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LAWYERS AND THE PANAMA PAPERS: HOW ETHICAL RULES CONTRIBUTE TO THE PROBLEM AND MIGHT PROVIDE A SOLUTION

Mike Donaldson*

ABSTRACT

*On the evening of January 31, 2016, I sat down to follow a Sunday night routine shared by millions of Americans: I watched 60 Minutes. An hour later, I was mad. For the first time in my life I felt a little embarrassed to be a lawyer. What ruined my Sunday evening? I watched Steve Kroft's report on the Global Witness Investigation "Undercover in New York," in which an undercover Global Witness investigator visited thirteen New York lawyers. The investigator posed as a representative of a fictitious African government official who wanted to bring a large amount of suspicious money into the U.S. Only one lawyer immediately refused to help. The others "suggested using anonymous companies or trusts to hide the [M]inister's assets" and openly discussed "how to move suspect funds into the United States"*¹

It turns out that Global Witness investigation uncovered just the tip of the iceberg. The Panama Papers revealed lawyers in the United States and around the world engaging in this conduct on a massive scale for clients. What could have led all of these lawyers to believe they were entitled to help a client hide what were obviously the proceeds of overseas wrongdoing? Do lawyers just not know the rules? This paper suggests a more troubling reality: prevailing ethical rules do not expressly—and probably do not impliedly—prohibit U.S. lawyers from helping a client to break the law of a foreign jurisdiction. The rules do not expressly require a lawyer who "reasonably believes" a client is breaking the law—even U.S. law—to withdraw.

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1. *Lowering the Bar: How American Lawyers Told Us How to Funnel Suspect Funds into the United States*, GLOBAL WITNESS (Jan. 2016), https://www.globalwitness.org/documents/18208/Lowering_the_Bar.pdf.

This article explains why these holes in the rules need to be addressed, and suggests some ways to tackle this issue. The article identifies the main risk of continuing to do nothing—a potential end to the social license that allows lawyers to be self-regulating, resulting in a loss of the independence of the bar.

I. INTRODUCTION

HAVE lawyers totally lost their moral compass? You might think so if you saw the Global Witness investigation “Undercover in New York”² or the 60 Minutes story³ that reported it:

Global Witness sent an undercover investigator to meet with 13 New York City law firms, posing as an advisor to an African minister who wanted to bring millions of dollars of suspect funds into the U.S. . . . Lawyers from 12 of the 13 law firms he visited in preliminary meetings suggested using anonymous companies or trusts to hide the minister’s assets Several lawyers had additional suggestions for how to move suspect funds into the U.S. . . . Only two of the law firms told the investigator that they could not help: one during the meeting, and another by email after the meeting.⁴

The media coverage of the Panama Papers reveals the same thing, but on a massive scale around the world.⁵ It is clear from the Panama Papers⁶ that lawyers are playing a central role in helping their clients hide money, avoid taxes, cover up bribery and corruption, cheat creditors, and launder the proceeds of crime.⁷ If the Global Witness investigation shows us anything, it is that a number of lawyers apparently do not see anything wrong aiding clients in this manner.⁸

2. *Id.*

3. Steve Kroft, *Anonymous, Inc.*, CBS News (Jan. 31, 2016), <http://www.cbsnews.com/news/anonymous-inc-60-minutes-steve-kroft-investigation/>.

4. *Lowering the Bar*, *supra* note 1.

5. See, e.g., INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://panamapapers.icij.org> (last visited Mar. 4, 2017); INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://panamapapers.icij.org> (last visited Mar. 4, 2017); Jacob Soll, *Why We Should Be Really Worried About The Panama Papers*, INDEPENDENT.AE (April 24, 2016), <http://independent.ae/1398/really-worried-panama-papers/>; Thomas Piketty, *Panama Papers: Act Now. Don’t Wait for Another Crisis*, GUARDIAN (April 9, 2016), <https://www.theguardian.com/commentisfree/2016/apr/09/panama-papers-tax-havens-thomas-piketty>; see also FREDERIK OBERMAIER & BASTIAN OBERMAYER, *THE PANAMA PAPERS: BREAKING THE STORY OF HOW THE RICH AND POWERFUL HIDE THEIR MONEY* (2016).

6. The name “Panama Papers” is in some ways a misnomer. It likely owes its use more to catchy alliteration rather than strictly accurate description. The term is partly accurate because it describes the leak of millions of documents from a global law firm. But the documents disclose transactions from around the world, including the United States. An example of this can be found in Treasury Secretary Henry Morgenthau’s May 21, 1937 memo to President Franklin Roosevelt (describing the massive scale of tax avoidance schemes).

7. See, *Lowering the Bar*, *supra* note 1.

8. Letter from John Leubsdorf, and William H. Simon, Gertrude Saunders & William Saunders, to Global Witness (Jan. 28, 2015) (on file with Global Witness), <https://>

There was a time when lawyers were respected in America—even revered—as a kind of public servants. This is not the case today. In his brilliant ethics presentation titled *Lawyer Jokes Are No Laughing Matter: What Lawyer Jokes Reveal About the Profession and Why It Isn't Funny!*,⁹ Sean Carter uses the following joke as just one example of the public's perception about greed and dishonesty among lawyers:

A housewife, an accountant, and a lawyer were asked, "How much is 2+2?"

The housewife replies, "Four!"

The accountant says, "I think it's either 3 or 4. Let me run those figures through my spreadsheet one more time."

The lawyer pulls the drapes, dims the lights and asks in a hushed voice, "How much do you want it to be?"¹⁰

This is a long way from the heroic Atticus Finch portrayed in Harper Lee's classic novel *To Kill a Mockingbird*.¹¹ How did we get here? Are lawyers really allowed to act like this? Can we change the rules? And what will happen if we do not? These are some of the questions this paper will discuss.

Here is the basic problem: lawyers can play two very different roles, but a single set of ethical rules governs both.¹² The two roles are the advocate—think of Atticus Finch representing a client in court¹³—and

www.globalwitness.org/documents/18209/Opinion_of_John_Leubsdorf_and_William_Simon.pdf ("Very likely, your investigator could have found other lawyers who would have behaved similarly Your investigation is of great public importance. It suggests a willingness on the part of prominent lawyers to assist corrupt officials to profit from betrayals of public trust.").

9. Sean Carter, *Lawyer Jokes are no Laughing Matter*, ASS'N OF CORPORATE COUNCIL (Mar. 4, 2017), <https://www.acc.com/chapters/wisc/upload/Laughing-PDF.pdf>.
10. *Id.* ("Like ethnic jokes, lawyer jokes tend to play to common stereotypes and misconceptions about attorneys. As a result, it is tempting to dismiss them as just a low form of humor. Yet, perhaps we shouldn't dismiss them altogether as they do provide an insight into how the legal profession is perceived by the general public.").
11. See, HARPER LEE, *TO KILL A MOCKINGBIRD*, (Harper Collins, 2014).
12. See, e.g., Murray L. Schwartz, *The Professional and Accountability of Lawyers*, 60 CALIF. L. REV. 669, 671 (1978); Judith A. McMorrow & Luke M. Scheuer, *The Moral Responsibility of the Corporate Lawyer*, 60 CATH. U.L. REV. 275 (2010); *A Gathering of Legal Scholars to Discuss the Professional Responsibility and The Model Rules of Professional Conduct: Panel Discussion*, 35 U. MIAMI L. REV. 639 (1981); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985).
13. We do not have to think of fictitious lawyers. A real life example is John Adams defending the Red Coats charges in the Boston Massacre. But the stories of fictitious lawyers are powerful examples that make for lively ethical discussions. See Geoffrey C. Hazard, *Book Review: Faith and the Professions*, By Thomas L. Shaffer, Brigham Young University Press, 1987, 63 NOTRE DAME L. REV. 393 (1988) ("Professor Shaffer demonstrates . . . through the method of illustration, that the legal profession has come to put too much weight on codes and rules as the medium of discourse about professional ethics. More is needed than the codes or rules to make sense of the subject of professional ethics. According to Professor Shaffer, that need is met at least in part by illuminating narrative.").

the non-advocate, sometimes called a transactional lawyer, advisor, or counselor—think of any lawyer acting in circumstances that are not part of, or connected to, proceedings in court.¹⁴

Because the same rules govern both types of lawyer roles, a lawyer advising a client in private about the client's income tax obligations is told to play by the same basic rules that govern the advocate's fight to defend his client against a murder charge.¹⁵ So, in the privacy of a boardroom—with no judge (and perhaps not even an opposing lawyer) to monitor his conduct and make sure all the relevant facts are fully and fairly brought out, the advising tax lawyer takes on a perceived duty to counsel the client about how to avoid the obligations the law would otherwise impose—just as the advocate strategizes how to beat the murder charge. But, unlike the lawyer in court, in the quiet seclusion of the boardroom, the advising lawyer has no referee to blow the whistle when things get out of hand. A rather large elephant in the boardroom is the financial reward for the lawyer who can help a client “fight the system” by not paying taxes or avoiding some other legal obligation. We should perhaps not be too surprised at the results.

It does not have to be this way. One solution would be to reform the ethical rules to make it clear that the overriding duty of the non-advocate lawyer is to help clients comply with the law—not to avoid it. I propose two modest changes to American Bar Association (ABA) Model Rules of Professional Conduct that would help address this.¹⁶ I have not found anyone else proposing these specific changes to the ABA Rules as a result of the Global Witness investigation or Panama Papers. The International Bar Association's official reaction to the Panama Papers, for example, was to simply reaffirm its current guidelines, even though they clearly are not working.¹⁷

What will happen if we do not make changes? My worry is that if the public will continue to view lawyers as helping their clients to evade the law and lawyers will lose their social license for self-regulation,¹⁸ Voters will demand that government start making the rules that govern lawyers and that the government enforce them.¹⁹ This threatens the indepen-

14. See Lee, *supra* note 11.

15. See *International Principles on Conduct for the Legal Profession*, INT'L BAR ASS'N, 1 (May 28 2011), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=1730FC33-6D70-4469-9B9D-8A12C319468C>; MODEL CODE OF PROF'L RESPONSIBILITY Scope (2000) [hereinafter MRPC R.].

16. The ABA Rules represent a broad consensus about what the ethical rules ought to be, and they significantly influence the content of the ethical rules that are adopted in many jurisdictions. See *id.*

17. *The 'Panama Papers' and the Legal Profession*, INT'L BAR ASS'N (April 2016), www.ibanet.org/Document/Default.aspx?DocumentUid=3b4f5c67-3973-4f9e-9aa8-1076b1d4f5fe.

18. See Jonathan Macey, *Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of A Profession*, 74 *FORDHAM L. REV.* 1079, 1081 (2005).

19. See INT'L PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION § 1.3 (INT'L BAR ASS'N 2011), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=1730FC33-6D70-4469-9B9D-8A12C319468C> (“There is an ongoing debate as to the ex-

dence of the bar, and hence threatens the rule of law itself. Lawyers are supposed to be the ones who hold governments to account. But, how can they do this effectively if they are ultimately accountable to the government?²⁰ Lawyers still have time to get this right. We should before it is too late.

II. THE FIRST PROBLEM: TWO TYPES OF LAWYERS GOVERNED BY ONE RULE

A. THE LAWYER AS ADVOCATE AND THE PRINCIPLE OF NON-ACCOUNTABILITY

The prototype of the “good” lawyer is the heroic Atticus Finch of *To Kill a Mockingbird*, who defends a railroaded minority defendant before an all-white jury in a small southern town in the 1930s.²¹ This is the kind of lawyer about whom we do not tell jokes, and who we all wish we had more of in our society.

Even when an advocate zealously defends an “obviously guilty” defendant or advances a morally repugnant argument, a fair-minded observer can see the defense lawyer as merely ensuring a fair trial, and hence as performing an admirable service that is essential to a free society. We can even accept that the client who wants to push the envelope by asserting a highly debatable legal proposition—that a reasonable person would not suspect that the contents of a coffee cup might be hot in the absence of a printed warning to that effect, for example²²—is entitled to be represented by the advocate of her choice, who must zealously advance the client’s case even if he personally believes it to be dumb or offensive. How can everyone be entitled to an effective day in court if there is no lawyer to represent them?

We can therefore admire the advocate who makes un-admirable arguments and agree that there is a broader social good in advocates sometimes being forced to make morally repugnant arguments on behalf of undeserving and morally bankrupt clients. We do not hold the advocate morally accountable for doing so. In ethical parlance, this is known as the

tent to which governmental and legislative interference with the administration and conduct of the legal profession may be warranted.”).

20. See CHARTER OF CORE PRINCIPLES OF THE EUR. LEGAL PROFESSION AND CODE OF CONDUCT FOR EUROPEAN LAWYERS Principle (j) (COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE 2013), http://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf (“It is one of the hallmarks of unfree societies that the state, either overtly or covertly, controls the legal profession and the activities of lawyers. . . . [O]nly a strong element of self-regulation can guarantee lawyers’ professional independence vis-à-vis the state, and without a guarantee of independence it is impossible for lawyers to fulfil their professional and legal role.”)
21. See Lee, *supra* note 11.
22. *Liebeck v. McDonald’s Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309, at *1 (N.M. Dist. Aug. 18, 1994).

principle of non-accountability.²³ It is a cornerstone of legal ethics.

There is a reason the principle of non-accountability works when lawyers are acting as advocates. Every one of the advocate's factual or legal arguments is subject to critique by the opposing lawyer, who can also cross-examine the advocate's witnesses and call her own evidence to establish additional or contrary facts.²⁴ This is all overseen by a judge, who can ensure that the advocate does not go too far in defending the client.²⁵ Most importantly, the advocate's morally questionable arguments have to pass muster with an impartial judge and jury before they take effect.²⁶ Thus, the ultimate responsibility for accepting or rejecting them rests not on the advocate, but on somebody else. The adversary system serves not only as a check on the advocate's zeal, but is also the basis for shifting moral accountability from the advocate to the ultimate decision-maker—leaving the advocate morally non-accountable for serving the client.²⁷

B. THE NON-ADVOCATE LAWYER

Another type of lawyer we have become too familiar with is the greedy Wall Street corporate lawyer who works for, and closely resembles, Gordon Gekko and those like him, who espouse the notion that “[g]reed is good.”²⁸ This lawyer zealously twists and bends the law beyond recognition and gains for his client benefits the law never intended to give. We see this lawyer less as an essential cog in the system that is the rule of law and more as an impediment to it.²⁹

But, we tolerate bad non-advocate behavior because we have been taught to believe everyone deserves legal advice, and we cannot stop Gekko's lawyers from doing what they do without also stopping Atticus Finch from taking on the unpopular cause of zealously defending Tom Robinson against the tyranny of the majority. We buy into the myth that

23. Murray L. Schwartz, *The Professional and Accountability of Lawyers*, 60 CALIF. L. REV. 669, 671 (1978); Judith A. McMorrow & Luke M. Scheuer, *The Moral Responsibility of the Corporate Lawyer*, 60 CATH. U.L. REV. 275, 276 (2010).

24. See 5 FRED LANE, § 19:10. *Right to cross-examine*, in LANE GOLDSTEIN TRIAL TECHNIQUE (3d ed., 2016); see, 5 FRED LANE, § 11:1. *In general*, in LANE GOLDSTEIN TRIAL TECHNIQUE (3d ed., 2016).

25. See *How Courts Work: The Role of Judges*, AM. BAR. ASS'N (Mar. 7, 2017), http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/jury_role.html.

26. See *id.*

27. That moral accountability can be shifted yet further—for example, to a legislature. Consider a statute codifying the law of self-defense, which requires acquittal of a person who kills another in certain circumstances. When a judge or a jury acquits on this basis, they are morally accountable for deciding that the legal requirements of self-defense have been established. But the moral accountability for the criteria themselves rests on the legislature—and theoretically on the people who voted for the legislators.

28. WALL STREET (20th Century Fox 1987).

29. I do not mean to suggest there are only the two types of lawyers, or that all advocates are altruistic and good while all corporate lawyers are greedy and bad. Far from it. My point is that the good advocate and bad non-advocate can both justify their conduct based on the same rules—which suggests the Rules are not properly functioning as signposts for good behavior.

the counselor and the advocate are doing essentially the same job, and must therefore be governed by the same ethical rules and standards, and so we extend the advocate's principle of non-accountability to the non-advocate lawyer as well.

C. THE FOOLISHNESS OF A SINGLE RULE FOR TWO DIFFERENT ROLES

Advocate and non-advocate lawyers do not really have the same job. Treating them as if they do makes about as much sense as requiring a commercial pilot and a bus driver to work from the same pre-departure checklist because they both move people from A to B and are both responsible for passenger safety. Based on this theory, we would tell the pilot he just needs to make sure the tires are fully inflated, the brakes work, and the windshield is clean, and he is good to go without checking whether the plane can actually fly. Why can we easily see the stupidity of this approach when it comes to pilots and bus drivers, but not when it comes to counselors and advocates?

Not only do lawyers who give corporate or tax advice have different jobs, they are subject to very different checks on their behavior. Outside the advocacy context, there is no third-party arbiter to decide the ultimate facts. In a situation where the lawyer is only advising, there is not even an opposing lawyer present. In the counseling context, if the lawyer conceals, aggressively spins facts, or twists the law there is nobody to restrain him. Does this not make it obvious there should be different rules for the two types of lawyers? As Murray Schwartz states, "[s]hould these expectations of lawyer behavior change when the arbiter is removed? A simple parallel may be found in an athletic contest such as a basketball game. When a game is formally refereed, our expectations of the players and coaches are very different than in a 'pick-up' game."³⁰

Governing advocate and non-advocate lawyers with the same ethical rules is dangerous. When combined with the unfortunate but prevalent idea that the practice of law is more of a business than a profession, the transactional lawyer's job then becomes to make as much money for the client as possible with whatever means are available. By claiming the moral high ground afforded to the zealous advocate, the non-advocate lawyer can claim to be morally and legally insulated from whatever the client might be up to. She can even claim to be performing a social good by helping the client beat the system—just like Atticus Finch.³¹ In fact, a lawyer who refuses to help a client avoid the law is, on the currently prevailing view, undermining the rule of law by refusing to provide its most basic requirement—adequate legal representation.³²

30. Murray L. Schwartz, *The Professional and Accountability of Lawyers*, 60 CALIF. L. REV. 669, 671 (1978);

31. See Lee, *supra* note 11.

32. See Shwartz, *supra* note 30, at 673.

This reveals the real problem with the current ethical framework—the deeply-ingrained idea that it is an essential good for non-advocate lawyers to help clients avoid the application of the law is all-pervading. No ethical rule will stop a bad lawyer from being bad. But, under the current system, even *good* lawyers who *want* to help their client do what is right do not find it easy to do so. While there will always be some bad lawyers (just as there are some bad drivers, some bad police officers, and some bad dentists), we should at least have ethical rules that help *good* lawyers make *good* decisions and do the right thing. Clearly we do not.

D. DIFFERENT RULES FOR NON-ADVOCATE LAWYERS

The way to solve this problem is by having different rules for non-advocate lawyers.³³ This is not a new idea.³⁴ In a 1978 California Law Review article, Murray Schwartz proposed different rules for advocates and non-advocate lawyers.³⁵ He suggested “[t]he boundary between advocate and non-advocate is defined in terms of the presence or absence of the impartial arbiter of the adversary system.”³⁶ Another way to think of the boundary is that advocates help clients deal with the consequences of past actions, whereas non-advocates help clients plan future acts.

Schwartz persuasively argued for a broad change in the rules applicable to non-advocates that would (1) prohibit them from using “unfair, unconscionable, or unjust, though not unlawful, means” to achieve the client’s objectives, and (2) prohibit them from helping their clients to achieve “unfair, unconscionable, or unjust, though not unlawful” ends by any means.³⁷ His proposal has so far fallen on deaf ears. McMorrow and Scheuer more recently echoed Schwartz’s call for changes, arguing “corporate lawyers cannot accurately claim that they are not morally responsible for their work on behalf of corporate clients.”³⁸

While I agree with Schwartz and McMorrow, I have a more modest proposal. I suggest simply that we ought to be much more careful about allowing non-advocate lawyers to be involved with clients who probably want to break the law. I am not suggesting these clients should not have

33. Sometimes lawyers perform both roles. Even within the same retainer, what can begin as advice can later develop into actual or potential litigation. The rules therefore need to focus on the type of function the lawyer is performing, and the context in which the lawyer is doing so. Letter from William Simon, to author (Jan. 7, 2017) (on file with author) (“While I think the advocacy/distinction is useful, I find it oversimplified. Sometimes lawyers need to take exceptional responsibility in advocacy situations, for example, where they have information that will be unavailable to others. And sometimes non-advocate lawyers may have a license to frustrate enforcement of an unjust law. Those who invoke Atticus Finch invariably fail to mention that he commits probably justified obstruction of justice in the last pages of the novel.”).

34. Schwartz, *supra* note 30, at 696.

35. *Id.*

36. *Id.*

37. *Id.* at 680, 685.

38. Judith A. McMorrow & Luke M. Scheuer, *The Moral Responsibility of the Corporate Lawyer*, 60 CATH. U.L. REV. 275, 277 (2010).

access to legal advice—we want lawyers to be able to tell these clients what their legal obligations are and how to comply with them. But if the client wants to act illegally after receiving such advice, we should do more to make sure that client does not have a lawyer's help. Below, I suggest changes to the ABA Rules to do this.

In the advocacy context, we accept the principle that it is better that ten guilty men go free than one innocent man be convicted.³⁹ We accordingly recognize that the advocate is entitled to represent and fully assist clients who *may* be guilty of breaking the law because we must give those clients a full and fair opportunity to defend the charge against them.

There is no reason we have to accept the same “err on the side of the lawbreaker” approach in the non-advocate context. In fact, we might think that having people comply with the law is so important that we might want to err the other way—that where clients want to do things that are just *arguably* illegal, a lawyer should not be entitled to help them. But, such a rule might deprive law-abiding people of legal advice and could encourage vague, overbroad legislation that deliberately creates grey zones of uncertainty within which no lawyer can venture. My proposal is more modest. I do not think a transactional lawyer should be allowed to help a client do something that the lawyer *reasonably believes* is illegal.

To the non-lawyer, telling a non-advocate lawyer she cannot help somebody do something she reasonably believes is illegal might not sound like a revolutionary idea. To the ABA, it apparently is. This brings us to the second problem. The current ABA Rules do not explicitly prohibit a lawyer from acting in those circumstances.⁴⁰ But, they should.

III. THE SECOND PROBLEM: WHAT THE ETHICAL RULES SAY (AND DON'T SAY)

There are no “bright lines” in the ABA Rules that clearly prohibit what the lawyers did in the Global Witness investigation. Law Professors John Leubsdorf and William H. Simon hinted as much in their ethical opinion⁴¹ provided to Global Witness, in which they stated their view that the lawyers' conduct⁴² was unethical, but that other lawyers may disagree.⁴³ As a result, they suggested “it would be desirable for the authorities to revise current doctrine to remove any ambiguity about how it applies to

39. SIR WILLIAM BLACKSTONE, *THE STUDENT'S BLACKSTONE: COMMENTARIES ON THE LAWS OF ENGLAND, IN FOUR BOOKS* 556 (John Murray, 1865).

40. See MRPC (2000).

41. Leubsdorf and Simon, *supra* note 8.

42. The opinion suggests Leubsdorf and Simon were only asked to review the interviews of 3 of the 12 lawyers Global Witness surreptitiously recorded.

43. Leubsdorf and Simon, *supra* note 8, at 1 and 3 (“Very likely, your investigator could have found other lawyers who would have behaved similarly. However, our opinion represents the most plausible understanding of the rules. . . . We note that the relevant doctrine contains ambiguities, and we do not expect that all lawyers will agree with us.”).

such conduct.”⁴⁴

These are some of the basic flaws in the ABA Rules not identified in Leubsdorf and Simon’s opinion:

1. The ABA Rules don’t clearly prohibit American lawyers from assisting a client in a breach of some foreign law.⁴⁵
2. A lawyer is not required by the ABA Rules to withdraw from representation unless the lawyer actually knows the client is breaking the law.⁴⁶ If the lawyer only reasonably believes that to be the case, the lawyer is entitled to continue acting on behalf of the client.⁴⁷
3. The ABA Rules don’t explicitly require the lawyer to ask more questions in suspicious circumstances.⁴⁸ At best, a fairly strained interpretation of the Rules might imply such a duty.

A. FAILURE TO DEFINE “LAW”

The first flaw is that the ABA Rules don’t explicitly prohibit an American lawyer from assisting a client with a scheme to break the law of a foreign jurisdiction, so long as the specific acts done in the United States don’t violate any U.S. law.⁴⁹ The ABA Model Rule 1.16 says:

- (a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
- (1) the representation will result in violation of the rules of professional conduct or other law⁵⁰. . . .

The ABA Rules do not define “other law.” An American lawyer, applying normal principles of extraterritoriality,⁵¹ would be justified in in-

44. Leubsdorf and Simon said this specifically about the lack of a clear statement that ethical rules apply to an initial interview before the lawyer is formally retained. As noted below, the Global Witness investigation revealed more problems than this with the current wording of the ABA Rules.

45. See MRPC (2000).

46. See MRPC R. 1.0(f), 1.16 cmt. 2.

47. See MRPC R. 1.0(h),(i).

48. See *infra* note 32.

49. They may implicitly, though, as Leubsdorf and Simon argued in their Global Witness opinion. Leubsdorf & Simon, *supra* note 8. Criminal conspiracy laws, and statutes like the Foreign Corrupt Practices Act or anti-money laundering legislation might also make the lawyer’s assistance in some cases illegal under U.S. Law, and therefore also prohibited by the ABA Model Rules. MRPC R. 1.2(d); see Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1–78dd-3 (2012); Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of Titles 12, 18, and 31 U.S.C.); USA Patriot Act of 2001 Pub. L. No. 107-56, 115 Stat. 278. (codified as amended in scattered sections of Titles 5, 8, 10, 12, 15, 18, 20, 21, 22, 28, 31, 42, 47, 49, and 50 U.S.C., and FRCRP). But the fact that so many lawyers interviewed by Global Witness were apparently willing to proceed despite these laws makes it obvious that these implied obligations are not catching lawyers’ attention.

50. MRPC R. 1.16(a)(1).

51. A deceptively simple example of the extraterritoriality principle in the interstate commerce context is the Supreme Court’s admonition that, “The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.” *Edgar v. Mite Corp.*, 457 U.S. 624, 642-43 (1982). See

terpreting the Rule as only obligating the lawyer to withdraw if the client's conduct involved a breach of *U.S. law*. Setting up a Delaware corporation is perfectly permissible under U.S. law. Under the intra-territorial view of the Rule, the American attorney is not prohibited from incorporating a Delaware company for a foreign client who intends to transfer assets to that corporation in violation of the law of some other country—of which the American attorney may be blissfully unaware.⁵² (My point isn't that this is what the ABA Rules *actually mean*, but rather that they are not clear one way or the other.) This might be one reason why the lawyers visited by Global Witness were able to convince themselves their conduct was not a violation of any ethical rules.

B. FAILURE TO REQUIRE DUE DILIGENCE ON RED FLAGS

The next problem is that the ABA Rules do not explicitly require a lawyer to dig deeper into facts that might indicate a breach of foreign or domestic law.⁵³ This might also have contributed to the apparent belief of the lawyers visited by Global Witness that they were free to advise the hypothetical African Minister about how to hide his "payments" without asking more questions.⁵⁴ The ABA Model Rules 1.2(d) and 1.0(f) say:

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

Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation* for a discussion of how extraterritoriality is much more complex than this. As such, a lawyer thinking not very carefully about the ABA Rule could easily conclude that a state bar rule framed in these terms would not be referring to the law of Germany when it uses the term "law, 85 MICH. L. REV. 1865, 1873-1880, 1884-1913 (1987); *see id.*

52. *See* MRPC R. 1.16 (1983).

53. The ABA suggests that the duty of competence requires a lawyer to be fully informed of all material facts, and that a failure to ask enough questions is a breach of this duty. ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Informal Op. 1470 (1981). That strikes me as a highly strained interpretation. The Rules might require a lawyer to find out more if it looks like the client may be about to break some U.S. law prospectively. *See* MRPC R. 1.1, 1.4(a)(5), but do not cover a prospective breach of foreign law (about which the U.S. lawyer is not qualified to advise) or require discovering the source of funds. If they did, the "Voluntary Good Practices" guidelines would not be necessary. *See infra* note 36. An advising lawyer might legitimately ask: "If a client wants to buy a convenience store business in Manhattan, then what possible relevance is there to the transaction that the client got the funds from his grandmother's will, or from winning the lottery, or from a drug deal?" The source of funds has nothing to do with how much due diligence to do on the landlord's title, what capital structure the company holding the store should have, what events of default might result in termination of the lease, or any other issue on which a purchaser's lawyer might advise. To be meaningful, a requirement for due diligence needs to be explicit, and can't be buried in a debatable interpretation of some other Rule. *See* ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981).

54. *See Lowering the Bar, supra* note 1.

of the law.⁵⁵

"Knowingly," "known," or "knows" denotes *actual knowledge* of the fact in question. A person's knowledge may be inferred from circumstances.⁵⁶

The ABA Rules also contain definitions of "reasonably believes" and "reasonably should know."⁵⁷ Although these definitions are almost unintelligible, their mere presence in the Rules demonstrates that "knows" is a different standard than, for example, "reasonably should know."⁵⁸ There is no question that the lawyers recorded by Global Witness *should have* known something fishy was going on, but there is no proof they *actually knew*—and the ABA Rules did not explicitly require them to find out.⁵⁹

The ABA Rules also make it clear that a mere suspicion of criminal activity is not enough to *require* the lawyer to withdraw—nor is a reasonable belief! This is what Rule 1.16(b) says:

- (b) . . . a lawyer *may* withdraw from representing a client if:
 - (2) the client persists in a course of action involving the lawyer's services that the lawyer *reasonably believes* is criminal or fraudulent;
 - (3) the client has used the lawyer's services to perpetrate a crime or fraud⁶⁰. . . .

Notice the most important words in this rule: "may" and "reasonably believes."⁶¹ The lawyer "may" withdraw—meaning that she also may not withdraw, and may continue to act.⁶² As Murray Schwartz puts it, "the provision that the lawyer may but need not withdraw necessarily implies that either decision is correct as a matter of professional as well as legal accountability."⁶³ And, this is so *even if* the lawyer "reasonably believes" the client is breaking the law.⁶⁴ As long as the lawyer doesn't "actually know" the client is breaking the law, she is not breaking Rule 1.2(d). It does not take much imagination to appreciate what kinds of mischief a lawyer governed by such a rule might get up to.

55. MRPC R. 1.2(d).

56. MRPC R. 1.0(f).

57. MRPC R. 1.0(i) ("‘Reasonable belief’ or ‘reasonably believes’ when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."), MRPC r. 1.0(j) ("‘Reasonably should know’ when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question."); see MRPC R. 1.0(h) ("‘Reasonable’ or ‘reasonably’ when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.").

58. See MRPC R. 1.0(h), (i), (j).

59. See *Lowering the Bar*, *supra* note 1; see also MRPC R. 1.16(b).

60. MRPC R. 1.16(b) (1983).

61. See *id.*

62. *Id.*

63. Schwartz, *supra* note 12, at 691.

64. See MRPC R. 1.16(b)(2) (1983).

The ABA has endorsed⁶⁵ a “Voluntary Good Practices Guidance” that is primarily intended to combat money laundering and terrorist financing.⁶⁶ This comprehensive guideline identifies the red flags that should cause a lawyer to ask more questions about what is going on, and recommends withdrawal if the lawyer does not get satisfactory answers.⁶⁷ But, they are non-binding, and are only “intended to serve as a resource that lawyers can use in developing their own voluntary approaches.”⁶⁸ What this communicates to the average lawyer is that it is something he doesn’t have to do. And many lawyers—steeped in the idea that they owe their client an advocate-like duty of loyalty—simply will not.

C. ABA RULES LIKELY PERMITTED WHAT THE GLOBAL WITNESS LAWYERS DID

Unfortunately, I disagree with Leubsdorf and Simon’s conclusion that the lawyers recorded by Global Witness violated explicit ethical rules.⁶⁹ What they offered to do was certainly “unethical” in the way that any non-lawyer would understand the term. But, this conduct was not explicitly prohibited by the ABA Rules.⁷⁰ Leubsdorf and Simon say that Rule 1.2(d)’s prohibition on knowingly assisting a client in illegal activity:

[E]ntails reasonable and good faith efforts to ascertain facts needed to determine the extent to which the assistance sought would further illegality. It also requires communicating clearly to a client, or to any prospective client that the lawyer advises, a refusal to assist in illegal

65. See ABA COMM. ON ETHICS & PROF’L RESPONSIBILITY, Formal Op. 463 (2013).

66. ABA H.D. Res. 116 (2010) (adopted) (adopting and recommending the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing report); ABA Task Force on Gatekeeper Reg. and the Prof., Sec. of Real Prop., Tr. & Est. Law, Sec. of Int’l Law, Sec. of Bus. Law, Sec. of Tax’n, Crim. Just. Sec., Am. College of Tr. & Est. Couns., Am. College of Real Est. Lawyers, Am. College of Mortg. Att’ys, and Am. Com. Fin. Lawyers, paper on Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing (2010) [hereinafter Good Practices Guidance], <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/116.authcheckdam.pdf>.

67. *Id.*

68. ABA COMM., *supra* note 65, at 2.

69. LEUBSDORF AND SIMON, *supra* note 8, at 1.

70. I am grateful to Professor William Simon for further explaining to me the basis of his contrary view: The duty of due diligence is one that courts have found implicit in the general law of fraud as applied to both lawyers and lay people. See, e.g., *United States v. Benjamin*, 328 F.2d 854, 862 (2d Cir. 1964), cert. denied, 377 U.S. 953 (1964). It would be odd if a lesser standard would apply to norms focused on people with exceptional expertise and public responsibility. Note also that the inquiry we think necessary to fulfill duties to the public would also be necessary to protect the client. No one doubts that lawyers should make inquiry needed to protect the client, though the rules don’t state that clearly either. E-mail from William H. Simon, Professor, Columbia Law School, Professor Emeritus, Stanford Law School, to author (Jan. 7, 2017) (on file with author). My point is that the ABA Model Rules do not make this clear (as demonstrated by the Panama Papers and Global Witness investigation), and in fact suggest otherwise by drawing a distinction between what lawyers “actually know” and what they “reasonably believe.” See MRPC R. 1.0(f), (h), (j) (1983). If anything, Simon’s argument further demonstrates that the ABA Model Rules need to be changed.

activity when it appears that the client or prospective client contemplates using the lawyer's services in such activity.⁷¹

While I agree that this is how lawyers should conduct themselves, I do not agree at all that the ABA Rules make this clear:

1. The ABA Rules do not explicitly prohibit helping a client to break foreign law—they do not say which law applies in determining whether a client's actions are “illegal activity” (to use Leubsdorf and Simon's terminology).⁷²
2. If the lawyer does not “actually know” that the client is breaking a U.S. law, the lawyer is not required to withdraw.⁷³ Even if the lawyer “reasonably believes” the client is breaking the law, the ABA Rules suggest the lawyer is free to continue to represent the client.
3. Unless an American lawyer is also qualified to practice in the foreign jurisdiction, she could never “actually know” that a client is breaking the law of that foreign jurisdiction.⁷⁴ It is arguable that an American lawyer, not qualified in the foreign jurisdiction, could not even “reasonably believe” that to be the case—at least not without an opinion to that effect from a foreign lawyer.
4. The ABA Rules do not explicitly require the lawyer to ask a client questions like: “How did you get this money?” or, “What will you do with your U.S. corporation after my work is done?” The ABA has described such questions as “voluntary.” Only by piecing together several other rules⁷⁵ could a lawyer conclude that the obligation to give competent advice arguably requires asking such questions and receiving complete and satisfactory answers.⁷⁶

71. LEUBSDORF AND SIMON, *supra* note 8, at 1.

72. *See supra* note 53.

73. *See* MRPC R. 1.16(b).

74. *See* MRPC R. 1.0(f), (j). *But cf.* MRPC R. 1.1 cmt. 2.

75. *See supra* note 53.

76. These problems are not unique to the ABA Model Rules. For example, The Federation of Law Societies of Canada's Model Code of Professional Conduct says that “a lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment.” MODEL CODE OF PROF'L CONDUCT R. 3.2-7 (Can.). The rule's commentary clearly requires lawyers to ask more questions, including verification of beneficial ownership and understanding the purpose of a transaction, “if a lawyer has suspicions or doubts about whether he or she might be assisting a client in dishonesty.” *Id.* at r. 3.2-7 cmt. 3. By using the term “dishonesty in this context,” the Canadian Model Code likely captures a broader range of conduct than the ABA Model Rules. But “dishonesty” is undefined, and “illegal conduct” does not explicitly include a breach of foreign law. As a European example, the Codex Ethicus for Icelandic Lawyers requires a lawyer to “act in accordance with true Laws and his conscience.” CODEX ETHICUS ART. 1 (Ice.). But neither the Codex nor the Act on Professional Lawyers deal with either the foreign law or reasonable belief problems. *See* CODEX ETHICUS (Ice.); Act on Prof'l Lawyers, No. 77/1999 (Ice. 1999) (as amended 2004) (public law regulating the legal profession in Iceland and establishing the Icelandic Bar Association). Also, the Council of Bars and Law Societies of Europe's Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers requires EU lawyers to comply with the professional obligations of other Member States when practicing cross-border in the EU. Code of Conduct for Eur. Lawyers r. 2.4 (Couns. of Bars & Law Soc'ys of Eur. 2007). But it too sheds no explicit light on either the foreign

No wonder ten out of the twelve lawyers interviewed by Global Witness thought they were free to help the fictitious African Minister.⁷⁷ No wonder people hate lawyers.

IV. HOW TO FIX THE ABA RULES

It is time to change the rules. Two simple changes to the ABA Rules would go a long way toward solving the problem exposed by Global Witness and the Panama Papers.

1. "Other law" in Rule 1.16(a)(1) should be defined to include foreign law. There is simply no excuse⁷⁸ for a lawyer knowingly helping a client to break the law of *any* jurisdiction. Doing so implies a cynicism and disrespect for the rule of law that demonstrates an unfitness to practice. The Rules should make this clear.
2. A non-advocate lawyer who reasonably believes⁷⁹ the client is breaking the law—of any jurisdiction—should be prohibited from acting. In the face of such a reasonable belief, the lawyer can ask more questions, and may, by doing so, get answers that change such a belief. But, if the lawyer's belief does not change (either because more facts simply confirm the reasonable belief, or because the client will not answer), the lawyer should be required to withdraw.⁸⁰

Each of these proposals is discussed below.

A. PROHIBITING ASSISTANCE IN A BREACH OF FOREIGN LAW

While it is defensible on moral and ethical grounds, a prohibition on non-advocates helping a client to break foreign law raises at least two practical issues. One is the scope of exceptions where the foreign law is itself immoral or unjust. Another is how far an American lawyer should have to go to ascertain the requirements of foreign law.

1. *Exceptions on Moral and Ethical Grounds*

It is not morally wrong for a non-advocate lawyer to help a client avoid

law or reasonable belief problems. (The case for requiring EU lawyers to not assist in breaching the law of another Member State is presumably fairly clear, even if not explicitly stated. But this is not so when clients may be involved in the breach of a law of a non-EU jurisdiction.) Finally, the International Bar Association's International Principles on Conduct for the Legal Profession also does not discuss either issue—even though each principle includes in its commentary a discussion of the cross-border implications of the relevant principle. See INT'L BAR ASS'N, *Int'l Principles on Conduct for the Legal Prof.* (2011).

77. See *Lowering the Bar*, *supra* note 1.

78. An exceptional case for unjust or immoral laws is discussed below. See *infra* Part IV (A)(1).

79. Another option—sure to be more controversial—would be a "reasonably ought to know" standard. I'm usually not in favor of such standards as they can invite the application of ex post facto law. Here such a rule would not advance the overall objective of ethical rules, which is to guide lawyers into ethical behavior.

80. See MRPC R. 1.16(b).

a law that is itself morally wrong.⁸¹ Any foreign law rule should make this clear. If a client is subject to discriminatory property laws that violate human rights, for example, an American lawyer should be entitled to help the client even if doing so will result in a breach of that foreign law.

One way to frame the exception might be to allow the American lawyer to help the client break a foreign law that, if it existed in America, would violate the client's civil or constitutional rights. Another might be to rely on the standards set by international human rights conventions to which the United States is a party, and permit the lawyer to assist a client in breaching foreign law that violates those standards. Whatever they are, such exceptions should be narrowly drawn and clearly expressed.

2. *How Far Should a Lawyer Have To Go?*

How far should a lawyer have to go in inquiring as to foreign law? There is no simple answer to this question. If the rules are too onerous—if for example they required an American lawyer to obtain a written formal legal opinion on every transaction involving a foreign client—transaction costs would increase to the point that many people would stop using lawyers. But, at the other end of the spectrum, simply asking the client, “Are you breaking the law of some other jurisdiction?,” is unlikely to be effective in all cases and would be unreasonable in at least some of them.

The Bar needs to develop some criteria for what constitutes a reasonable belief about foreign law—criteria that are flexible enough to accommodate a variety of circumstances, and practical enough that they don't bring the practice of law to a grinding halt. It might be that the more the client's actions look like they would be illegal if done in the United States, the higher the duty to inquire. Or, the “red flags” approach of the Voluntary Good Practices Guidance could be adapted to establish when and how far the non-advocate lawyer needs to go in ascertaining foreign law.⁸² This will not be easy. But, to reiterate, the current situation—where foreign law apparently does not enter into the equation at all—needs to change.

B. REQUIRING WITHDRAWAL UPON REASONABLE BELIEF IN ILLEGALITY

Actual knowledge—moral certainty—is a rare commodity in the day-to-day practice of law. Most lawyers operate in the realm of reasonable belief most of the time. As a result, telling lawyers that they only have an obligation to withdraw when they *actually know* the client is breaking the law is almost meaningless.

81. Leubsdorf and Simon acknowledge this exception in their Global Witness opinion: “It may sometimes be permissible to tell [clients] how to circumvent a law that is widely and in good faith considered unjust.” LEUBSDORF AND SIMON, *supra* note 8, at 2.

82. ABA, *Good Practices Guidance*, *supra* note 53.

If we changed the Rules, and told non-advocate lawyers that they can't act on the client's behalf in the face of a *reasonable belief* that their client is breaking the law, a lawyer in that situation can do one of two things. The lawyer can withdraw—leaving it to the client to try to convince some other lawyer he is not acting unlawfully. Or, the lawyer can ask more questions of the client—and maybe of the client's foreign lawyers—and see if his reasonable belief changes.⁸³

In the Global Witness example, further inquiry might have shown the payments made to the Minister to be not so suspicious after all.⁸⁴ For all we know, there could be some lawful local custom of gift-giving that renders the payments less suspicious. Or, the Minister's foreign lawyers might advise that a domestic law permitted the payments. Or, maybe the Minister's zeal to preserve secrecy arose not out of a desire to hide wrongdoing, but rather to protect his family from kidnappers. Or, maybe the Minister's representative misunderstood or mischaracterized the nature of the payments. So asking more questions might enable the lawyer to continue acting if he gets meaningful and satisfactory answers.

But, if the client refuses to provide more information—or if further information simply reinforces the reasonable belief that already exists—the non-advocate lawyer should be required to withdraw. This means that clients will not have access to legal services for certain types of transactions—specifically, transactions where competent lawyers reasonably believe the client is asking for the lawyer's help in breaking the law. Is this such a bad thing?⁸⁵ It certainly is not unheard of under the existing Rules—even in the advocacy context.⁸⁶ For example, an advocate cannot allow a client to mislead the court (through perjury or otherwise).⁸⁷ Even where we give the advocate a lot of room to maneuver within the principle of non-accountability, there are some lines that can't be crossed, which results in clients who want to cross them being unable to obtain legal representation. This tells us that the general principle that everyone should have access to competent legal advice should have limits.

V. WHAT WILL HAPPEN IF WE DON'T FIX THESE PROBLEMS?

It has become far too easy for lawyers to believe their principal role is to help their clients get around the law. The Panama Papers and the Global Witness Report lifted the curtain on this issue. The public now has proof of what they have long suspected: that non-advocate lawyers

83. The Good Practices Guidance might play a useful role here as they provide a template of questions the lawyer might ask to overcome a reasonable belief in illegality. See ABA, *Good Practices Guidance*, *supra* note 53.

84. See *Lowering the Bar*, *supra* note 1.

85. According to Schwartz it is not, but he also notes the contradictory views of Charles Fried and others. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 60 CALIF. L. REV. 669, 684-85, 693-95 (1978).

86. See, e.g., MRPC R. 3.3(a)(3), (b).

87. See *id.*

are not really entitled to the moral high ground to which they have retreated.⁸⁸ My fear is that if lawyers do not fix this problem themselves, it will be fixed for them in ways that seriously undermine the rule of law and the fundamental freedoms it protects.

An angry and increasingly “populist” public is much more likely to discard the principle of non-accountability altogether than it is to make fine distinctions between the roles of advocate and non-advocate.⁸⁹ This would seriously compromise the ability of advocates to zealously represent their clients.⁹⁰

And, while they are at it, the public may also decide that it is time to take away from lawyers the responsibility to make the rules by which they are governed.⁹¹ Would this be so bad? It would, although this may not be obvious to an angry public whose trust lawyers have squandered.

Let us think back to our fictional ideal advocate, Atticus Finch.⁹² Or, to a real-world example like John Adams, who successfully defended—against the weight of virulent public opinion—the British soldiers charged with murdering Adams’ fellow citizens in the so-called Boston Massacre.⁹³ There are countless others. One thing these great lawyers had in common was independence—from popular opinion, from established prejudices, and from the machinery of the state whose job it is to enforce the law.

An independent bar is a necessary condition for a free society governed by the rule of law.⁹⁴ If you don’t think that is so, just think for a minute about what Atticus Finch or John Adams—or any lawyer defending unpopular people or ideas today—might be required to do if they are regulated by the state, or by the same public in whose opinion their cause is so unpopular.

Of course there are risks with an independent bar. If lawyers could do *anything* without being subject to the same rules that apply to everyone else, they would become above the law. The very idea of one class of society being above the law is itself incompatible with the rule of law. What we need, then, is a way to maintain lawyers’ independence from state regulation, but without being independent of the law itself. This is the role of the ethical rules and principles that govern lawyers’ conduct. Through these rules, lawyers are supposed to become the servants of the legal system rather than its masters.

88. *See id.*

89. Compare MRPC R. 2.1, with MRPC R. 3.1, 3.3–3.5.

90. *See* MRPC R. 3.1 cmts. 1 & 2.

91. Anthony Infanti argues that this is already happening through media and other public condemnation of lawyers as a result of tax lawyers’ role in high profile corporate inversions. Antony C. Infanti, *Eyes Wide Shut: Surveying Erosion in the Professionalism of the Tax Bar*, 22 Va. Tax. Rev. 589, 602 (2003).

92. *See* Lee, *supra* note 10.

93. *John Adams and the Boston Massacre Trial of 1770*, LAW LIBRARY OF CONG. (last updated Jun. 9, 2015), https://www.loc.gov/law/help/rare-books/john_adams.php.

94. INT’L BAR ASS’N, *supra* note 15.

Who makes these ethical rules? The lawyers do. And they must if they are to maintain an independent bar. In some jurisdictions the judges make the rules, have a veto power over them, or a say in them.⁹⁵ The government typically has no role to play in regulating an independent bar. But, this could be changed—and will be if lawyers do not fix the problems discussed in this paper. Self-regulation is a privilege, not a right, and it can arguably be taken away by legislation.⁹⁶

Businesses are typically not allowed to be self-regulating—our underlying assumption is that we cannot trust a business to police itself because the business' sole or main objective is the pursuit of profit.⁹⁷ Lawyers were thought to be different because they have (and are supposed to recognize, and to enforce) a higher duty to society to uphold the law (typically expressed as a duty to the court) that ranks ahead of the duty to clients—and certainly ahead of the lawyer's pocketbook.⁹⁸ But, if that is no longer the case—and if lawyers are using their self-regulated status to justify helping clients to avoid their legal obligations—what is the rational or moral basis for allowing self-regulation to continue?

I really hope it does not come to this. I want to retain an independent bar. That is why I have written this paper.

VI. CONCLUSION

Lawyers need to be reminded that law is first and foremost a profession, not a mere business. It has become far too common for lawyers to put their clients' interests and their own financial interests ahead of their societal duty to uphold the law.

When this happens in court, a judge can rein in an advocate's inappropriate conduct. But, no one may ever know when it happens in a boardroom. We need ethical rules for non-advocate lawyers that will prevent them from helping those they reasonably believe are breaking the law—foreign or domestic. We can debate whether the current ABA Rules already do or do not prohibit what Global Witness caught some lawyers doing. Or we can just fix the Rules to make this clear.

As embarrassing as it is for lawyers, the great value of the Global Witness investigation is that in ethical matters, "Narrative reveals dimensions of events that rules cannot."⁹⁹ Now that the true dimensions of the gaps

95. Because advocates appear in court, judges can regulate their conduct regardless of what the ethical rules say or even in the absence of such rules. This is not the case for non-advocate lawyers.

96. I say arguably because there may be constitutional limits on the state's ability to interfere with the independence of the bar. See *Canada (Att'y Gen.) v. Fed'n of Law Soc'ys*, [2015] 1 S.C.R. 401 (Can.) (constitutional challenge to the application of anti-money laundering and anti-terrorist financing legislation to the legal profession). But I would not recommend that lawyers ignore an obvious problem just to see how far they can push the limits of this principle. It would be far better to fix the problem now, before any government tries to fix it for us.

97. MRPC Preamble ¶¶ 1, 6.

98. *Id.*

99. *Hazard, supra* note 13, at 396.

in the ABA Rules have been made clear, let us do something about it before it is too late.