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Comment

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It is a welcome opportunity to comment on Professor Morgan's thoughtful exposition.[1] I agree with the three basic standards of counselling that he posits.[2] However, Professor Morgan's formulation of the first two standards masks difficulties that may be worth bringing into focus. When account is taken of these difficulties, Professor Morgan's formulation ultimately may be agreeable primarily because of the general terms in which it is cast. At this level of generality, it would be hard for anyone to disagree, even those whose views may be as different as Professors Freedman,[3] Luban,[4] and Simon.[5] At the same time, the formulation of Professor Morgan's third standard may be too narrow.

According to Professor Morgan's first standard, a lawyer's "professional function" is to assist a client to "take appropriate advantage of lawful opportunities."[6] For the moment, let us ignore the meanings pregnant in the term "appropriate." Thus simplified, Morgan asserts that a lawyer "may" assist a client in pursuing lawful opportunities. This general formulation raises the issue of whether Morgan uses the term "may" to refer consistently to norms emanating from the same normative order as the term "lawful."

Let me first explain the term "normative order." All of us act within several simultaneously coexisting normative orders, and for each of us these orders are concentric upon one's self as a specific individual. One normative order is the law, meaning the positive law of the polity of which we are residents. For lawyers, standards emanating from the legal order include the Rules of Professional Conduct governing lawyers.[7] Other legal standards include the statutory prohi-

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1. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439 (1990).

2. *Id.* at 445.

3. Professor Monroe Freedman is currently the Howard Lichtenstein Distinguished Professor Legal Ethics at Hofstra University School of Law. AALS DIRECTORY OF LAW TEACHERS 341 (1990).

4. Professor David Luban is currently a professor of jurisprudence at the University of Maryland School of Law. *Id.* at 541-42.

5. Professor William Simon is currently a professor of law at Stanford University. *Id.* at 760.

6. *See* Morgan, *supra* note 1, at 445.

7. *See generally* MODEL RULES OF PROFESSIONAL CONDUCT (1983) (setting forth rules of professional conduct for attorneys).

bition on mail fraud[8] and as Professor Morgan notes, the common law concerning agency.[9]

A second normative order for a lawyer is the professional ethic prevailing in the group of lawyers with whom the particular lawyer identifies. The legal profession is extremely heterogeneous. The lawyer in the "elite" big-firm practice in a specific city may define this role in different ways than the small-firm practitioners within the same city, or than a lawyer in big-firm practice in another city. The definition of one's peer group within the profession has not only functional dimensions but normative ones as well. A normative standard recognized within a particular professional peer group may require a more or less exacting standard than what the law specifies. For example, in one professional peer group it may be impermissible to take a default judgment against an opposing lawyer without a warning telephone call, even though the standard of the law clearly allows a lawyer to do so without such a warning.

The drafters of the Model Code of Professional Responsibility (the Code) took some notice of this problem.[10] Indeed, at least one provision of the Code incorporates a local professional standard by reference, making it a legal standard as well. Disciplinary Rule 7-106(C)(5) provides: "[A lawyer shall not] [f]ail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply."[11]

A third normative order for many lawyers emanates from the religious group with which the lawyer is affiliated. This normative order may impose more exacting standards upon the lawyer than those of either the law or the lawyer's peer reference group. For example, the religious group may strongly condemn "taking advantage" of others. Such a restriction may be subject to a subcategorization, however, so that it operates differently when applied to "coreligionists" rather than to "outsiders."

Another normative order is the lawyer's personal moral system. The terms of this order are revealed in such expressions as, "I don't care. I'm not going to do it."

Professor Morgan's standard suggests that a lawyer "may" assist a client in taking advantage of lawful opportunities.[12] If the normative

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8. *See, e.g.*, 18 U.S.C. § 1341 (1990) (general federal mail fraud statute).

9. Morgan, *supra* note 1, at 456-57.

10. *See generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) (setting forth rules of professional conduct for attorneys).

11. *Id.* DR 7-106(c)(5).

12. Morgan, *supra* note 1, at 446-47.

order referred to is the law, then Professor Morgan proposes that the law permits a lawyer to assist a client in pursuing lawful opportunities. So interpreted, the proposition is simply a statement of law and as such is perhaps a tautology. I doubt that either Professor Freedman or Professor Simon would disagree with the statement, as put in such general terms.

However, the term "may" might not refer to the normative order of the law, but rather to another normative order such as one of those described above. If the law of civil procedure permits a default judgment to be taken without a warning telephone call to an opposing attorney, but the norm recognized in the lawyer's reference group prohibits such action, then the term "may" in Professor Morgan's standard has at least two possible meanings. Hence, it would be a matter of uncertainty and possible dispute whether taking a default judgment without a warning telephone call is something a lawyer properly "may" do for a client. In a professional peer group that regarded the group's normative order as binding, despite the latitude afforded by the law, a lawyer "may" *not* proceed unless adhering to the convention requiring the telephone call. Using this interpretation, then, Professor Morgan's proposition would be wrong, or at least ambiguous.

This ambiguity can be explicated more fully if we consider the justification that might be offered by a lawyer who felt bound by the local convention concerning default judgments. He simply might say, " 'May' doesn't mean 'must,' and I have professional discretion to refrain from taking full advantage of an opposing lawyer's lapse." This protestation may be met with the response, "Aha! You pull your punches, do you?" Such a response could elicit a more carefully framed rejoinder: "That sort of thing is not done in this legal community." The lawyer might then start rummaging around in Professor Morgan's formulation, ascertain that the term "professional" modifies "function of a lawyer" and that "appropriate" modifies "advantage."[13] Solid ground at last. The lawyer would say, relying on Professor Morgan's standard, that while it may be "lawful" to take a default judgment without a warning telephone call, it is not "professional" or "appropriate."

The same analysis applies to differences between the norms of the legal order and the norms of a religious group to which the lawyer belongs, or the norms of the lawyer's personal moral standards.

Now, if such is the structure of the normative orders in which the lawyer is situated, and if one accepts that the non-legal normative

13. *See id.* at 445.

orders have precedence in a specific case, then it is coherent to assert that a lawyer may not pursue a lawful advantage for his client. On the other hand, if the non-legal order does not have precedence, then the command of the law is clear enough and the lawyer may take the default. Furthermore, in the absence of some superseding group or personal norm, it is difficult to see why the lawyer is not "obliged" to take the default judgment. The norm of the law allows the lawyer to do so, and the norms of both the law and professional ethics require the lawyer to use best efforts in assisting the client. As stated in comment (1) to Rule 1.3 of the Model Rules of Professional Conduct, "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. . . ."[14]

In any event, the discourse about what a lawyer "may" do is not simply about the legal norms that govern the lawyer's conduct. Rather, the discussion addresses the relationship between a legal norm (default judgments may be taken without a telephone call) and a norm emanating from some other normative order, such as that in the lawyer's peer group or in the lawyer's personal moral system.

If this analysis is correct, then it could clarify discussion of the tensions between "law" and "morality." Moreover, it should be observed that the term "law" is ambiguous. "Law" can denote either the positive law or some normative order that obtains legal status within the legal profession or some segment of it. The term "morality" is also ambiguous. It may refer to such things as community mores, an individual's personal morality, or the ethical standards of some designated group of right-thinking good citizens.

Essentially, a similar analysis can be applied to Professor Morgan's second standard. This standard states that a lawyer should do no more harm to a third party than "reasonably required" in the "legitimate service" of the client's interests.[15] As Professor Morgan demonstrates, the law itself imposes important limitations on the harm that a lawyer may inflict on third persons. These limitations may not be as exacting as critics of the law wish. There are legitimate questions as to what the law is and what it might become, and there is surely room to say that the law ought to exact more from lawyers than it does currently.

That said, however, the law will never be coextensive with "morals," however defined. Only in the wildest utopian fantasies or the

14. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 comment (1) (1983).
15. Morgan, *supra* note 1, at 445.

most frightening Orwellian nightmares can we imagine that the law should come to ordain what moralists say we should do unto one another. To occupy the domain of morality, the law would have to probe our innermost knowledge. Experience with witch hunts and Stalinism suggests that law cannot achieve that ambition and that it should forego attempting to do so. It is equally improbable that the law's normative order will correspond to the norms of various subgroups within society — the legal profession, the business community, the feminist community, and the academic community. Thus, what the law regards as "reasonable" incidental harm, by Professor Morgan's standard, is unlikely to conform perfectly to the standard emanating from any other normative order — professional, religious, or personal.

If "reasonably required" refers to lawfully permissible harm to third parties, Professor Morgan's standard is again a legal truism. The law's mandate to minimize harm to the third party indeed is simply the reciprocal of the mandate to maximize benefit to the client only within the limits of the law. Of course, there may be disagreement as to what the law permits or should permit. For example, arguably the statute of limitations could be abolished or replaced by the equitable concept of laches. But clearly that is not what critics mean when they say that a lawyer should not plead the statute of limitations against a just debt. What they must mean is that pleading the statute of limitations inflicts more harm on the creditor than is permitted by some normative order other than the law.

Rarely is the identity of this alternative normative order clearly specified. Perhaps it is that of all right-thinking good citizens. Maybe it is simply the personal morality of the speaker. In any case, the subject of the discourse is the discrepancy between what positive law permits in the way of incidental harm to third party interests and what some alternative normative regime permits. The first step in the inquiry is to identify the normative order being referred to when it is said that the law's norm is unfair. When this normative order has been identified, the next question is whether the non-legal norm should supersede or "trump" the legal norm governing the lawyer and, if so, under what circumstances. This is a very complicated problem, more so than there is opportunity to explore here. However, factors in an answer would seem to me to include the following:

> — In deciding what a lawyer properly may do for a client, there are cases where a lawyer should submit to the dictates of individual conscience and avoid finding guidance only in what the law prescribes.
> — In deciding what a lawyer properly may do for a client,

there are cases where a lawyer should submit to the dictates of the law and not place reliance on what individual conscience prescribes.
— In resolving either of the foregoing dilemmas, the lawyer should consider not only his or her individual identity as a "lawyer" but also the lawyer's specific personal and societal identity. The lawyer should also consider the corresponding characteristics of the client.

The convention is that the "rules of professional ethics" apply to all lawyers, regardless of their identity, situation in practice, or place in the larger societal milieu. Of course, the legal norms of professional conduct apply to all lawyers, regardless of identity or situation. It does not follow, however, that the other normative orders in which lawyers find themselves are all the same or speak with one voice. To the contrary, such other normative orders differ from each other and conflict with the dictates of the law in a wide range of circumstances. To understand the nature of these conflicts, the beginning point is to identify and articulate the content of the other normative orders by which the lawyer is circumscribed.

As for Professor Morgan's third standard, one may accept that a lawyer should exhibit "empathy, respect, and practical wisdom" toward a client.[16] However, I wonder why these qualities should be exhibited only toward clients. Allowance, of course, should be made for the differences in the responsibilities that a lawyer owes to clients as compared with the duties owed to "others." Those differences, however, presumably are covered by Professor Morgan's first two standards. Assuming compliance with those standards, why should not a lawyer's "empathy, respect, and practical wisdom" extend to adversaries, both opposing parties and professional opposite numbers? That surely is not unthinkable. Indeed, Ethical Consideration 7-10 of the Model Code of Professional Responsibility states: "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."[17]

Perhaps division over this last proposition may underlie the divisions over other issues of lawyer "professionalism."

16. *Id.*
17. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10 (1980).