTATEMENT OF THE LAW GOVERNING LAWYERS 1996, *supra* note 143, at § 204. Section 204, entitled *Removing Imputation*, provides in part:

- (2) Imputation specified in § 203 does not restrict an affiliated lawyer with respect to a former-client conflict under § 213, when there is no substantial risk that confidential information of the former client will be used with material adverse effect on the former client because:
 - (a) any confidential client information communicated to the personally-prohibited lawyer is unlikely to be significant in the subsequent matter;
 - (b) the personally-prohibited lawyer is subject to screening measures adequate to prevent sharing of confidential information of the former client with any person involved in the subsequent matter; and
 - (c) timely and adequate notice of the screening has been provided to all affected clients.

Id.

²⁰³ *Id.* at § 204(3). Section 204 provides:

Imputation specified in § 203 does not restrict a lawyer affiliated with a former government lawyer with respect to a conflict under § 214 if:

- (a) the personally-prohibited lawyer is subject to screening measures adequate to eliminate involvement by that lawyer in the representation; and
- (b) timely and adequate notice of the screening has been provided to the appropriate government agency and to affected clients.

Id.

²⁰⁴ See, e.g., *Clinard v. Blackwood*, No. 01A01-9801-CV-00029, 1999 WL 976582 (Tenn. Ct. App. Oct. 28, 1999); *Kala v. Aluminum Smelting & Ref. Co. Inc.*, 688 N.E.2d 258 (Oh. 1998).

²⁰⁵ See generally Susan R. Martyr, *Visions of the Eternal Law Firm: The Future of Law Firm Screens*, 45 S. C. L. REV. 937 (1994).

²⁰⁶ See Ethics 2000 Public Discussion Draft, *supra* note 102, at Rule 1.11.

²⁰⁷ See *id.* at Rule 1.10.

cares for you and me.²⁰⁸ We need to stand ready to rethink our legal rules and their meaning in light of God's kingdom. We should never be content or comfortable with what we have achieved. God is active through our work to preserve the goodness of creation. But we should never forget that our task is a human endeavor, inevitably marred by sin. We, like the Sadducees, always see dimly. As God's instruments in a sinful world, we need to wear hubris monitors that continually alert us to the folly of our own wisdom.

A good example of the need for humility in the work of Ethics 2000 concerns our deliberations about Model Rule 4.2, which prohibits contact by lawyers with represented persons unless "authorized by law".²⁰⁹ This rule means that a lawyer must speak to a represented person only by speaking to that person's lawyer. For example, a prosecutor concerned that a defense lawyer has not communicated a proposed plea bargain to a criminal defendant may not communicate with the defendant to find out. Similarly, an insurance company lawyer who fears that the plaintiff has not been informed by her counsel of a settlement offer may only remind the plaintiff's lawyer, not the plaintiff about the offer.

Lawyers have long been prohibited from communicating with adverse parties. Canon 9 originally banned communication "upon the subject of controversy with a party represented by counsel."²¹⁰ It also admonished lawyers not to give legal advice and "...to avoid everything that may tend to mislead a party not represented by counsel"²¹¹ The ABA Code retained this dual prohibition, adding two exceptions. A lawyer could communicate directly with a represented party if the lawyer had the prior consent of the opposing lawyer or if "authorized by law to do so."²¹² The Model Rules repeated

²⁰⁸ Thomas D. Morgan, *A Christian Perspective on Legal Ethics*, 2 J. CHRISTIAN JURISPRUDENCE 15, 19 (1980).

²⁰⁹ ABA MODEL RULES, *supra* note 82, at Rule 4.2. Rule 4.2, entitled *Communication With Person Represented by Counsel*, provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." *Id.*

²¹⁰ ABA CANONS, *supra* note 78, at 8.

²¹¹ *Id.*

²¹² ABA CODE, *supra* note 80, at DR 7-104. DR 7-104, entitled *Communications With One of Adverse Interest*, provides:

- (A) During the course of his representation of a client a lawyer shall not:
 - (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be

this rule, and in 1995 substituted "person" for "party."²¹³ The Restatement elaborated a bit, but basically reiterated the same provision.²¹⁴

represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

- (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

Id.

²¹³ ABA MODEL RULES, *supra* note 82, at Rule 4.3. Rule 4.3, entitled *Dealing with Unrepresented Person*, provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Id.

²¹⁴ RESTATEMENT OF THE LAW GOVERNING LAWYERS 1996, *supra* note 143, at §§ 158-59. Section 158 and 159 provide:

§ 158. Represented Non-Client – General Anti-Contact Rule

- (1) A lawyer representing a client in a matter may not communicate about the subject of the representation with a non-client whom the lawyer knows to be represented in the matter by another lawyer, or with a representative of an organizational non-client so represented as defined in § 159, unless:
 - (a) the communication is with a public officer or agency to the extent stated in § 161;
 - (b) the lawyer is a party and represents no other client in the matter;
 - (c) the communication is authorized by law;
 - (d) the communication reasonably responds to an emergency; or
 - (e) the other lawyer consents.
- (2) Subsection (1) does not prohibit the lawyer from assisting the client in otherwise proper communication by the lawyer's client with a represented non-client, unless the lawyer thereby seeks to deceive or overreach the non-client.

§ 159. Definition of Represented Non-Client

Within the meaning of § 158, a represented non-client includes:

- (1) a natural person represented by a lawyer; and
- (2) a current employee or other agent of an organization represented by a lawyer:
 - (a) who supervises, directs or regularly consults with the lawyer concerning the matter or who has power to compromise or settle the matter;
 - (b) whose acts or omissions may be imputed to the organization for purposes of civil or criminal liability in the matter; or

This rule has devoured a greater number of hours in Ethics 2000 than any other. The reason: self-interest and hubris. One group of lawyers, those in the United States Department of Justice, have generated much, though not all of the controversy. For about a decade, Justice Department lawyers have sought exemption from the anti-contact rule.

In 1989, Attorney General Richard Thornburgh instructed Department of Justice lawyers in an internal memorandum to ignore Model Rule 4.2 prior to criminal indictments because he deemed undercover contacts "authorized by law" and, more generally, because the Supremacy Clause exempted federal lawyers from state ethics rules. By 1991, the first federal court disagreed.²¹⁵

Attorney General Janet Reno responded by seeking to transform the Thornburgh Memorandum into an administrative regulation.²¹⁶ The final rule defined a number of contacts as "authorized by law," including all investigations, regardless of whether or not undercover work was required, and contacts initiated by a represented party who a court finds "has given voluntary, knowing and informed consent."²¹⁷

Recently, the Eighth Circuit found the legal foundation for the Reno rule nonexistent. In *U. S. ex rel O'Keefe v. McDonnell Douglas Corp.*,²¹⁸ the Eighth Circuit held that the Department of Justice had no legal authority to promulgate such a rule. Shortly thereafter, Congress passed the McDade Amendment, which specifically requires Federal prosecutors to adhere to state ethics rules.²¹⁹

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- (c) whose statements, under applicable rules of evidence, would have the effect of binding the organization with respect to proof of the matter.

Id.

²¹⁵ See *United States v. Lopez*, 765 F. Supp. 1433 (N.D. Cal 1991), *vacated on other grounds*, 989 P.2d 1032 (9th Cir. 1993).

²¹⁶ See 59 Fed. Reg. 39,910 (1994) (codified at 28 C.F.R. pt. 77).

²¹⁷ See 28 C.F.R. §§ 77.6, 77.7 (1998). Judicial orders are not required when "not feasible" and a justice department lawyer finds that there is a "substantial likelihood" that a "significant conflict of interest" exists between the represented party and his or her lawyer. *Id.* at § 77.9(a)(2).

²¹⁸ *United States ex rel O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998). Earlier, the Supreme Court of New Mexico disciplined a federal lawyer who spoke directly to a represented defendant when the latter initiated the communication. *In re Howes*, 940 P.2d 159 (N.M. 1997). The court rejected any argument that empowered the Attorney General to adopt policies inconsistent with state ethics requirements. *Id.*

²¹⁹ 28 U.S.C. § 530(B) (1998).

These events have renewed the debate over exceptions to the rule in of Ethics 2000. The Justice Department wants us to reinstate some version of the Reno Regulation as our revised proposed rule. Justice Department representatives have argued that enforcement of this rule will block legitimate and necessary criminal and civil investigations. Others, especially practicing lawyers, urge us to maintain the current provision because it protects clients and curbs lawyer overreaching. Most prominent are lawyers who represent large corporate entities that are at least occasionally the subject of Justice Department investigation.

Our response, following hours of debate, reading reams of cases, and considering a wide range of fact patterns, clearly supports the current rule but suggests one added amendment inspired in part by the Reno Regulation. We propose adding, in addition to the "authorized by law" exception, a small additional amendment: a lawyer may contact a represented person if authorized by a "court order." This means that a particular contact with a represented person will be allowed if it has been authorized by prior case law (for example, pre-indictment contact with a potential grand jury target)²²⁰ or, where a lawyer has doubt about the scope of the prohibition, by a court order preceding the contact in a particular matter. This is precisely the kind of order that should have been (but was not) sought in a recent case to legitimate whether responding to a defendant who initiated a contact was voluntary, knowing, and informed.²²¹ A court order also might be sought in a civil case where opposing counsel suspects that settlement offers are not being communicated to the opposing party.

We realize that this additional exception will not satisfy some in law enforcement, but we believe that contact not previously authorized by case law or statute should be made only after a neutral third party is convinced that it is warranted. Deferring to judges in tough cases may increase administrative effort, but we believe it is worthwhile to require those seeking contact with represented persons to justify their reasons, and let a judge determine whether a contact initiated by an opposing party is voluntary, knowing, and the product of true informed consent.

Have we rethought this rule enough to meet the conflicting needs of law enforcement and individual rights? We certainly have had to wade through some moralistic and legalist hubris to reach even this tentative

²²⁰ See, e.g., *United States v. Schwimmer*, 882 F.2d 22, 28-29 (2d Cir. 1989).

²²¹ See *In re Howes*, 940 P.2d 159 (N.M. 1997).

conclusion. We have been urged, on the one hand, never to interfere with the discretion of the Executive Department's authority to enforce the law. We have been told, on the other hand, that corporate counsel represents each and every employee at all times and in all matters. Separating the true need for legal representation or law enforcement from the overbroad claims of blanket protection has not been easy. For this reason, our human endeavor may be subject to further refining. But for the moment, it seems best to respond to the legitimate needs of law enforcement by encouraging those who seek contact with a represented person to ask a judge when unclear about the validity of a particular contact.

VIII. CONCLUSION

So, is it possible to be a good Christian, even a good Lutheran and to be a good lawyer? Luther emphatically says "yes." The kingdom of God "lets us make outward use of the legitimate political ordinances of the nation in which we live, just as it lets us make use of medicine or architecture, food or drink or air."²²² Our secular tasks are human, but our vocation is God-driven. We must never forget that we are accountable to God and that we rely on God's forgiveness. Our faith calls us into the world, to serve others and to glorify God in our ordinary "places of responsibility." Moving in the right dimension means that we need to be more attentive to doing justice, loving kindness and walking humbly with our God in all of our everyday callings. It also means that, in doing justice, we should never end the quest for curbing destructive and unfair behavior. In loving kindness, we should seek to remove the mask of individual and corporate self-interest in order to respond fairly to the needs of others. And, in walking humbly with our God, we should avoid legal and moral self-righteousness.

May Jesus' response to the Sadducees teach us that we all have been given fresh eyes to see the right dimension.

²²² *Apology, supra* note 72, at 222.