

Scholarly Commons @ UNLV Boyd Law

Scholarly Works

Faculty Scholarship

2001

Presidential Ethics: Should a Law Degree Make a Difference?

Nancy B. Rapoport

University of Nevada, Las Vegas -- William S. Boyd School of Law

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Law and Politics Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Rapoport, Nancy B., "Presidential Ethics: Should a Law Degree Make a Difference?" (2001). *Scholarly Works*. 140.

<https://scholars.law.unlv.edu/facpub/140>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

Presidential Ethics: Should a Law Degree Make a Difference?

NANCY B. RAPOPORT^{*}

Lawyers can do a great deal of harm in the world, and it is important that law schools not unleash on the world lawyers who are armed with legal knowledge, but lack the judgment to keep their skills and conduct in perspective.¹

True confessions time: I am a moderate-to-liberal Democrat *and* someone who was profoundly disappointed by President Clinton's personal conduct while he was in office.² Even though most commentators split along party lines, with Republicans saying "shame on Bill!" and Democrats saying "it's a personal matter!," I was spending most of my time bemoaning the effect that the President's conduct had on the public's perception of lawyers. After all, President Clinton has a law degree and is licensed to practice in Arkansas. The numerous jokes that were based on what "is" is³ and the multitude of editorials written about whether or not "normal" people would have lied under oath about their sexual misbehavior⁴ gave me the shivers — how can laypeople take lawyers

* © Nancy B. Rapoport 2001. All rights reserved. Dean and Professor of Law, University of Houston Law Center. A draft of part I of this Article was first presented in conjunction with the University of Houston Law Center's 2001 Ruby Kless Sondock Lecture in Legal Ethics, with Helen Thomas as the keynote speaker. Special thanks go to my wonderful research assistant, H.C. Chang; to Kathleen Clark, Catherine Glaze, Morris & Shirley Rapoport, Jeff Van Niel, and Brad Wendel for their valuable editorial comments; and to Harriet Richman and the University of Houston Law Center Faculty Research Center staff for their last-minute "finds." The views expressed in this Article are mine alone and are not those of the University of Houston Law Center or the University of Houston generally. Just because I'm the dean doesn't mean that my views are inextricably linked to the Law Center; *but see* http://victorian.fortunecity.com/benjamin/186/1b_louis-xiv (tradition ascribes to Louis XIV, King of France, the statement "L'État c'est Moi," meaning "I am the state").

1. Kathleen Clark, *Legacy Of Watergate For Legal Ethics Instruction*, 51 HASTINGS L. J. 673, 677 (2000).

2. Don't get me wrong: I liked a lot of his presidential policies. I was just saddened by his personal behavior. Or, as Cragg Hines has reported, "In the run-up to the 1992 presidential campaign, a liberal Democratic friend in Arkansas observed: 'If you give Bill Clinton half a chance, he'll disappoint you.'" Cragg Hines, *Clinton Years: Great Promise Unfulfilled*, HOUSTON CHRON., Jan. 14, 2001, at Outlook Sec.

3. *See, e.g.*, Jeremy Manier, *What, Exactly, Does He Mean By That?*, CHI. TRIB., Jan. 24, 1999, at C1 (discussing Clinton's definition of "is"); Thomas Hargrove, *Clinton's Definition of "Is" Becomes Part of the Culture*, THE PATRIOT LEDGER (QUINCY, MA), Aug. 14, 1999, at I2 (same).

4. Not that Independent Counsel Kenneth Starr came across smelling like a rose, either. *Compare, e.g.*, Jay L. Kanzler, Jr., *Lying About Sex Is Still Lying*, ST. LOUIS POST-DISPATCH, Jan. 6, 1999, at B7 (berating President Clinton for lying under oath) with Caroline Knox, *Commentary: Lesson No. 1: Don't Talk Down to Young People; Impeachment: Most Kids Are Smarter than the Politicians Think They Are When it Comes to Telling One Lie from Another*, LOS ANGELES TIMES, Jan. 4, 1999, at B5 (arguing that different lies should be punished differently, and context counts in determining the severity of any lie). One of the best pro-Clinton articles, even though I don't agree with it, is Robert W. Gordon, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 FORDHAM L. REV. 639 (1999). For an article that truly captures what Clinton and

seriously when arguments about semantics and the "context" of false statements make us look like weaselly little nitpickers?⁵

Now, I'm all in favor of lawyers making cogent arguments that use semantics to analyze cases and statutes in order to derive their proper meanings (in the case of academics) or desired interpretation (in the case of advocates), and I do believe in the zealous representation of clients.⁶ But I also believe that lawyers should behave in such a way that the public sees them as worthy of trust.⁷ And I have to admit that President Clinton didn't do much to help us maintain that trust. Of course, he's not the only politician who's been caught lying or who has done something of which he isn't proud.⁸ But the fact that he's both a politician and a

Starr could have left as legacies, compared to what they *did* leave, see Charles J. Ogletree, Jr., *Personal and Professional Integrity in the Legal Profession: Lessons From President Clinton and Kenneth Starr*, 56 WASH. & LEE L. REV. 851 (1999); see also Deborah L. Rhode, *Conflicts of Commitment: Legal Ethics in the Impeachment Context*, 52 STAN. L. REV. 269 (2000).

5. Bill Simon put it best:

One widely held though controversial view of the Clinton impeachment scandal implies that the two conceptions [law as categorical versus law as interpretable] were in conflict there. In this view, the President clearly did violate the literal terms of a relevant formally enacted rule. On the other hand, other more fundamental but less formal values of democracy and privacy were jeopardized, not so much by the conduct of the President, as by the conduct of his prosecutor. Now, the President's lawyers certainly compounded, in the view that I am describing, the damage and the danger that was done by defending his conduct, not in terms of principled appeals to privacy and democracy, but in terms of legalistic nitpicking. But if you accept this interpretation of the Clinton impeachment scandal, and I want to acknowledge that it is controversial, then you will be inclined to entertain the possibility that part of the problem may have been twenty-five years of ethics education that encouraged lawyers and law students to think of ethical obligation in terms of relatively unreflective compliance with formal rules. This type of education has de-emphasized, sometimes quite consciously and deliberately, duties of complex judgment and notions of obligation to fundamental but informal values.

William H. Simon, *Conceptions of Legality*, 51 HASTINGS L.J. 669, 671 (2000).

6. But not to the exclusion of keeping the system honest. See Nancy B. Rapoport, *Seeing the Forest and The Trees: The Proper Role of the Bankruptcy Attorney*, 70 IND. L.J. 783 (1995).

7. This is the concept of lawyer as public citizen. See, e.g., ABA MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (1998) [hereinafter MODEL RULES] ("A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."); David Luban, *Asking the Right Questions*, 72 TEMPLE L. REV. 839 (1999); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Clyde Spillenger, *Evasive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1521-30 (1996) (discussing Brandeis's view of the lawyer as public citizen); Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1150 (1990) ("The work of John Marshall, Abraham Lincoln, Clarence Darrow, Louis Brandeis, Charles Houston, Thurgood Marshall, Archibald Cox, Ruth Bader Ginsburg, and Marian Wright Edelman, to name but a few brilliant lawyers, proves the point that 'social consciousness is not inconsistent with effective advocacy.'"); Morris Dees, *The Brandeis Legacy*, 37 BRAND. L.J. 317 (1998).

8. Remember my true confession in the first paragraph of this Article? I believe that a lot of what President Clinton did while he was in office was good, and I support many of his policies and initiatives. Besides, the Republicans have their own ethical horror story.

[B]ut far more than twelve attorneys were involved in what has come to be known as Watergate. Attorneys Egil "Bud" Krogh and David Young were involved (along with [John] Ehrlichman and [G. Gordon] Liddy) in a conspiracy relating to a break-in at Daniel Ellsberg's psychiatrist office. Political trickster Donald Segretti, a young attorney, pleaded guilty to distributing illegal campaign literature.

lawyer gives me the opportunity to ask whether lawyer-politicians should be held to higher standards than "regular" politicians.⁹ Not surprisingly, I conclude that they should.¹⁰

I. ARE THERE ETHICAL RULES HOLDING LAWYER-POLITICIANS TO A HIGHER STANDARD?

Even a casual reading of the *Model Rules of Professional Conduct* quickly highlights the fact that most of the ethics rules focus on the behavior of lawyers who are representing *clients*. For example, Model Rule 3.3 regulates the statements that lawyers make to tribunals.¹¹ Model Rule 1.11 governs lawyers

Howard E. Reinecke, an attorney and former Lieutenant Governor of California, was convicted of perjury. John Connally, an attorney, former Governor of Texas and former Secretary of the Treasury, was indicted but found not guilty of accepting a bribe. Edward L. Morgan, a former Associate Counsel to the President and Assistant Secretary to the Treasury, pleaded guilty to obstructing the IRS regarding the President's taxes (by back-dating a gift of Vice Presidential papers). Harry S. Dent, a former Special Counsel to the President, pleaded guilty to violation of the Corrupt Practices Act. Frank DeMarco, the President's private tax attorney, was indicted for tax fraud but found not guilty. And Richard Kleindienst, former Attorney General, pleaded guilty to lying to the Senate about the ITT matter.

By my count (and my research was not exhaustive), no less than twenty-one lawyers found themselves on the wrong side of the law.

See John W. Dean III, *Watergate: What Was It?*, 51 HASTINGS L.J. 609, 611-12 (2000). And let's not forget that President Nixon also had a law degree. He, like President Clinton, lied while in office: "A close reading of the events that preceded Nixon's resignation shows that, as the tapes were forced out of his close control, more and more members of the immediate staff not only discovered that Nixon had lied to them but a devastating portrait of their President emerged, not a man they recognized, and not a President they could be proud to serve." *Id.* at 621.

Nixon was a lawyer, and he lied; he had lawyers around him, and they lied; Clinton is a lawyer, and he lied. There are a lot of people out there who are bothered by the very public misbehavior of lawyers holding high office. See Robert F. Drinan, *Reflections on Lawyers, Legal Ethics and the Clinton Impeachment*, 68 FORDHAM L. REV. 559 (1999) (discussing whether Kenneth Starr and his team of lawyers also misbehaved).

9. Remember, Nixon was disbarred, and Clinton's Arkansas license has been suspended for five years. See generally Gerald Walpin, *Clinton's Future: Can He Polish His Image and Keep His License To Practice Law?*, 28 HOFSTRA L. REV. 473, 477-78 (1999); Editorial, *Ending the Clinton Scandal*, THE PROVIDENCE J.-BULL., Jan. 24, 2001, at B6 ("[Clinton] was found in contempt of court. And he is only the second president (Richard Nixon, the other) to be sanctioned through the loss (if temporary) of his law license."); *infra* notes 19-36 and accompanying text.

10. I won't be talking about the whole panoply of government ethics in this Article. There are some wonderful articles that elaborate, far better than I could, about the nuances of the ethics of prosecutors, judges, and lobbyists. See, e.g., W.J. Michael Cody, *Special Ethical Duties for Attorneys Who Hold Public Positions*, 23 MEM. ST. U. L. REV. 453 (1993); J. Scott Gary, *Ethical Conduct in a Judicial Campaign: Is Campaigning an Ethical Activity?*, 57 WASH. L. REV. 119 (1981). In my opinion, the all-around best scholar on governmental ethics is Kathleen Clark. For a representative sample of her work, see, e.g., Kathleen Clark, *Do We Have Enough Ethics In Government Yet?: An Answer From Fiduciary Theory*, 1996 U. ILL. L. REV. 57 (1996); Kathleen Clark, *The Ethics Of Representing Elected Representatives*, 61 LAW & CONTEMP. PROBS. 31, 39 (Spring 1998) [hereinafter Clark, *Representing Elected Representatives*]; Kathleen Clark, *Toward More Ethical Government: An Inspector General for the White House*, 49 MERCER L. REV. 553 (1998); Clark, *supra* note 1.

11. Model Rule 3.3 provides in part that "(a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." (emphasis added). See MODEL RULES Rule 3.3.

who represent clients in private practice after having worked for the government.¹² And Model Rule 4.1 prevents lawyers from knowingly making false statements in the course of representing their clients.¹³ Of course, lawyers representing politicians have to follow all of the ethics rules, since the politicians *are* their clients.¹⁴ And lawyers who work on political campaigns — who may not think of the candidate as a client — also have to make sure that their actions don't run afoul of the relevant ethics rules.¹⁵

Most of these rules, though, don't address the behavior of lawyers who happen to *be* politicians.¹⁶ Yet there are some rules that do affect lawyer-politicians

12. Model Rule 1.11 not only prohibits former government lawyers from representing "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," but also prohibits a government lawyer from "participat[ing] in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment." MODEL RULES Rule 1.11.

13. Model Rule 4.1 provides: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." MODEL RULES Rule 4.1.

14. For example, President Clinton's lawyer had to correct the record after President Clinton admitted that he lied under oath. See John Gibeaut, *Presidential Lessons*, 84 A.B.A. J. 52 (Dec. 1998) ("After Lewinsky changed her story and Clinton himself acknowledged 'inappropriate intimate contact' with her, Bennett had to correct the record by telling the judge to disregard the Lewinsky affidavit. Otherwise, Bennett could have faced professional discipline for lack of candor toward the court."); see also MODEL RULES Rule 3.3. In fact, case law abounds regarding lawyers being disciplined for making gross misstatements during campaigns. See Robert F. Housman, *The Ethical Obligations of a Lawyer in a Political Campaign*, 26 U. MEM. L. REV. 3, 17-19 (1995); see *id.* at 19 ("This case law demonstrates that when a candidate, who is a lawyer, steps beyond the boundaries of mere vituperative political speech and into the realm of false or defamatory rhetoric, the lawyer may be subject to sanction under the rules of ethics."); see also *id.* at 28-30 (attorneys disciplined for misstatements while engaged in campaigning not for themselves, but for others). Kathleen Clark makes this point nicely:

Much has been written about lawyering for the President — certainly much more than has been written about lawyering for a legislator. Former White House Counsel Bernard Nussbaum was accused of making the mistake of thinking that his client was President Clinton rather than "the office of the President." But it is not entirely clear how "representing the office of the President" would differ from "representing the President." Under either formulation, the lawyer faces the same kinds of limitations faced by lawyers in private practice. She must not assist the client in wrongdoing. In other words, John Dean's mistake was not that he thought that President Nixon was his client; his mistake was assisting his client in obstructing justice.

Clark, *Representing Elected Representatives*, *supra* note 10, at 39.

15. Five years ago, Robert Housman conducted an informal study of fifty-three lawyers, and very few of those lawyers applied the relevant ethics rules to their work for politicians (e.g., doing conflicts checks, avoiding material misstatements, etc.). Housman, *supra* note 14, at 15-16.

16.

For some government lawyers, however, especially the political appointees in the Department of Justice and the White House, the ordinary rules of professional ethics are not so useful. The genuinely difficult questions about right and wrong that they are most likely to face in the course of their work are inevitably going to be resolved, not by professional ethics, but by personal standards of integrity and by implicit or explicit bargaining with their appointing official, the President. For these lawyers, and even more for the President, the overwhelming reality is that character counts. We should not expect that to change.

directly. The closest thing to an explicit regulation governing the behavior of lawyer-politicians is Model Rule 8.2:

- (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
- (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

The more general rule regarding misconduct, Model Rule 8.4, governs lawyer behavior at all times and thus, by definition, applies to lawyer-politicians:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Although Model Rule 8.4 applies all the time, lawyers forget that it applies even when they are not doing "lawyerly" things.¹⁷ Given that Model Rule 8.4(c) and 8.4(d) are broad enough to cover a multitude of missteps — "(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice" — lawyers who are also politicians would do well to remember their jurisdiction's version of these rules.¹⁸

Nelson Lund, *The President as Client and the Ethics of the President's Lawyers*, 61 LAW & CONTEMP. PROBS. 65, 80-81 (1998).

17. Whatever *those* are. There is a lot of talk these days, especially regarding multidisciplinary practice, about exactly what lawyers do that is *distinctly* the practice of law. See, e.g., Luban, *supra* note 7; Gordon, *supra* note 7.

18.

In the absence of specific guidelines, public officials should generally avoid action which might result in, or create the appearance of, using their public office or position for private gain, or adversely affecting the confidence of the public in the integrity of the government. Public officials, and particularly attorneys who serve as public officials, are held to a higher standard than they were before the mid-1970s. The press, as well as the public, requires higher standards of ethical conduct. The difficulty arises when the written and articulated rules of this expected conduct have not become as clear and precise as has the public's demand that even the appearance of misconduct be prohibited.

II. WHY SHOULD LAWYER-POLITICIANS FOLLOW THE ETHICS RULES EVEN WHEN THEY AREN'T REPRESENTING CLIENTS?

I know that there are a lot of lawyers out there who ask, "why should *I* be held to a higher standard than the average citizen?" This is a time-honored view, espoused not just by lawyers but by some legal academics, such as Charles Fried.¹⁹ But David Luban has a beautiful response:

If lawyers have special responsibilities to legal justice, that is not because they are divinely elected, or better and holier than the rest of us. It is because of how their role fits into an entire division of social labor. Lawyers represent private parties before public institutions, or advise private parties about the requirements of public norms, or reduce private transactions to a publicly-prescribed form, or ratify that transactions are in compliance with public norms. To say that they have special duties of fidelity to those norms is no more ecstatic and supernatural than saying that food-preparers have heightened duties to ensure their hands are clean. It is their social role, not the brush of angels' wings on their foreheads, that requires them to wash their hands every time they go to the bathroom. Indeed, even Fried acknowledges that "the lawyer like any citizen must use all his knowledge and talent to fulfill that general duty of citizenship, and this may mean that there are special perspectives and opportunities for him."²⁰

I agree with Fried that we (lawyers and non-lawyers) *all* have the duty to keep the system honest; but when it comes to the role of the lawyer in society, I'm with Luban.²¹

Cody, *supra* note 10, at 481. See also Housman, *supra* note 14, at 85 ("The role of the individual lawyer is particularly important with regard to lawyers who leave a firm to join a campaign. In these instances, the individual lawyer is best situated to identify and prevent ethical problems. The individual lawyer is most capable of reviewing the matters assigned to him as part of the campaign with an eye to determining when these matters might conflict with the interests of clients of his prior firm. The individual lawyer is also best suited to review his or her own behaviors to ensure their ethical nature.").

19.

Some of the more ecstatic critics have put forward the lawyer as some kind of anointed priest of justice . . . But this is wrong. In a democratic society, justice has no anointed priests. Every citizen has the same duty to work for the establishment of just institutions, and the lawyer has no special moral responsibilities in that regard.

Luban, *supra* note 7, at 849 (quoting Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1080 (1976) (footnotes omitted)).

20. Luban, *supra* note 7; see also Gordon, *supra* note 7, at 849-50.

21. When I showed an earlier draft of this Article to Brad Wendel, Assistant Professor of Law at Washington & Lee University, Brad asked whether Luban's view might *require* Clinton's lawyers to have engaged in the process of making the extremely legalistic arguments in order to fulfill their responsibility to social justice. See E-mail Correspondence from Brad Wendel, Assistant Professor of Law, Washington & Lee University (Jan. 12, 2001) (on file with the Author). My answer, I suppose, turns a bit on whether Clinton's lawyers thought that the focus on sexual misbehavior was on target but not relevant ("yeah, he did it, but that's no reason to destroy his Presidency") or was actionable and needed the traditional types of zealous defenses ("he may have done it, but

Let's take things a step further. Not only do lawyers have a special duty to use their training and skills to improve society,²² but they have a special duty to "stay clean." Remember what Model Rule 8.4 says: "It is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] (d) engage in conduct that is prejudicial to the administration of justice." Note that Model Rule 8.4 doesn't restrict the scope of the prohibition to actions done during the representation of a client.²³ It's professional misconduct to lie, period, whether a lawyer is representing a client or just going about her weekend errands.²⁴ Of course, the tricky part of using Model Rule 8.4 as a perpetual watchdog over how lawyers are behaving when they're *not* representing their clients is that one person's "conduct prejudicial to the administration of justice" is another's "freedom of speech" (remember Joe McCarthy?).²⁵

There are two reasons why lawyers, even lawyer-politicians, should comply with Model Rule 8.4. One is that the rule is on the books, and serious violations of the rule may well be cause for sanctions. The other is that honesty is a necessary component to fulfill the special duty that lawyers have: to work to improve the system of justice. In societies where truth is a fluid concept, used when convenient and ignored when bothersome, there is no "system" of justice. Without the honesty of those specially trained in understanding the justice system, "justice" is what is expedient at a given time. Who can have faith in *that*?

The last-minute arrangement between President Clinton and Independent Counsel Robert Ray demonstrated that "conduct that is prejudicial to the administration of justice" is a sanctionable offense. On Clinton's last full day in office, he agreed to a deal that involved a fine, a five-year suspension of his

can they *prove* it?"). Moral relativism aside, *see infra* note 42, I am more comfortable with the latter scenario. The "yeah, he did it, but it's not relevant" argument feels very much like ends justifying the means.

22. And I don't limit that duty to the endorsing of traditionally liberal or left-wing causes. Right-wing lawyers have a similar duty to improve society based on *their* philosophy. So do moderate lawyers.

23. Compare MODEL RULES Rule 8.4 with MODEL RULES Rule 4.1 (Model Rule 4.1 *does* have the "in the course of representing a client" language).

24. Right about now in a discussion of ethics is when folks start raising the issue of what is permissible under the lawyer's "zealous representation" ethics requirement. I agree that zealous representation is a requirement of our advocacy system. I just don't think zealousness trumps a lawyer's duty as an officer of the court, and I don't particularly think that our advocacy system works well. *See, e.g.,* Rapoport, *supra* note 6.

25. *See* E-mail Correspondence from Brad Wendel, *supra* note 21. Not only is freedom of speech at risk if we push Model Rule 8.4 too far, but so are other issues on which people disagree: e.g., abortion, sexual identity, etc. Perhaps a better way to think of Model Rule 8.4 is as a way to enforce Luban's concept of the lawyer as one who has a special duty to seek out social justice: if a lawyer is comporting herself in accordance with principles of social justice (e.g., she's not lying, defrauding, misleading, etc.), she shouldn't run afoul of Model Rule 8.4. Of course, the problems with that conception are that (1) it depends on who's defining "social justice" and (2) it depends on who's enforcing Model Rule 8.4. I don't have a solution for the conundrum of moral relativism, *see infra* note 32. I just believe that there is a *findable* middle ground between "everything counts" and "only my way counts." I know it when I see it. *See* *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). But is that sufficient? Sigh . . .

Arkansas law license, an agreement not to seek reimbursement of some of his legal fees, and the following admission:

Today I signed a consent order in the lawsuit brought by the Arkansas Committee on Professional Conduct which brings to an end that proceeding.

I have accepted a five-year suspension of my law license, agreed to pay a \$25,000 fine to cover counsel fees and acknowledged a violation of one of the Arkansas model rules of professional conduct because of testimony in my Paula Jones case deposition. The disbarment suit will now be dismissed.

I have taken every step I can to end this matter. I have already settled the Paula Jones case even after it was dismissed as being completely without legal and factual merit. I have also paid court and counsel fees and restitution and been held in civil contempt for my deposition testimony regarding Ms. Lewinsky which Judge Wright agreed had no bearing on Ms. Jones['] case, even though I disagreed with the findings in the judge's order. I will not seek any legal fees incurred as a result of the Lewinsky investigation to which I might otherwise become entitled under the Independent Counsel Act.

I have had occasion frequently to reflect on the Jones case. In this consent order I acknowledge having knowingly violated Judge Wright's discovery orders in my deposition in that case.

I tried to walk a fine line between acting lawfully and testifying falsely but I now recognize that I did not fully accomplish this goal and that certain of my responses to questions about Ms. Lewinsky were false.

I have apologized for my conduct and have done my best to atone for it with my family, my administration and the American people.

I have paid a high price for it, which I accept, because it caused so much pain to so many people. I hope my actions today will help bring closure and finality to these matters.²⁶

Scores of editorials ran the gamut of opinion, from acknowledgement that such a deal, although harsh and embarrassing, was the most appropriate action,²⁷ to dismay that the deal was so generous to Clinton.²⁸ A few days later, the press started focusing on other last-minute decisions that Clinton had implemented at

26. [William Jefferson Clinton], *I have paid a high price, which I accept*; *The White House released this text of President Clinton's statement in which he acknowledged giving false statements under oath*, THE HERALD (Glasgow), Jan. 20, 2001, at 2.

27. See, e.g., OpEd, *Bill Clinton Makes a Deal*, THE HERALD (Rock Hill, SC), Jan. 24, 2001, at 7A ("If even Kenneth Starr calls the Clinton plea bargain 'very reasonable and sensible,' it must be fair."); *Penitent and Priest: Departing Clinton Confesses and Absolves Others*, PITT. POST-GAZETTE, Jan. 23, 2001, at A8 ("It was unlikely that Mr. Clinton planned to hang his shingle at a Little Rock law firm, but this sanction still stings. If nothing else, it means that he can forget about following William Howard Taft in moving from the White House to the U.S. Supreme Court.").

28. See, e.g., *The Clinton Farewell*, THE GRAND RAPIDS PRESS, Jan. 24, 2001, at A10 ("Was the deal . . . deserved? Probably not. He pays a \$25,000 fine and for five years loses a law license he probably wouldn't have used anyway."); Editorial, *And on the Last Day, Clinton Missed Change*, SEATTLE POST-INTELLIGENCER, Jan. 24, 2001, at B4 ("Clinton is to pay a \$25,000 fine and not practice law for five years. This is not a guy who will have trouble finding work without a law license.").

the end of his presidency: from making 176 pardons (including the Marc Rich pardon)²⁹ to removing a variety of gifts from the White House (for which the Clintons later made partial payment).³⁰

For me, the most interesting part of the deal was, naturally, the suspension.³¹ According to various newspaper reports, the Agreed Order of Discipline that Clinton signed included the admission that he "'knowingly' engaged in 'conduct that is prejudicial to the administration of justice.'"³² That admission was sufficient to trigger Arkansas's penultimate disciplinary penalty — the five-year suspension.³³

The use of the word "knowingly" is telling. Clinton knowingly committed an ethical violation, and Arkansas punished him for it. Clinton, though, did *not* use the word "knowingly" in connection with the admission that some of his testimony was false, because knowingly giving false testimony is an admission of perjury, and Clinton was not willing to go that far in his statement.³⁴ Had Clinton admitted perjury instead of disputing Judge Wright's findings (while paying the \$90,000 fine), he could have been subject to automatic disbarment in Arkansas.³⁵

Whether or not the five-year suspension will get in the way of Clinton's future plans is, to my mind, a moot point. The issue isn't whether he was going to re-enter law practice after his presidency but, rather, what is the appropriate sanction for a lawyer who twists the legal process. As Steven Lubet puts it so succinctly, "Clinton lied. Lying is wrong. Consequences follow. You cannot tell

29. Steve Gillers commented on the Rich pardon: "Three inquiries are in progress, two in Congress and one by Mary Jo White, the United States attorney in Manhattan, whose office brought the indictment against Mr. Rich and who was kept ignorant of the president's intentions. Each investigation should proceed because each may help the public learn pieces of the truth." Stephen Gillers, *Motive Is Everything in the Marc Rich Pardon*, N.Y. TIMES, Feb. 17, 2001, at A17.

30. See, e.g., *The Clinton Farewell*, *supra* note 28, at A10.

31. Of course, all of the hoopla about the Marc Rich pardon has also been fascinating. See, e.g., Gillers, *supra* note 29, at A17; William Jefferson Clinton, *My Reasons for the Pardons*, N.Y. TIMES, Feb. 18, 2001, at § 4, pg. 13; William Safire, *Lay Off Our Bill*, N.Y. TIMES, Feb. 19, 2001, at A15.

32. Steven Lubet, *It Takes a Plea Agreement: Clinton's "Moment of Truth" a Meaningful Public Consequence*, CHI. TRIB., Jan. 23, 2001, at 15.

33. John A. MacDonald, *Clinton's Suspension "Severe": Five Years is Arkansas' Maximum*, THE HARTFORD COURANT, Jan. 23, 2001, at A2 ("The five-year suspension . . . is the longest that can be meted out in Arkansas and is just one step short of disbarment.").

34.

The words used also matter, for what they don't say. In the filing, for example, there is an admission that Clinton "knowingly" gave "evasive and misleading" answers in his deposition. What Clinton would not do, and Ray accepted this, was use language that tracked any perjury statute. The only use of the word "false" to describe unspecified answers is found in the White House statement Clinton issued.

Thomas Oliphant, *Clinton's Closure*, THE BOSTON GLOBE, Jan. 23, 2001, at A11.

35. MacDonald, *supra* note 33, at A2 ("In general, conviction of a felony brings automatic disbarment in Arkansas, state experts said, adding that it is easier for a lawyer to get his license back if he is suspended rather than disbarred.").

lies under oath and continue to be a lawyer. Period."³⁶

III. HOW DO WE REINFORCE THE NEED FOR LAWYERS TO BEHAVE PROPERLY?

Is there a way that we can reinforce the notion that lawyers must follow the same rules they learned when they were growing up: that good people try their best to behave decently, not because others are watching but because decent behavior is the right thing to do?³⁷ And if there is a way to reinforce that notion, who should do it? Is it the responsibility of law schools, or should that responsibility come earlier (or later)?

We need to be clear about what we're thinking of teaching. If we're talking about teaching *morals*, then law school is a bit late.³⁸ Besides, not everyone shares the same moral values, and I'd hate to establish a single orthodoxy.³⁹ But if we simply teach the rules of professional responsibility in law school, without talking about values like civility and collegiality, then we encourage law students to divorce the rules from the actual practice of law. That has led to ugly consequences, as John Dean pointed out:

In short, the many lawyers who broke the law during Watergate did so for all the reasons that lawyers should be the first to recognize: arrogance about the law, incompetence in the law and misplaced loyalty. I can say that with authority (and shame) because I am one of them. The study of ethics will not solve the problem, but it will provide a sensitivity training, alerting practitioners to the pitfalls, and reinforcing the code of a profession that serves only one master: the rule of law itself. Ethics training can prevent incompetence and loyalty from ever justifying what occurred during Watergate, so lawyers recognize the mistakes before they make them. Ethics instruction is meaningless, however, for those so arrogant to believe they know when the law applies to them, and when it does not.

If Watergate's only legacy is the widespread teaching of ethics in law schools, and it raises the antenna of future government attorneys, good will have come from the mistakes we made. We wrote the book on what not to do. It may be worth studying.⁴⁰

Contrary to the hope that John Dean expressed, we all know that the mandatory,

36. Lubet, *supra* note 32, at 15.

37. It's a bit like the title of Robert Fulghum's book, *All I Really Need to Know I Learned in Kindergarten*. I haven't read the book, but I like the title. See ROBERT FULGHUM, *ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN: UNCOMMON THOUGHTS ON COMMON THINGS* (1993).

38. Not that it's not worth trying. It's just that law students — even the youngest ones — are adults, and playing catch-up in principles of moral behavior is hard.

39. We should be able to agree on some basic principles, but given the climate of moral relativism that has been trendy lately, see *infra* note 42, we could have some problems.

40. Dean, *supra* note 8, at 623.

single professional responsibility course in law school⁴¹ is not the best way to inculcate professional responsibility, and that teaching black-letter ethics rules, divorced from *real* situations facing *real* lawyers, leads to hypertechnical interpretations and a disconnect from the values underlying the ethics rules.⁴² In

41. The requirement itself stems from a post-Watergate reaction and resulting attempted "fix." Kathleen Clark has a pithy discussion of how this came to be:

Lawyers who held high-level positions in the Nixon administration and in his re-election campaign were convicted of perjury, fraud, criminal violations of a citizen's constitutional rights, obstruction of justice, burglary, false statements, campaign law violations, and conspiracy. The profession apparently felt that it had to do something to repair the image of lawyers, and in 1974 the ABA did indeed take action. What kind of reforms did the ABA adopt in order to prevent future Watergates? The ABA adopted an accreditation requirement that law schools ensure that each graduate receive instruction in legal ethics.

When I learned that this was the ABA's response to Watergate, my first reaction was somewhat cynical. Did the ABA really believe that if only G. Gordon Liddy had been given instruction in legal ethics, he never would have planned the break-in of the Democratic National Committee headquarters in the Watergate?

My initial reaction was, I now think, a bit too cynical. A course in legal ethics would not have prevented G. Gordon Liddy or Richard Nixon from participating in or directing the crimes of Watergate. On the other hand, ethics instruction might have helped some of the other lawyers, such as Egil Krogh, develop the practical skills to deal with difficult professional situations where their client or supervisor wanted their assistance in illegal activity.

Clark, *supra* note 1, at 674. Of course, another post-Watergate consequence was the establishment of the Independent Counsel law. See Lund, *supra* note 16, at 66.

42.

The way we now tend to teach our students legal ethics in the courses that have been mandated in the wake of Watergate tends to emphasize relatively mechanical, unreflective rule-following at the expense of relatively complex contextual judgment. Think of the *Model Rules*, for example, that the ABA promulgated in the aftermath of Watergate and that are now the doctrinal core of all legal ethics courses or at least most of them. The *Model Rules* were explicitly drafted for the purpose of creating black letter rules (that is the term that the drafters used) that obviate complex judgment. The predecessor code of the ABA actually had a series of norms that were designed to inspire complex judgment — the so-called "ethical considerations" — aspirational norms that were eliminated in the *Model Rules* precisely to reduce legal ethics to a matter of black letter rule following. And then consider the Multistate Professional Responsibility Exam that Ron Rotunda mentioned. The multistate exam, of course, is the main test of ethical understanding of new entrants to the bar in most states. Until this year it consisted entirely of multiple choice, machine-graded questions and answers. When you are taking a bar review course designed to prepare you to take this test, the instructors will often tell you quite explicitly "Don't think too much when you're answering these questions. What is being tested is not your ability to think but your ability to regurgitate a series of rote answers."

Simon, *supra* note 5, at 670-71; see also W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 10 (1999) (law school professional responsibility courses have focused primarily on a regulatory model rather than one that tries to inculcate moral values).

The whole issue of moral relativism ("hey, you have your values, and I have mine; and mine are just as good as yours"), see, e.g., James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, 21 CAP. U. L. REV. 735, 784-85 (1992), makes any linking of professional responsibility to "moral values" just that much more difficult. A reasonable way of thinking about morals lies somewhere between the point of view that *all* views are morally permissible and that only one set of views is morally right — but where along the continuum should lawyers focus? For some good reads in the area of moral relativism, see, e.g., W. Bradley Wendel, *Value Pluralism In Legal Ethics*, 78 WASH. U. L.Q. 113 (2000); Richard Posner, *The Problematics of Moral and Legal Theory*, 111

other words, that post-Watergate fix just doesn't work. The alternative, teaching ethics throughout the law school curriculum, has the advantage of presenting ethical dilemmas in context.⁴³ Unfortunately (and this is not an argument against the pervasive method itself), law students learn far more about what is "ethical" in practice from observing other lawyers in action.

The best example of this principle is in Larry Hellman's study on the disconnect between the legal rules taught in a professional responsibility class and the "rules" that students learn while working with lawyers.⁴⁴ The law students in his study encountered real-life examples of neglect, incompetence, conflicts of interest, and the like — a smorgasbord of bad ethics.⁴⁵ It's not surprising that law students will pay attention to the behavior of practicing lawyers rather than the admonitions of law professors.⁴⁶ Many law professors either haven't practiced at all or haven't practiced in years, so their credibility about how lawyers behave "in the real world" is a bit suspect.

Unless the "real world" of lawyering changes, then, we can expect most law

HARV. L. REV. 1637 (1998); Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89 (1996); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901 (1995); Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49 (1993); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Paul T. Wangerin, *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education*, 62 TULANE L. REV. 1237 (1988); Drucilla Cornell, *Toward A Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985).

43. See, e.g., DEBORAH RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVERSIVE METHOD* (2d ed. 1998); Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992); see also Teresa Stanton Collett, *Teaching Professional Responsibility in The Future: Continuing the Discussion*, 39 WM. & MARY L. REV. 439 (1998); Roger C. Cramton & Susan P. Konialk, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145 (1996); Mary C. Daly, Bruce A. Green & Russell G. Pearce, *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 LAW & CONTEMP. PROBS. 193 (1995); Bruce A. Green, *Less Is More: Teaching Legal Ethics In Context*, 39 WM. & MARY L. REV. 357 (1998); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995); Carrie Menkel-Meadow & Richard H. Sander, *The "Infusion" Method at UCLA: Teaching Ethics Pervasively*, 58 LAW & CONTEMP. PROBS. 129 (1995); Thomas B. Metzloff & David B. Wilkins, *Teaching Legal Ethics*, 58 LAW & CONTEMP. PROBS. 1 (1995); Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as The Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719 (1998); Deborah L. Rhode, *Annotated Bibliography of Educational Materials on Legal Ethics*, 11 GEO. J. LEGAL ETHICS 1029 (1998); David B. Wilkins, *Redefining The "Professional" in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism*, 58 LAW & CONTEMP. PROBS. 241 (Autumn 1995).

44. Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537 (1991).

45. See *id.* at 603-05.

46. One scary thought is that law professors are, in fact, teaching law students bad habits. See, e.g., Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367 (1996). Another scary thought is that law students, and lawyers, have some hard-wired personal characteristics that cause them to use their aggression to push the envelope of good behavior. See generally Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547 (1998); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1340 (1997).

students to be cynical about the rules they learn in their Professional Responsibility classes. And how must the real world change? Those people who have the power to set the tone for behavior — senior lawyers in public and private practice; judges; and, yes, elected officials — must make it clear that the values of civility, professionalism, and ethics *are* the system's values.⁴⁷ The best lawyers must showcase their willingness to follow ethical principles, and judges who have the power to sanction bad conduct must do so (and should publish the opinions in which they sanction lawyers).

And that, in a nutshell, is why I am so disappointed with the personal behavior of President Clinton, and why I always carried a grudge against President Nixon. As lawyers, they failed to set the right tone. They made it that much easier for fledgling lawyers to contemplate bending the ethics rules. A president who is also a lawyer should not play upon the symbolism of the office of the President to the exclusion of remembering the duties of an officer of the court.

47. Cf. Nancy B. Rapoport, *Moral Bankruptcy: Modeling Appropriate Attorney Behavior in Bankruptcy Cases*, THE NEB. LAW. 10 (Mar. 1999).