

Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism

Scott R. Peppet*

ABSTRACT: This Article combines contractarian economics and traditional ethical theory to argue for a radical revision of the legal profession's codes of ethics. That revision would end the legal profession as we know it—one profession, regulated by one set of ethical rules that apply to all lawyers regardless of circumstance. It would replace the existing uniform conception of the lawyer's role with a more heterogeneous profession in which lawyers and clients could contractually choose the ethical obligations under which they wanted to operate. This "contract model" of legal ethics, in which lawyers could opt in and out of various ethical constraints, would lead to greater efficiencies, greater satisfaction for attorneys and clients, and greater vitality for the legal profession.

* Associate Professor of Law, University of Colorado School of Law. I wish to thank Ian Ayres, Jennifer Gerarda Brown, Michael Moffitt, William Simon and W. Bradley Wendel for their excellent comments, as well as the participants in the University of Colorado's faculty writing workshop and the Quinnipiac-Yale Law School Dispute Resolution Workshop for their suggestions. Thanks also to my able research assistants Melissa Bast and Justin Konrad.

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I. INTRODUCTION

Consider the following hypothetical. Two lawyers are about to negotiate the settlement of a medical malpractice claim. They have not worked together before, and their clients—an anesthesiologist and a patient that the anesthesiologist met only briefly in the operating room—do not know each other well. Aware that the legal ethics standards in their jurisdiction permit a great deal of adversarial posturing, bluffing, and even outright misrepresentation,¹ the lawyers (and their clients) worry that their discussions will quickly devolve into adversarial and inefficient hard-bargaining. Each knows that an honest and collaborative negotiation will likely produce better results with lower transaction costs, but each also fears exploitation by a deceptive adversary.

These lawyers face a fundamental game theoretic problem that has long challenged economists, game theorists and legal scholars: how bargainers can sort honest collaborators from manipulative adversaries.² If two negotiating parties can signal credibly a commitment to collaborate, they increase the odds of reaching a satisfactory negotiated outcome. But clients are often strangers, and lawyers today practice in a large and increasingly diverse bar that is spread across the globe. Although pockets of practice certainly exist in which attorneys and clients know their adversaries, modern practice often necessitates dealing with unknown counterparts. Absent prior experience with each other or information about each others' reputations, how can legal negotiators distinguish collaborators from dishonest adversaries?

This Article argues that the legal profession's ethics codes could, and should, help lawyers and clients solve this sorting problem. It makes the case for reforming our legal ethics codes to permit lawyers and clients to "opt in" to heightened bargaining ethics standards through contracts that trigger new, aspirational code provisions. For example, imagine that, prior to their negotiations, the lawyers and clients in this medical malpractice situation sign an agreement on *how* they will bargain. The agreement supplements both contract law and the ethics codes in their jurisdiction by requiring good-faith bargaining and the full disclosure of material facts and law, and by forbidding even those misrepresentations permitted under the *Model Rules of Professional Conduct*.³ By contracting for this heightened standard, the clients expose themselves to contract damages if they violate the agreement. In addition, however, the lawyers stake their licenses on collaborating honestly. Assuming that violation of their agreement could lead to

1. See *infra* Part III.

2. See *infra* Part II.

3. See *infra* Part III.

disciplinary sanctions, this high-stakes signal might lend credibility to their stated desire to avoid dishonest tactics.

These parties are turning to contract to try to solve the bargainer's sorting problem. They intend to invoke the legal profession's disciplinary process through private agreement. Under existing legal ethics codes, however, their effort will clearly fail. No state ethics code would recognize such an agreement, nor would disciplinary counsel prosecute violations of such a contract. Indeed, existing ethics codes might discourage a lawyer from entering into such a contract—for fear that the agreement creates a conflict of interest by obligating the attorney to his client's adversary. This response reflects the Dominant Approach to legal ethics that has long held sway over the profession. The Dominant Approach contends, in essence, that there is one uniform legal profession that must be guided by one uniform set of ethical rules and principles, and that those rules and principles must protect the ideal of the lawyer as adversarial advocate.⁴

This Article argues for a new and very different conception of legal ethics, which I call the “contract model” of legal ethics. It uses the bargainer's sorting problem, and this medical malpractice example, to illustrate the deficiencies of the Dominant Approach (and of existing critiques of that approach). The current *Model Rules* set one ethical standard for all negotiating lawyers—a permissive standard that many lawyers may find disagreeable.⁵ The contract model of legal ethics would reform the *Model Rules* to allow lawyers to choose their bargaining ethics—and subject themselves to public discipline for failing to live up to those choices.

The Article draws from recent scholarship that has extended Coasian or contractarian law and economics to the analysis of legal ethics.⁶ Contractarian economics has had pervasive influence on such contexts as contract law,⁷ corporate law,⁸ and securities regulation,⁹ and scholars have begun to apply this perspective to the regulation of the legal profession.¹⁰ In

4. See *infra* Part III.A (discussing the Dominant Approach).

5. See *infra* Part IV.

6. See *infra* Part IV.

7. See generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

8. See generally, e.g., Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989).

9. See generally, e.g., Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998).

10. See, e.g., Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665 (2001) (applying law and economics analysis to the *Model Rules of Professional Conduct*); see also Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998) (discussing confidentiality); Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1752–53 (1998) (arguing that many ethics rules should be default rules rather than immutable rules).

I have also applied this approach to the field of mediation ethics, arguing that contractarian law and economics can shed light on that developing area. Scott R. Peppet,

general, contractarian analysis suggests that the legal ethics codes can be overly rigid and uniform. In exploring conflict of interest rules and confidentiality regulations, for example, contractarian scholars have argued that lawyers and clients might benefit from being able to tailor their ethical obligations by “opting in” or “opting out” of professional obligations.¹¹ To date, however, there has been no contractarian analysis of the legal ethics rules that regulate lawyers’ private bargaining.¹²

There is a reason that the ethics rules governing bargaining ethics have so far escaped unscathed. The minimalist way in which we currently regulate bargaining is one of the most powerful expressions of the profession’s conception of the lawyer as adversarial advocate. To reform bargaining ethics is to end the profession as we know it. This Article, therefore, is not merely an application of contractarian economics to bargaining ethics. It is more normatively ambitious. The Article seeks to connect contractarian analysis to more traditional legal ethics theory—to the central normative lessons that can be drawn from the Dominant Approach and from that approach’s critics. Thus, the contract model articulated here does not grant lawyers and clients absolute freedom to tailor the profession’s ethics through contract. Instead, the contract model would bound that freedom by modifying the profession’s ethics codes to permit “opting in” only to varied, but specified, rule sets that the bar pre-determines it can, and should be willing to, enforce.¹³ These rule sets would essentially bifurcate the legal profession by creating an easy mechanism for lawyers and clients to self-designate as more collaborative and forthcoming than traditional attorneys.

The Article proceeds as follows. Part II focuses on the specific bargaining problem presented in this malpractice hypothetical—how negotiators can efficiently sort honest collaborators from deceptive hard-bargainers. It first reviews existing attempts to solve this problem, and demonstrates that none suffice. Part III then surveys the existing ethics rules related to legal negotiation, and argues that these rules are unhelpful to practicing attorneys facing this problem. It asks why a new approach to legal ethics is necessary. It explores the Dominant Approach to legal ethics and the dominant critiques of that approach.¹⁴ It then critiques these existing approaches to legal ethics, arguing for a more pluralistic, contract-based model.

Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation, 82 TEX. L. REV. 227, 275–85 (2003).

11. See *infra* Part IV.

12. Some have hinted at such an approach. Richard Painter, in particular, has applied contractarian analysis to bargaining between law firms and public regulators. See *infra* notes 175–82 and accompanying text (discussing William Simon and Richard Painter).

13. See *infra* Part IV.

14. See *infra* Part III.

Part IV then turns to the central argument of the Article—that the profession needs a new, contract-based model of legal ethics. This approach to legal ethics addresses some of the profession’s oldest and most vexing problems. These include the problem of context (how the profession can best accommodate the heterogeneity of legal practice areas), the problem of moral activism (whether and how much lawyers should assert their own moral beliefs in client relationships), the problem of client autonomy (how attorneys and the legal profession can best respect the autonomy of those that interact with the legal system), and the problem of role morality (whether a person’s role as an attorney excuses actions that otherwise would be morally questionable). The contract model takes a new approach to these problems by striking a balance between the profession’s traditional fetishizing of uniform professional rules and the alternative of permitting unfettered ethical discretion by individual lawyers. It is based on two fundamental premises: (1) that the profession’s ethical rules and enforcement mechanisms matter, but (2) that those rules should be sufficiently flexible to facilitate heterogeneity in the profession and ethical decision-making by lawyers and their clients. At its core, the contract model prioritizes giving attorneys and clients autonomy to choose their own normative space for legal practice, while simultaneously retaining some control for the profession over the structure and enforcement of that space. After discussing the general contours of the contract model of legal ethics, Part IV uses that discussion to propose specific modifications to the *Model Rules of Professional Conduct* dealing with attorney behavior in legal negotiations.

Part V then abstracts from this specific example to discuss the implications of the contract model for the profession and for legal ethics. It argues that the contract model respects the autonomy of lawyers and clients more than existing approaches to legal ethics, and that it introduces more significant moral choice into a lawyer’s practice. Part V also discusses some of the problems inherent in the contract model. It ultimately concludes, however, that the contract model offers a new opportunity for the profession to experiment with and invigorate its commitment to legal ethics.

II. THE PROBLEM: SORTING THE COLLABORATORS FROM THE SHARPIES

A. THE COLLABORATOR’S SORTING PROBLEM

Negotiation can be roughly analogized to the famous Prisoner’s Dilemma game.¹⁵ If two negotiators collaborate and share information

15. For an explanation of the Prisoner’s Dilemma game, see generally WILLIAM POUNDSTONE, *PRISONER’S DILEMMA* 101 (1992); ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* 27–30 (1989). For a useful discussion of the analogy between negotiation and the Prisoner’s Dilemma game, see RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 238–39 (2002).

openly (they “cooperate” in the game), they can each benefit. Their ability to trust one another often will facilitate finding mutually advantageous or “joint gain” solutions, and they are thus likely to reach more economically beneficial bargaining outcomes than they would if forced to deal with a hard-bargaining counterpart. Conversely, two hard-bargainers (or “defectors” in a Prisoner’s Dilemma game) may each suffer. They may engage in difficult and adversarial tactics that increase transaction costs, decrease the odds of settlement, and lessen the chance of finding joint gains.

If a hard-bargainer meets a naïve collaborator, however, the hard-bargainer may be able to exploit her counterpart for personal gain. There is little doubt, for example, that negotiators have incentive to lie. Many hard-bargaining or adversarial tactics derive their power largely from deception.¹⁶ As anyone who has negotiated knows, “lying can be highly effective . . . [it] offers significant distributive advantages to the liar.”¹⁷ In Prisoner’s Dilemma terms, the hard-bargainer defects by lying and thereby increases her personal payoff.¹⁸

Deception only works if undetected, however, and therefore deceivers try to appear trustworthy and forthright. In game-theoretic terms, such second-level deception (i.e., deception about deception) creates a sorting or signaling problem.¹⁹ A negotiator must try to determine the “type” of her counterpart—is the counterpart an honest, collaborative type or a more hard-bargaining, deceptive type? The counterpart, meanwhile, may be sending off misleading signals about his type. He may present himself as a collaborative, honest type in order to mask that he actually plans to deceive for personal gain.

This is one of the most basic bargaining problems. To the extent that parties can separate out, *ex ante*, honest collaborators from deceptive hard-

16. See Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 48–52 (1985) (reviewing hard bargaining tactics); Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 346–48 (same). See generally Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1 (1987) (discussing various tactics and ultimately condemning all forms of deception in bargaining).

17. Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1230 (1990); see also Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 35–36 (2000) (“Sadly, it appears that lying in negotiations occurs frequently—often to the great advantage of the liar.”). I do not mean to suggest that undetected lying necessarily is advantageous. There are certainly moral consequences to such lies, and there can also be practical consequences (increased guilt, increased tension within a relationship, etc.). Nevertheless, I will largely assume here that undetected lying offers distributive advantages in many negotiations, and, therefore, can tempt lawyers and clients.

18. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 515 (1994) (labeling this the sucker’s payoff).

19. DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 122–42 (1994).

bargainers, collaborators will seek out other collaborators. By avoiding hard bargainers whenever possible, collaborators will avoid the possibility of exploitation and increase the likelihood of a successful negotiation. Unfortunately, it may be difficult or impossible to be certain about a counterpart's type. As William Simon has put it, often "honest parties can't distinguish sharpies from other honest parties."²⁰

This uncertainty imposes costs. To the extent that a party *cannot* sort collaborators from sharpies, she will enter a negotiation with trepidation. If she treats an undetectable sharpie as an honest collaborator, a negotiator may fare badly. As a result, she may choose to defend herself by limiting herself to "safe" strategies that protect against exploitation. She may withhold information about her needs and priorities from the other side, for fear that her counterpart will try to use that information to extract concessions.²¹ Much research shows that this can lead to failed negotiations—the negotiating parties may not reach agreement even though an agreement is possible.²² Research also shows that such trepidation may cause Pareto-inefficient outcomes²³—the parties may reach a deal, but it may not be the most economically beneficial deal possible.²⁴ In short, negotiators

20. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 209 (1998); *see also* William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 652–54 (2003) (renewing this discussion).

21. *See* MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 72–76 (1992) (discussing obstacles to integrative negotiations); DAVID A. LAX & JAMES K. SEBENIUS, *MANAGER AS NEGOTIATOR* 172–73 (1986) (noting that negotiators are "reluctant to reveal their preferences and beliefs because they fear that such disclosures will be exploited"); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 12–23 (2000) (discussing tension between creating and distributing value). Empirical studies show that negotiators both seek and provide far less information about each others' interests and priorities than one might expect. *See, e.g.*, Leigh L. Thompson, *Information Exchange in Negotiation*, 27 J. EXPERIMENTAL SOC. PSYCHOL. 161, 177 (1991) ("[T]hese findings suggest that information exchange is difficult to elicit in negotiation and that negotiators may even resist or avoid information exchange.").

22. HOWARD RAIFFA ET AL., *NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING* 273–74 (2002) (describing studies of how parties leave gains from trade on the table because of strategic behavior); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 972–77 (1979) (discussing strategic behavior).

23. An agreement is Pareto-efficient if there is no other possible agreement that can make one party better off without making another party worse off. *See, e.g.*, HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 156–64 (1982) (discussing Pareto efficiency in negotiations).

24. Asymmetric information models of strategic behavior indicate that inefficiency is a common outcome. *See* Joseph Farrell, *Information and the Coase Theorem*, J. ECON. PERSP., Fall 1987, at 113, 113; *see also* Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 23 (1982) (noting that strategic behavior over dividing the pie may inhibit Coasian bargaining); Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 384 (1999) (suggesting that parties do not bargain after judgment, contrary to the Coase theorem). Psychological research also indicates that subjects sometimes arrive at "lose-lose" outcomes. *See, e.g.*, Leigh Thompson & Dennis Hrebec, *Lose-Lose Agreements in Interdependent Decision Making*, 120 PSYCHOL. BULL. 396, 406 (1996) (reporting that lose-lose

live in fear of exploitation by others, that fear hampers strategy choices, and those strategy choices may then lead to suboptimal outcomes.

B. *THREE PARTIAL, BUT COMPROMISED, ATTEMPTS TO SOLVE
THE SORTING PROBLEM IN LEGAL NEGOTIATIONS*

In *legal* negotiations, lawyers and clients clearly struggle with the sorting problem. Litigators settling disputes engage in all manner of defensive, and inefficient, tactics to protect their clients against the possibility of exploitation. One study found, for example, that although a majority of surveyed lawyers wanted to negotiate in a more collaborative, honest, open manner, a majority also employed hard-bargaining tactics instead.²⁵ This suggests that lawyers understand the strategic difficulties of trying to collaborate with an uncertain adversary, and they default to safer—and more adversarial—approaches. Transactional lawyers closing deals face similar challenges. If two transactional attorneys do not know each other, they may waste a great deal of time, money, and effort on verifying each other's representations, drafting complex contracts that hedge against the risk of exploitation, and generally trying to protect against the possibility that they are dealing with a sharpie.

To solve the collaborator's sorting problem, legal negotiators—whether lawyers or clients—must be able to signal credibly a commitment to collaborate. But what type of signal will work?

Economists and game theorists have long debated this question.²⁶ Effective signals must be clear and credible. Credibility depends on the signal being costly for the actor, or impossible to mimic or revoke. For

outcomes occurred twenty percent of the time in a study of over five thousand subjects negotiating a simulation in which they had compatible preferences). Other studies indicate the opposite. Some experimental studies show that parties generally reach efficient outcomes, although they may not distribute the gains from trade evenly. Elizabeth Hoffman & Matthew L. Spitzer, *The Coase Theorem: Some Experimental Tests*, 25 J.L. & ECON. 73, 91–95 (1982); J. Keith Murnighan et al., *The Information Dilemma in Negotiations: Effects of Experience, Incentives, and Integrative Potential*, 10 INT'L J. CONFLICT MGMT. 313, 331–32 (1999).

25. See Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want,"* 12 OHIO ST. J. ON DISP. RESOL. 253, 255 (1997) (finding that seventy-one percent of attorneys adopted a positional or hard-bargaining strategy, even though sixty-one percent thought that problem-solving or collaborative strategies should be used more often). See generally Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002) (testing efficacy and incidence of problem-solving and other strategies).

26. For the classic discussion of signaling, see generally A.M. SPENCE, *MARKET SIGNALING: INFORMATIONAL TRANSFER IN HIRING AND RELATED SCREENING PROCESSES* (1974). For a general discussion of signaling and the sorting problem, see Peter C. Cramton, *Strategic Delay in Bargaining with Two-Sided Uncertainty*, 59 REV. ECON. STUDY 205, 205 (1992) (discussing signaling); Vincent P. Crawford, *Explicit Communication and Bargaining Outcomes*, 80 AM. ECON. REV. 213, 213–17 (1990) (comparing literature on tacit communication in bargaining to scholarship on explicit signals and cheap talk).

example, if two drivers are playing a game of chicken by driving their cars straight at each other to see who will turn first, one driver can credibly signal her intention to win by throwing her steering wheel out the window.²⁷ This signals that she will not swerve first in a far more credible way than were she simply to swear to her intention to stay the course.²⁸

This Part analyzes three possible signaling solutions to the bargainer's sorting problem in the legal context. First, Ronald Gilson and Robert Mnookin have argued for a reputational solution.²⁹ Although few parties litigate against each other repeatedly, lawyers sometimes do. As a result, an attorney may earn a reputation as a collaborator—or as a hard-bargainer. The reputational markets within the legal profession may allow a client to signal a desire to collaborate by hiring an attorney known to be cooperative. In effect, an attorney can lend his collaborative reputation to his client, thereby solving the sorting problem for the client.³⁰

Second, the new “Collaborative Law” movement has taken another approach in the family law context.³¹ In Collaborative Law, lawyers and clients pledge *ex ante* that if they cannot settle their clients' divorce, the lawyers will withdraw and the clients will have to retain new counsel to litigate. In other words, the lawyers post a bond as a signal of their commitment to collaborate. If they cannot settle the case, they are out.

Finally, some practitioners have tried a third approach: promising through contract to disclose all relevant information, abstain from misrepresentations, and negotiate in good faith.³² Although it may sound farfetched to imagine two lawyers contracting with each other, and their clients, to be honest and forthright in their negotiations, it is an increasingly common occurrence in legal practice.

This Part explores these three attempts to solve the bargainer's sorting problem, and why each is in some way inadequate. It argues that each of these approaches ultimately depends on lawyers or clients knowing each other and being able to sort based on reputation. None is likely to work in contexts devoid of reputational information. In other words, none is likely to

27. See generally THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (1960) (discussing credible commitment strategies). I am indebted to Roger Fisher for this example.

28. Talk is cheap. For an introduction to the cheap-talk literature, see ROBERT GIBBONS, *GAME THEORY FOR APPLIED ECONOMISTS* 210–18 (1992), and Joseph Farrell & Matthew Rabin, *Cheap Talk*, 10 *J. ECON. PERSP.* 103 (1996).

29. See Gilson & Mnookin, *supra* note 18, at 514–15 (discussing litigation as a Prisoner's Dilemma). Economists have also considered the reputational solution. See, e.g., Jeong-Yoo Kim, *Cheap Talk and Reputation in Repeated Pretrial Negotiation*, 27 *RAND J. ECON.* 787, 788 (1996) (discussing reputational solutions to the sorting problem).

30. Recent empirical work indicates that this may in fact hold true in legal disputes. See Jason Scott Johnston & Joel Waldfogel, *Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation*, 31 *J. LEGAL STUD.* 39, 59 (2002).

31. See *infra* notes 39–58 and accompanying text.

32. See *infra* notes 59–78 and accompanying text.

help the majority of lawyers and clients in the majority of negotiations—including the medical malpractice example discussed in the Introduction. As will become clear in Part IV, I agree with the general idea of contracting to help resolve the collaborator's sorting problem. I argue here, however, that purely private contracts will be of little help outside of contexts—like family law—in which lawyers and clients are likely to know each other. As a result, this Part concludes by calling for a new approach to legal ethics that *can* aid lawyers and clients struggling with the sorting problem by permitting them to contractually trigger public code provisions and disciplinary sanctions.

1. The Gilson/Mnookin Reputational Solution

Game theorists have long assumed that repeat play can solve the sorting problem.³³ If two parties negotiate against each other repeatedly, they will build reputations, and those reputations will serve as signals. (Put differently, a negotiator invests in her collaborative reputation, and that investment serves as a bond on her intention to continue to collaborate.) Assuming that there is some risk of detection if an otherwise honest and collaborative negotiator cheats her counterpart, and that detection will damage her reputation, there is incentive to avoid cheating.

The problem is one-shot interactions. If two players are *not* going to see each other again, reciprocity is less relevant. And in a market with little repeat play, reputations may not develop that can aid in sorting. In the legal context, many litigating parties do not know each other. A tort plaintiff may have no prior relationship with the defendant who manufactured an allegedly defective product. The buyer of a business may not know the seller. In short, many legal negotiations are one-shot.

In a seminal article, Ronald Gilson and Robert Mnookin articulate the ingenious realization that lawyers are often repeat players even if their clients are not.³⁴ The reputational market among lawyers may be more robust than among clients. Thus, lawyers can sort each other by type—in a given legal community the lawyers are likely to know the collaborators from the sharpies. Indeed, lawyers may engage in many kinds of activities—from organizing in firms to joining professional associations—to enhance their reputations and facilitate such sorting.³⁵

This solution undoubtedly works particularly well in practice contexts in which lawyers know each other and interact repeatedly. It seems plausible, for example, that all of the family lawyers in a reasonably-sized city might

33. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984) (discussing how reciprocity and reputation can stabilize cooperation).

34. Gilson & Mnookin, *supra* note 18, at 522–27.

35. *Id.* at 530–31.

know each other and thus be able to circumvent the sorting problem.³⁶ Indeed, family lawyers commonly report that they can distinguish collaborators from hard-bargainers.³⁷ In addition, *some* reputational information is almost always available—a lawyer can call a colleague or friend in another city to do due diligence on an unknown adversary.

At the same time, Gilson and Mnookin acknowledge that the reputational solution is imperfect.³⁸ As the profession has expanded exponentially over the last decades, it has become increasingly common for attorneys within a firm not to know each other, let alone attorneys city-, nation-, or world-wide. In the medical malpractice hypothetical discussed in the Introduction, for example, neither the attorneys nor the clients had a prior relationship, nor was reputational information available. This is true in a great deal of general civil litigation—although Lawyer A may be able to rely on the proverbial grapevine to learn a little bit about Lawyer B, A may not learn enough to sort effectively. For the remainder of this Article, therefore, I will limit my discussion to the hard cases in which reputational information is *not* available. In those cases, negotiating lawyers and clients must supplement the reputational solution to sorting with some other device.

2. The “Commit to Mutual Withdrawal” Solution

Practicing lawyers have begun to experiment with other ways to overcome the sorting problem. This Part reviews one such experiment—the Collaborative Law movement.³⁹

Collaborative Law began in the early 1990s in the family law context. The basic idea is simple. In Collaborative Law, both divorcing parties agree to hire self-identified “collaborative lawyers” to handle their case. The lawyers and parties then agree that, so long as a so-called collaborative lawyer represents each side, the attorneys will serve their clients *only* during negotiations. In other words, if the attorneys fail to settle the case, they will

36. *Id.* at 541–46.

37. *Id.*

38. *Id.* at 527–34, 546–50.

39. For an overview of collaborative law, see Pauline H. Tesler, *Collaborative Law Neutrals Produce Better Resolutions*, in 21 ALTERNATIVES TO THE HIGH COST OF LITIG. 1, 9 (2003) [hereinafter Tesler, *Collaborative Law Neutrals*]. See also James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431 (2002); Robert W. Rack, Jr., *Collaborative Lawyering: For Lawyers, it's Settle or Withdraw*, DISP. RESOL. MAG., Summer 1998, at 8; Pauline H. Tesler, *Collaborative Law: A New Approach to Family Law ADR*, 2 CONFLICT MGMT. 12 (1996). For more popular descriptions of collaborative lawyering, see Brian Florence, *A Different Divorce—Collaborative Lawyering*, UTAH B.J., Dec. 2002, at 18; Patricia Gearity, *ADR and Collaborative Lawyering in Family Law*, MD. B.J., May/June 2002, at 2; Steven Keeva, *Working It out Amicably: Collaborative Lawyers Agree up Front to Settle Disputes out of Court*, A.B.A.J., May 2003, at 66; Pauline H. Tesler, *Collaborative Law: What It Is, and Why Lawyers Need to Know About It*, 13 AM. J. FAM. L. 215 (1999).

withdraw.⁴⁰ The parties and their lawyers sign “limited retention” agreements (LRAs) that limit the scope of the lawyer-client relationships and require the lawyers to withdraw if they cannot reach settlement. These agreements explain the lawyer’s limited role and the mandatory mutual withdrawal provisions. In addition, the parties and their lawyers sign a “collaborative law participation” agreement (CLPA) at the start of their negotiations. This is a contract with the other side that signifies mutual interest in the Collaborative Law process.

Collaborative Law practitioners describe this contractual modification of the traditional lawyer-client relationship, and of the traditional lawyer-lawyer negotiation process, as a huge benefit for all involved.⁴¹ Collaborative Law practice is touted as more cost-effective, more creative, and less damaging to the clients’ relationship than traditional adversarial litigation. It has become fashionable in the family law context—there are now at least eighty-seven local and regional Collaborative Law groups in twenty-five states.⁴²

Collaborative Law is a clever solution to the sorting problem. In order to signal credibly a commitment to collaboration, *both* lawyer and client must lose something if they fail to collaborate. A mandatory mutual withdrawal provision accomplishes this. If the parties do not settle, the client loses because she must expend the costs necessary to find, hire, and train new counsel.⁴³ The lawyer, meanwhile, will lose the fees that the lawyer would normally receive for litigating the matter.⁴⁴ In economic terms, both the lawyer and the client have posted a “bond” that they will lose if they do not live up to their commitment to collaborate.

There are two major problems, however, with the mandatory mutual withdrawal solution. First, this approach may violate existing ethics codes. Second, and more important for our purposes, these contracts offer little real help with the negotiator’s sorting problem outside of the family law context.

a. Do Existing CLPAs Violate the Model Rules?

Commentators have focused critique of the Collaborative Law process on whether mandatory mutual withdrawal provisions are an impermissible

40. See David A. Hoffman & Rita S. Pollak, “Collaborative Law” Looks to Avoid Litigation, 28 MASS. L. WKLY. 1989, 1989 (2000).

41. See *id.*

42. John Lande, *Evading Evasion: How Protocols Can Improve Civil Case Results*, 21 ALTERNATIVES TO THE HIGH COST OF LITIG. 149, 163 (2003).

43. John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1322–23 (2003).

44. I argue below that lawyers must be able to post a bond in a different way—by triggering public disciplinary proceedings that put their license or practice at risk. This is a bond that might be scalable beyond the confines of the family law context. See *infra* Part IV.C.

ex ante constraint on the lawyer-client relationship.⁴⁵ Although lawyers, clients, and courts have often approved of limited-performance retainer agreements in other contexts, the prevailing ethics codes place some limits on a lawyer's ability to contract with her client in ways that severely limit the lawyer's professional obligations.⁴⁶ Model Rule 1.2(c) states that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."⁴⁷ The Comments clearly permit representing a client for a limited type of work (such as only for insurance defense work in a particular case).⁴⁸ In addition, the Comments state that "the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives."⁴⁹

I have my doubts about whether mandatory mutual withdrawal provisions can be squared with Rule 1.2. One must place a great deal of trust in limited-retention agreements to make these provisions palatable. By requiring that both parties hire new attorneys in the event that they cannot settle their dispute, mandatory mutual withdrawal provisions effectively permit one party to fire another party's lawyer. If one party refuses to settle, the other party must also find new counsel.⁵⁰ This allows one party to impose great costs on the other. Moreover, it seems at odds with the most fundamental premises of the legal ethics codes, which strive at every turn to protect the lawyer-client relationship. It seems likely that in some circumstances such provisions are not "reasonable under the circumstances."⁵¹ For example, if retaining new counsel imposes extremely asymmetrical costs on the two parties—one party can do it cheaply, the

45. See Lande, *supra* note 43, at 1375–78 (critiquing mutual withdrawal provisions). Compare Douglas H. Yarn, *The Attorney as Duelist's Friend: Lessons From The Code Duello*, 51 CASE W. RES. L. REV. 69, 79 (2000) ("Because collaborative lawyers are committed to withdraw if the matter requires litigation, there are questions as to whether a collaborative lawyer can meet a duty of zealous advocacy while simultaneously refusing to litigate."), with Sandra S. Beckwith & Sherri Goren Slovin, *The Collaborative Lawyer as Advocate: A Response*, 18 OHIO ST. J. ON DISP. RESOL. 497, 502 (2003) (arguing that "[z]ealous representation does not preclude a mutual agreement that counsel withdraw in the event that collaborative lawyering fails" and that collaborative lawyers can and should operate under the same ethical guidelines as all other attorneys).

46. See Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 921–24 (1998) (discussing the ways in which the Model Rules limit such contracting between lawyer and client); see also Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 306 (1995) (discussing ways in which ethics codes restrict contractual changes to the lawyer's authority). See generally David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-Off*, 11 GEO. J. LEGAL ETHICS 959 (1998).

47. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2003).

48. *Id.* at R. 1.2(c) cmt. 6.

49. *Id.*

50. See Lande, *supra* note 43, at 1354–56 (discussing this aspect of Collaborative Law).

51. MODEL RULES OF PROF'L CONDUCT R. 1.2(c).

other only at great expense—then these limited-retention agreements may work serious strategic disadvantage on the cost-sensitive party. Nothing in Model Rule 1.2 or its Comments suggests that it is reasonable for a lawyer to limit his representation of his client to the extent that the client is exposed to such disadvantage.

b. Can Mandatory Mutual Withdrawal Be Effective Outside of Family Law?

I neither need nor want to resolve the ethical standing of mandatory mutual withdrawal provisions here. For our purposes, CLPAs face a more fundamental challenge. They are not a workable solution to the negotiator's sorting problem outside the confines of the family law context.

The basic problem is that mandatory mutual withdrawal provisions will be unattractive to both lawyers and clients, absent pre-existing knowledge about the other side's reputation for collaboration. In short, they will only work in contexts in which Gilson and Mnookin's reputational solution is already available.⁵²

Absent reputational information, lawyers are unlikely to be willing to sign mandatory mutual withdrawal provisions for three reasons. First, absent pre-existing trust, an attorney is unlikely to sign away to an adversary the ability to decide when the attorney's representation of her client ends. Collaborative Law is practiced within small groups of loosely affiliated lawyers who come to know each other. In essence, these self-selecting groups can screen out sharpie attorneys.⁵³ If an attorney in a Collaborative Law group fails to live up to the group's norms, the group can eject the attorney or stop doing business with him. It is thus relatively easy for these lawyers to trust each other—membership in the Collaborative Law group itself serves as a reliable signal of collaborative intent.⁵⁴ Without this small group reputational market, few lawyers will sign mandatory mutual withdrawal provisions.

Lawyers outside of the family law context will find mandatory mutual withdrawal provisions unattractive for a second reason as well: in these contexts, one side of a dispute is likely to be represented by a contingency-fee lawyer. (Contingent fees are banned in the family law context.)⁵⁵

52. See *supra* notes 33–38 and accompanying text.

53. See W. Bradley Wendel, *Busting the Professional Trust: A Comment on William Simon's Ladd Lecture*, 30 FLA. ST. U. L. REV. 659, 669 (2003) (discussing how law firms and professional organizations can sometimes serve to signal collaborative intent so long as the organization is able to screen out non-collaborators).

54. Lande has argued that collaborative lawyers should experiment by eliminating mandatory mutual withdrawal provisions to see whether Collaborative Law can survive without this ethically questionable practice. Lande, *supra* note 43, at 1376. I assume that it could. My hypothesis is that the small reputational markets created amongst collaborative lawyers, and the screening function served by these groups, are doing most of the signaling work needed. Thus, the mandatory mutual withdrawal provisions may be redundant.

55. MODEL RULES OF PROF'L CONDUCT R. 1.5(d)(1).

Asymmetrical fee structures—e.g., plaintiff represented on a contingent fee, defendant on an hourly fee—make a mandatory mutual withdrawal provision unattractive for a contingency fee lawyer. Such a provision would expose that lawyer to great risk. First, the other side, paid hourly, could essentially eliminate the contingency lawyer's fee by refusing to settle and forcing the contingency lawyer to withdraw prior to concluding the case (while still collecting its already-accrued hourly fees). Second, the contingency lawyer's own client would gain tremendous leverage over that lawyer. The client could turn on the lawyer late in the negotiation process and threaten to reject settlement—thereby denying the lawyer of payment—unless the lawyer agreed to lower her fee. In short, mandatory mutual withdrawal provisions will be problematic for contingency lawyers.⁵⁶

Third, lawyers involved in general civil litigation are more likely than family lawyers to be wary of losing a client to another lawyer or law firm. Whereas family lawyers often have many clients in relatively short-term, one-time engagements, civil litigators may have fewer, more long-term relationships with their clients. A mandatory mutual withdrawal provision would threaten those relationships by allowing another lawyer or law firm to take over a client's case if it failed to settle. Even in today's legal market, in which long-term attorney-client relationships are more rare and corporate clients use many law firms for different purposes, civil litigators are likely to resist opening the door to their competition by turning over clients who fail to settle.⁵⁷

Finally, *clients* outside of the family law context may also dislike mandatory mutual withdrawal provisions. In family cases, both sides may know *ex ante* that they would like to settle rather than litigate. When children are at issue or the parties hope to preserve their relationship, divorcing clients can look ahead and easily see that collaboration would trump adversarial negotiation. In other contexts, such as commercial litigation, however, clients may be less certain. Often, clients may have very

56. A contingency lawyer could hedge against these risks by inserting an "in the event of termination" clause in her fee agreement. Some contingency-fee lawyers already use such clauses. See generally Lester Brickman, *Setting the Fee When the Client Discharges a Contingent Fee Attorney*, 41 EMORY L.J. 367, 379–85 (1992) (discussing contract remedies, including quantum meruit claims, for discharge situations). The fee contract could state that in the event of termination (due to failure to settle) the lawyer would receive a flat or hourly fee for work already done, or it could state that the lawyer would receive a reduced percentage of the ultimate recovery at trial. Although this reduces the problems that a contingency fee lawyer will have with a mandatory mutual withdrawal provision, it does not eliminate the asymmetrical anxiety such a clause will create for contingency, as opposed to hourly, attorneys. That asymmetry is the problem—it will, even in reduced form, create a strategic advantage for the hourly attorney, and thus will likely be *ex ante* undesirable for the contingency fee lawyer.

I am grateful to Ric Collins for raising the possibility of such a termination clause.

57. See Lande, *supra* note 42, at 164 ("Law firms serving major civil clients would almost never risk losing a litigation client to another firm due to a [mandatory mutual withdrawal provision].").

limited information about the quality of their case until their lawyers progress through the information-exchange or discovery process with the other side. Collaborative Law rests on the LRA—only if the clients sign a limited retention agreement at the start of the case can the lawyers commit to mandatory mutual withdrawal. But in many circumstances it would be unwise for a client to sign a mandatory mutual withdrawal provision at the start of her relationship with her attorney. In short, the Collaborative Law mandatory mutual withdrawal paradigm does not seem exportable to other contexts. If one hopes to help lawyers and clients *outside* of the family law context to sort honest collaborators from sharpies, one needs some other means to signal a commitment to collaborate.⁵⁸

3. The “Commit to Honest Disclosure” Solution

If reputational information is unavailable, and if lawyers cannot post a bond promising mandatory mutual withdrawal, what then can they do? Some lawyers and clients have begun to experiment with a third solution: private contracting for full, early, voluntary, and continuing disclosure. One can find two prominent examples of such contracts: Collaborative Law agreements and “mediation participation” agreements.

a. CLPA Provisions to Play Fair

First, Collaborative Lawyers often contract for honest disclosure. For example, the statement of “Principles and Guidelines” of the Arizona Collaborative Law Group states that the parties and their lawyers “agree to give full, honest and open disclosure of all information, whether requested or not.”⁵⁹ It also states that “[w]e shall maintain a high standard of integrity and specifically shall not take advantage of each other or of the miscalculations or inadvertent mistakes of others, but shall identify and correct them.”⁶⁰ Often CLPAs state that parties may not threaten to withdraw from the process or commence litigation as a way to exert leverage over the other party.

58. There is disagreement about whether collaborative law practice has grown, or can grow, beyond the boundaries of family law. Some claim that it is now used in some business, construction, environmental, estate, insurance, and employment disputes. See Tesler, *Collaborative Law Neutrals*, *supra* note 39, at 14–15 (2003) (providing examples of usage in different contexts); Douglas C. Reynolds & Doris F. Tennant, *Collaborative Law—An Emerging Practice*, BOSTON B.J., Nov./Dec. 2001, at 12, 28. There is little evidence of such use, however, and no empirical study to support these assertions. To the extent that these commentators are describing small practice areas with strong reputational markets, they may be accurate.

59. ARIZONA COLLABORATIVE LAW, PRINCIPLES AND GUIDELINES, sec. II (on file with the Iowa Law Review).

60. *Id.* at sec. IV.

CLPAs also often require good-faith negotiation.⁶¹ One such agreement, for example, states that “[p]articipation in the collaborative law process, and the settlement reached, is based upon the assumption that both parties have acted in good faith and have provided complete and accurate information to the best of their ability.”⁶² In addition, CLPAs often “encourage” each collaborative attorney to withdraw unilaterally in the event that the attorney learns that her client has abused the collaborative law process.⁶³ For example, one typical agreement states that “[c]ollaborative counsel are encouraged to withdraw from a case in the event they learn that their client has withheld or misrepresented information or otherwise acted so as to undermine or take unfair advantage of the collaborative law process.”⁶⁴

b. Mediation Participation Agreements

Although there is little research into whether “mediation participation” agreements (MPAs) typically include provisions similar to those found in CLPAs, there is some evidence that mediating parties, and their attorneys, are contracting for heightened ethical requirements.⁶⁵

For example, some MPAs state that “[b]y agreeing to mediate under these rules, the parties undertake to conduct mediation in a bona fide and forthright manner and make a serious attempt to resolve the dispute.”⁶⁶ Similarly, although many MPAs do not mention heightened disclosure requirements, some do. One, for example, states that:

61. See ARIZONA COLLABORATIVE LAW, PRINCIPLES AND GUIDELINES, sec. VII (on file with the Iowa Law Review) (“We understand that the process, even with full and honest disclosure, will involve vigorous good faith negotiation.”).

There has been enormous debate over whether negotiators have a contractual or ethical obligation to bargain in good faith, and about what it requires. I cannot do justice to that debate here. See generally E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987); Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025 (2003) (reviewing good faith literature); Jason Scott Johnston, *Default Rules/Mandatory Principles: A Game Theoretic Analysis of Good Faith and the Contract Modification Problem*, 3 S. CAL. INTERDISC. L.J. 335 (1993).

62. CINCINNATI COLLABORATIVE LAW, PARTICIPATION AGREEMENT, sec. VII (on file with the Iowa Law Review).

63. See ARIZONA COLLABORATIVE LAW, PRINCIPLES AND GUIDELINES, sec. VIII (on file with the Iowa Law Review).

64. See OHIO COLLABORATIVE FAMILY LAW PARTICIPATION AGREEMENT, sec. XII (on file with the Iowa Law Review).

65. Menkel-Meadow notes that mediators often “feel the need to contract for greater obligations of disclosure and honesty than is currently required by law or ethics.” Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 95 (2002).

66. COMMERCIAL ARBITRATION AND MEDIATION CTR. FOR THE AMERICAS, AM. ARBITRATION ASS’N, MEDIATION AND ARBITRATION RULES, art. 8 (1996), at www.adr.org (last visited Feb. 23, 2004) (on file with the Iowa Law Review).

All participants agree not to withhold relevant information that is readily available to them. If a participant believes that he or she cannot or should not release information, the participant will provide either the substance of the information in some form (such as by aggregating data, by deleting non-relevant confidential items, by providing summaries, or by furnishing it to the mediator to use or abstract) or will provide a general description of it, together with the reason for not providing the information directly.⁶⁷

Similarly, MPAs sometimes require good-faith mediation.⁶⁸ As important, MPAs sometimes spell out the requirements of good faith. For example, an MPA may state that:

The parties agree to act in good faith in all aspects of the mediation and negotiation and to participate fully in the search for an acceptable resolution to the issues involved. Each participant agrees to seek to understand the other points of view, concerns and interests as completely as possible and to convey his or her own point of view, interests, and concerns as clearly as possible, so they may be understood.⁶⁹

c. Problems with the "Commit to Honest Disclosure" Solution

There are several problems with the contract-to-disclose solution. First, there are again problems for these provisions under existing ethics codes. If a lawyer takes on obligations to an adversary without simultaneously limiting the scope of the lawyer's duties to her client through an LRA, that lawyer would seem to run afoul of the conflict of interest rules.⁷⁰ This may be the

67. DANIEL R. DENTON, MEDIATION AGREEMENT, at www.scmmediator.com/Forms/Mediation_Agreement/mediation_agreement.html (last visited Oct. 19, 2004) (on file with the Iowa Law Review).

68. See JAMS SAMPLE MEDIATION AGREEMENT, at www.jamsadr.com/mediation/forms.asp ("The parties agree to participate in good faith in the entire mediation process.") (last visited Oct. 19, 2004) (on file with the Iowa Law Review). For a discussion of good faith in mediation, see Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 596 (1997); John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002). See also Roger L. Carter, *Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367; Carol L. Izumi & Homer C. LaRue, *Prohibiting "Good Faith" Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel out of the Mediation Tent*, 2003 J. DISP. RESOL. 67, 80.

69. DENTON, *supra* note 67.

70. Painter points out that the *Model Rules* discourage a lawyer from contracting with a third party. Richard W. Painter, *Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers*, 65 FORDHAM L. REV. 149, 179 (1996). Model Rule 1.7, for example, provides that a lawyer has a conflict of interest if the lawyer's

situation with some MPAs. In addition, to the extent that an MPA requires a lawyer to disclose client confidences that the legal ethics codes would otherwise bar the lawyer from disclosing,⁷¹ it is unclear how the lawyer could comply with the MPA without client consent. Unlike a collaborative law LRA, MPAs do not explicitly revise the lawyer-client relationship—there is no limited-retention agreement in place. It thus creates a difficult situation for the lawyer: the MPA may obligate the lawyer to disclose, but the lawyer does not have an LRA in place that creates ongoing client consent for such disclosure. In that situation, the lawyer would be on weak footing to argue that the MPA itself justifies violating Model Rule 1.6 and her client's confidences.

One might have similar doubts about the unilateral attorney-withdrawal provisions often found in Collaborative Law LRAs. CLPAs often encourage an attorney to withdraw if she learns that her client has abused the Collaborative Law process by withholding information or trying to take unfair advantage.⁷² Although the *Model Rules* seem to permit such a provision,⁷³ the terms of many CLPAs and LRAs seem extremely vague about what exactly can trigger such unilateral withdrawal by an attorney. Generally, these provisions are quite broad. One typical Collaborative Law LRA, for example, states that “[i]f you [the client] should decline to make disclosures I regard as necessary I will, in my discretion, withdraw as your attorney, or terminate the Collaborative Law Process.”⁷⁴ Again, the question is whether such provisions are “reasonable under the circumstances.”⁷⁵ Although such a provision may be perfectly benign in many situations, there are undoubtedly other situations in which a lawyer may be assuming too much in asking a prospective client for such unlimited freedom to withdraw at some distant point in the future.

More important for our purposes, is the practical question of whether these provisions help overcome the sorting problem. I do not think they do. Their fundamental flaw is an absence of sanctions in the event that the provision is violated.

Again, in order to signal credibly a commitment to collaborate, *both* a lawyer and a client must stand to lose something in the event that they later renege on their commitment. Otherwise, the commitment is just cheap

representation of the client is “materially limited by the lawyer’s responsibilities to another client or to a third person.” MODEL RULES OF PROF’L CONDUCT R. 1.7(a) (2002).

71. See *supra* notes 65–69 and accompanying text (discussing disclosure requirements in MPAs).

72. See *supra* note 63 and accompanying text.

73. See MODEL RULES OF PROF’L CONDUCT R. 1.16 cmt. 8 (2003) (“A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement . . . limiting the objectives of the representation.”).

74. FLORIDA COLLABORATIVE LAW, RETAINER AGREEMENT (on file with the Iowa Law Review).

75. MODEL RULES OF PROF’L CONDUCT R. 1.2(c).

talk—it is too easy to revoke. In the Collaborative Law context, we saw that mandatory mutual withdrawal provisions impose costs on both lawyers and clients, and thus serve as a credible (albeit impractical) signal. Commitments to disclose, however, do not have symmetrical costs. Instead, they largely impose costs on a client, but not on her attorney.

If a lawyer and client decided during a negotiation to violate a previously-entered contract to disclose openly, would there be serious consequences? One could imagine that the client might be sued for fraud, or for breach of contract. The opposing party might seek damages related to that fraud, and/or rescind the settlement agreement. These claims would be somewhat unusual, but they are plausible.⁷⁶

But these potential costs will all fall on the client—not on the lawyer. Put differently, these are risks that the client might rationally choose to run. The likelihood of detection may be small and both the lawyer and the client may be able to insure against the costs of such a suit. As a result, the client might enter such an agreement, but then later decide to “defect.”

The lawyer may protest, arguing that his integrity is on the line. But the client may insist—it is her case, after all, and her decision. Moreover, the client may have the upper hand in this argument, because the lawyer really has little at stake. Disciplinary sanctions against the lawyer are unlikely, unless the lawyer entered the contract to disclose intending to later renege. Thus, the client may be able to pressure the lawyer to do the client’s bidding.

This possibility—that the client will later persuade the lawyer to renege—undermines the efficacy of these private contracts to collaborate. If an adversary knows that signing such an agreement is “cheap” and that the lawyer has little to lose if the client later wants to secretly renege, the agreement is worth very little.⁷⁷ Again, this is particularly true in contexts that lack strong reputational markets where reputational or informal sanctions might counteract the desire to cheat.

I do not mean to downplay the importance of reputational markets and sanctions.⁷⁸ Lawyers often place great stock in their reputations. Honest, collaborative lawyers may be particularly concerned about hurting their public image. At the same time, the reputational argument can only pull so much weight. In certain practice contexts, including much of commercial

76. This is analogous to common claims in the family law context. *See, e.g., Hess v. Hess*, 580 A.2d 357, 358 (Pa. Super. Ct. 1990) (holding that breach of the warranty of full disclosure may result in compensatory damages and that fraud in negotiation gives rise to an action in tort).

77. *See Carrie Menkel-Meadow, Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 431 (1997) (“It remains unclear what role these private ethical rules and standards will play in litigated disputes about the quality or ethics of ADR proceedings.”).

78. *See David Charny, Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 393 (1990) (discussing reputational sanctions).

litigation and transactional work, lawyers may not have reputational information about each other. They may never have worked together, and may never work together again.

C. WHAT IS NEEDED

Several things are needed to help lawyers and clients overcome the sorting problem.

First and foremost, a solution is needed that works outside of contexts in which reputational information is available. The reputational solution is a strong one, and Gilson and Mnookin are certainly right to call on the organized bar to create mechanisms to facilitate reputation-building.⁷⁹ But the bar can do more—it must also focus on solutions that work outside of reputation-rich contexts.

Second, some form of sanction is needed that does not depend upon mandatory mutual withdrawal provisions. These provisions are both ethically questionable and strategically unwise, particularly in contexts in which contingency fees play a role. At the same time, to date, they have served as the major motivator for lawyers to get their Collaborative Law cases settled.⁸⁰ If they are removed from the equation, some other form of sanction must be found.

Third, a workable solution to the sorting problem must allow lawyers and clients to signal a commitment to collaboration at *various times* in the negotiation process.⁸¹ The Collaborative Law paradigm in the family law context requires that this signal be given at the start of the engagement—because it depends entirely on the limited retention agreement between lawyer and client for its legitimacy under the ethical codes. But in other contexts, clients may not be sure about their case at the start of the lawyer-client relationship. They may want to wait and see. Yet they might still profit from having a means to signal a commitment to collaboration *later*, after the lawyer-client relationship has already been established (and the moment for signing an LRA has passed).

Finally, a solution must create some cost for *attorneys* if they violate a contract to collaborate. The sorting problem can be solved only if both a lawyer and her client suffer for violating a commitment to collaborate.

79. Gilson & Mnookin, *supra* note 18, at 561–64.

80. See generally Ryan Lessmann, *The Propriety of Mandatory Withdrawal Provisions Under the Model Rules* (surveying collaborative lawyers and finding almost uniform agreement that mandatory mutual withdrawal provisions were critical) (on file with the Iowa Law Review).

81. Put differently, the negotiation process is not the “two stage” game that Gilson and Mnookin model, in which at the first stage the client picks a lawyer, and in the second stage the lawyer and client negotiate against the other side. See Gilson & Mnookin, *supra* note 18, at 522–24 (describing a pre-litigation game or stage in which clients pick attorneys). Instead, it is a multi-stage process, and both lawyers and clients could benefit from being able to signal a commitment to collaboration at later stages.

Lawyers must post some sort of bond that will credibly communicate a commitment to collaboration and honesty.

III. WHY EXISTING APPROACHES TO LEGAL ETHICS DO NOT HELP

We have not made much progress with the sorting problem—absent reputational sanctions, we are not far from where we started. What then might we do to help lawyers and clients overcome the collaborator’s sorting problem? Ethics codes are one possible solution; if a code facilitated signaling by lawyers, it might lessen the collaborator’s anxieties. Unfortunately, the existing ethics rules leave much to be desired in this regard.

This Part reviews how existing legal ethics codes regulate bargaining, and the ways in which this regulation expresses the Dominant Approach to legal ethics. It then discusses existing critiques of the Dominant Approach, paying particular attention to the implications of these critiques for the sorting problem. This discussion lays a foundation for Part IV’s argument for a new contract model of legal ethics.

A. *THE DOMINANT APPROACH TO LAWYERS’ BARGAINING ETHICS*

1. Existing Regulation of Lawyers’ Bargaining Ethics

Model Rule 4.1 of the *Model Rules of Professional Conduct* is the primary ethics provision regulating attorneys’ bargaining behavior. Model Rule 4.1 states that “a lawyer shall not knowingly make a false statement of material fact or law to a third person[, nor] fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a [client’s] criminal or fraudulent act” (subject to the constraints of Rule 1.6 governing client confidences).⁸² Comment [2] of the rule carves out important exceptions, however. Comment [2] states that:

Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intention as to the acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.⁸³

This Comment thus permits certain forms of deception—regarding “[e]stimates of price or value placed on the subject of a transaction” and “a

82. MODEL RULES OF PROF’L CONDUCT R. 4.1(a)–(b) (2003); *see also* MODEL RULES OF PROF’L CONDUCT R. 1.6.

83. MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 2 .

party's intentions as to an acceptable settlement of a claim."⁸⁴ In short, the *Model Rules* seem to permit an attorney to misrepresent a client's reservation price or intentions during negotiations.⁸⁵

In addition, the rule permits attorneys to deceive about non-material facts and law—a distinction that allows for a great deal of “puffing” and “bluffing” in negotiations. Finally, the confidentiality provisions in Model Rule 1.6 constrain the disclosure provisions in Model Rule 4.1. Under the revised *Model Rules*, Rule 1.6 forbids a lawyer from disclosing information relating to representation without client consent unless the lawyer reasonably believes it necessary to prevent certain death or substantial bodily harm or to prevent or rectify certain types of serious crime or fraud by a client.⁸⁶

In combination, Model Rules 4.1 and 1.6 create a situation in which lawyers can engage in deceptive, or at least manipulative, hard bargaining without professional consequence. This is not to say that the *Model Rules* impose *no* constraints whatsoever on lawyers. It is simply to say that the rules take a fairly minimalist approach to bargaining ethics.

The Rules thus do little to help lawyers and clients overcome the sorting problem. Under existing ethics codes, sharpies can ply their trade without fear of sanction, assuming they do nothing illegal. They need not disclose their type—if they can engage in sharp tactics without detection, they have violated no rule.

2. The Status Quo as a Reflection of the Dominant Approach to Legal Ethics

Why do the *Model Rules* take this minimalist approach? The *Model Rules* reflect the Dominant Approach to lawyering. There are two central components of that approach. First, in content, the profession's codes and ideals have typically adhered to what has been called the standard

84. *Id.*; see also Patrick E. Longan, *Symposium: Ethical Issues in Settlement Negotiations*, 52 MERCER L. REV. 807, 813 (2001) (“[T]he lawyer should feel free to lie about his or her authority.”).

85. See Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207 (2001). The Ethics 2000 Commission considered revising this language. In particular, the Commission weighed adopting stronger standards in light of its recognition that mediation and settlement negotiations require a “higher level of truthfulness” today than they once did. *Id.* at 259. Ultimately, however, the Commission declined to change the provisions. The ABA considered requiring truthfulness in negotiation in the original version of the *Model Rules*, but rejected that proposal. See CTR. FOR PROF'L RESPONSIBILITY, ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 147 (1987). Geoffrey Hazard, the principal drafter of the 1983 Model Rules, has argued that “regulation of trustworthiness [cannot] go much further than to proscribe fraud.” Geoffrey Hazard, Jr., *The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. REV. 181, 196 (1981).

86. MODEL RULES OF PROF'L CONDUCT R. 1.6(a)–(b).

conception of the lawyer's role: a vision of lawyers as partisan, amoral advocates for their clients.⁸⁷ Second, the formalization of that standard conception into ethics codes has traditionally adhered to an ideal that the codes, and the standard conception of lawyering, must apply to all lawyers, all of the time, regardless of practice, personal belief, or circumstance.

a. The Standard Conception of the Lawyer's Role: The Principles of Nonaccountability and Partisan Professionalism

The standard conception of the lawyer's role has two basic principles or ideals: the principle of nonaccountability and the principle of partisan professionalism.⁸⁸ The principle of nonaccountability states that a lawyer is not morally accountable for the means used to advocate for a client, nor for the ends pursued.⁸⁹ The principle of partisan professionalism states that while serving as an advocate, a lawyer must, within recognized constraints of legality or professional ethics, seek to maximize the likelihood that a client will prevail.⁹⁰ Together, these principles form the basis of how most lawyers view their work and their ethics: a lawyer is a partisan and zealous advocate, dedicated to the client's cause, and absolved of responsibility for that cause and its pursuit, so long as the lawyer acts within the bounds of the law.⁹¹ He or she is an amoral gladiator.

This standard conception has received many articulations, and these principles have been given many names.⁹² The principle of partisan professionalism derives from the adversary system's assignment of roles. The adversary system requires each party to prosecute or defend its own case, and thus each party's agent is ultimately responsible for zealously pursuing its client's ends.⁹³ Similarly, what Luban calls the "adversary system excuse"

87. See David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 84 (David Luban ed., 1983) (citing Postema and Simon).

88. For a cogent and now classic articulation of these principles, see *id.* at 83–84. See also David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 *COLUM. L. REV.* 1004, 1006–17 (1990).

89. Luban, *supra* note 87, at 84.

90. SIMON, *supra* note 20, at 7 ("The core principle of the Dominant View is this: the lawyer must—or at least may—pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim."); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 *YALE L.J.* 1239, 1245 (1991) ("[T]he partisanship principle remains at the core of the profession's soul . . ."); Luban, *supra* note 87, at 84.

91. SIMON, *supra* note 20, at 7.

92. For example, William Simon and Gerald Postema call these the principles of partisanship and neutrality. Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 *N.Y.U. L. REV.* 63, 73 (1980); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *WIS. L. REV.* 29, 36. Luban calls them the principles of nonaccountability and professionalism. Luban, *supra* note 87, at 90. I prefer Luban's first label, but find a combination of "partisan" and "professionalism" the most descriptive as a second label.

93. See Luban, *supra* note 87, at 90 (discussing this argument).

has traditionally been used to justify the nonaccountability principle.⁹⁴ For lawyers to serve as zealous advocates, they must not restrain themselves because of moral doubt about their clients' means or ends. To be able to serve in this way, they must be, and feel, excused from the ordinary constraints of morality—they must be “relieve[d] . . . of moral accountability” so that they can serve with “moral ruthlessness.”⁹⁵

This ruthless conception of lawyering has been defended on various grounds. Such defenses generally share two characteristics: a basic trust in the virtues of the adversary system, and a desire to maximize client autonomy and access to law by restricting a lawyer's ability to impose her own moral judgments on a client's desires and ends.⁹⁶ Despite problems with these defenses,⁹⁷ they contain a grain of truth. In certain contexts, such as criminal defense, the standard conception of the lawyer's role seems politically and even normatively desirable. Similarly, in some circumstances client autonomy seems paramount. Whether the “adversary system excuse” and the protection of client autonomy can fully justify an attorney's questionable acts, however, is a complex matter, and not one about which we are all likely to agree. As a result, the most difficult question is how the legal profession should manage that potential disagreement.

*b. The Standard Conception of Professional Regulation:
The Principle of Regulatory Uniformity*

Historically, the profession has answered this question in the simplest way possible. In addition to the principles of nonaccountability and partisan professionalism, a third principle has guided the construction of the legal ethics codes. For at least the last one hundred years,⁹⁸ the legal profession in each state has imagined itself as a single entity that can and should be organized under a single, consistent set of professional norms. This is what I

94. *Id.*

95. *Id.*

96. See MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 9–24 (1975) (defending the adversary system justification for the standard conception of the lawyer's role); see also Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 192–205 (1978) (discussing the tension between professional responsibility and personal judgment). Charles Fried argues that special moral obligations arise out of a lawyer's relationship with a client, through which the lawyer fosters the client's autonomy. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060–72 (1976). Stephen Pepper's defense similarly turns on the importance of the lawyer's role as a facilitator and protector of client autonomy and access to the legal system. See Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617 (“The lawyer is the means to first-class citizenship, to meaningful autonomy, for the client.”).

97. See *infra* notes 117–124 and accompanying text.

98. For a helpful discussion of the history of this view, see DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 393–403 (1988) (discussing the background of the standard conception).

will call the principle of regulatory uniformity: the ideal that lawyers belong to one profession organized under one ethics code that applies to all.⁹⁹

This principle has controlled the creation of the organized bar and of its ethics codes.¹⁰⁰ “[A]s originally conceived, formal codes of professional conduct consisted almost entirely of broadly stated principles applicable to all lawyers in all contexts. . . . These unitary assumptions about professional norms . . . continue to dominate current legal ethics discourse.”¹⁰¹ Both the *Model Code of Professional Responsibility*¹⁰² and the *Model Rules of Professional Conduct*,¹⁰³ for example, are largely designed to govern all lawyers, irrespective of context, in all their activities.¹⁰⁴ Thus, the uniformity ideal of the Dominant Approach embodies what Professor Zacharias has labeled “fictions of symmetry.”¹⁰⁵ These fictions include the presumptions that all lawyers are competent, that all clients are similar, and that the same rules should govern all lawyers and clients.¹⁰⁶

The ethics codes bring to life the standard conception of the lawyer’s role through their core provisions dealing with client confidences, conflicts of interest, and partisan loyalty.¹⁰⁷ Although they permit some tailoring of the lawyer’s role, in general, both the *Model Code* and the *Model Rules* envision that these same principles will govern all attorneys.¹⁰⁸

On the ground, of course, lawyers do many different things, in many different contexts, for many different kinds of clients. This diversity is both

99. See Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 170 (1997) (calling this the “unitary approach”).

100. The uniformity ideal has recently found new expression in the drive to federalize legal ethics using a Congressionally mandated, uniform set of federal ethical rules. See Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 337 (1994) (predicting such federalization and citing literature on federalization).

101. David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye*, *Scholar*, 66 S. CAL. L. REV. 1145, 1152–53 (1993).

102. MODEL CODE OF PROF’L RESP. (1983).

103. MODEL RULES OF PROF’L CONDUCT (2003).

104. The *Model Rules* do allow some tailoring, as discussed below. See *infra* notes 169–74 and accompanying text. Nevertheless, the *Rules* generally assume uniformity of practice. See Zacharias, *supra* note 100, at 385 (“[T]he *Model Rules* continue the *Model Codes*’ basic approach of considering lawyers’ duties to be uniform, whatever role the lawyer plays.”). I do not wish to overstate. I do not contend that the Dominant Approach is completely dominant, nor that it is the only conception under which lawyers work. For a useful discussion of this issue, see LUBAN, *supra* note 98, at 393–403 (noting that “[t]he standard conception is never completely dominant: but . . . it is largely dominant, and at the very least, is critically important”).

105. Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 838 (2002).

106. *Id.* at 839–41.

107. Luban calls these the “three pillars” of the legal profession. Luban, *supra* note 87, at 90. See also Hazard, *supra* note 90, at 1246 (discussing a slightly different triptych of confidentiality, disinterestedness, and candor to a tribunal).

108. For a discussion of tailoring, see *infra* notes 169–82 and accompanying text (discussing contractarian analysis of conflict of interest rules).

necessary and desirable: attorneys have no choice but to fit their practice to the demands of client and circumstance. This practical reality creates problems for the Dominant Approach. No single, unified code of ethics can account for the diversity of legal practice that lawyers undertake. Thus, the principle of regulatory uniformity has been called both “one of the legal profession’s most important constitutive beliefs”¹⁰⁹ and also its “most dramatic delusion.”¹¹⁰

3. Problems with the Dominant Approach to Bargaining Ethics: What Is Needed

In keeping with the Dominant Approach, some scholars have defended Model Rule 4.1, arguing that perhaps “lies that sophisticated lawyers tell each other about their reservation prices in certain circumstances may not be wrong in any relevant way.”¹¹¹ Others have argued that lawyers actually have an *obligation* to misrepresent in negotiation if it will best serve their clients’ interests.¹¹² Robert Condlin, for example, has written that lawyers “must use any legally available move or procedure helpful to a client’s bargaining position. Among other things, this means that all forms of leverage must be exploited, inflated demands made, and private information obtained and used whenever any of these actions would advance the client’s stated objectives.”¹¹³ James White has similarly claimed that “[e]veryone expects a lawyer to distort the value of his own case, of his own facts and arguments, and to deprecate those of his opponent.”¹¹⁴

This approach to lawyers’ bargaining ethics has various costs. One is that an increasing number of attorneys, particularly women, seem disenchanted with the gladiatorial role that the Dominant Approach

109. Wilkins, *supra* note 101, at 1148 (claiming that this is one of the profession’s “most important constitutive beliefs: that it is a single profession bound together by unique and specialized norms and practices”).

110. Zacharias, *supra* note 105, at 841 (calling this “the most dramatic delusion inherent in the modern professional codes; namely, that a single set of rules should apply equally to, and can adequately govern, all legal representation”).

111. Alan Strudler, *Incommensurable Goods, Rightful Lies, and the Wrongness of Fraud*, 146 U. PA. L. REV. 1529, 1544 (1998) (analogizing to the philosopher Benjamin Constant’s argument that lies are sometimes permissible when the receiver has no right to ask the question posed).

112. *But see* ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 104–08, 113–20 (1999) (arguing that negotiation does not require or legitimize deception); Jonathan R. Cohen, *When People Are the Means: Negotiating With Respect*, 14 GEO. J. LEGAL ETHICS 739, 743 (2001) (“[T]he act of negotiation does not relieve one of the moral duty to respect others.”).

113. Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 71 (1992) (citations omitted).

114. James L. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 928.

requires.¹¹⁵ Not all lawyers want to be amoral gladiators. They would prefer to be able to practice in more collaborative, problem-solving ways, and to limit their negotiations to those lawyers who felt similarly. Unfortunately, the Dominant Approach to regulating lawyers' bargaining does not facilitate these desires.

More importantly, Model Rule 4.1 exacerbates a lawyer's sorting problem. Rule 4.1 is a minimalist rule that permits lawyers to deceive each other, at least about certain aspects of the bargaining process. At best, it suggests that hard, deceptive bargaining is acceptable in legal negotiations; at worst, it suggests that such bargaining is the essence of the lawyer's bargaining task. Rule 4.1 certainly leaves open the possibility of more honest, collaborative strategies, but it provides no means for parties to signal to each other that they are of the collaborative type.¹¹⁶

B. THE DOMINANT CRITIQUES OF LEGAL ETHICS

Just as the Dominant Approach is founded on these three principles—nonaccountability, partisan professionalism, and regulatory uniformity—one can sort the leading critiques of the Dominant Approach using the same three principles. Critics of the Dominant Approach have generally focused their attack on one (or two) of these three principles. Unfortunately, the Dominant Critiques have thus generally subscribed to *some* part of the Dominant Approach, even while rejecting other parts. In this Part, I review the Dominant Critiques before turning to their weaknesses.

1. The Discretionary Critique

Perhaps the most well-known critique of the Dominant Approach has come from those calling for lawyers to use more discretion in dealing with ethical dilemmas. Both David Luban¹¹⁷ and William Simon¹¹⁸ have argued

115. See Stacy Caplow & Shira Scheindlin, "Portrait of a Lady": *The Woman Lawyer in the 1980s*, 35 N.Y.L. SCH. L. REV. 391, 422–23 (1990) (reporting empirical results that female lawyers are dissatisfied with adversarial game-playing); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 49–60 (1985) (arguing that men favor the adversarial method whereas women prefer the cooperative method); Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119, 129–34 (1997) (critiquing the "gladiator model").

116. See SIMON, *supra* note 20, at 210 ("[I]f information is asymmetric and the default term is low commitment, [bargainers] might end up accepting that low commitment.").

117. Luban has argued that lawyers should balance their adherence to professional ethical rules against their adherence to personal ethical principles, however derived. See DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 231 (2d ed. 1995) (citing relevant sources); see also LUBAN, *supra* note 98; Luban, *supra* note 87. This is the "morality-centered" critique. See David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 874 (1999) (using this term). It does not mean that lawyers should be free to follow subjective whim and fancy, doing as they wish based on their personal moral predilections. Instead, Luban argues that professional ethics

for such discretion. Their approaches differ—Luban advocates that lawyers turn to their moral values in exercising their discretion, while Simon advocates that lawyers must base discretionary judgment on competing *legal* values—but the fine points of their debate need not concern us here.¹¹⁹ What must concern us are the commonalities throughout the Discretionary Critique. That approach leads away from strict adherence to, or dependence on, ethics rules, and toward personal discretion. According to Luban, the Dominant Approach “insists on categorical rules of zeal, confidentiality, and disinterestedness that drastically and wrongly pare back the scope of discretionary judgment.”¹²⁰ To correct for this overzealousness—in both senses—the Discretionary Critique at least partially abandons the rules to permit lawyers to make decisions for themselves.¹²¹

There are objections, of course. Within the Discretionary Critique, Luban has attacked Simon’s law-centered version for demanding too much of lawyers. Lawyers, Luban remembers, are people with limited time, limited capacities, and, often, limited interest in legal and political abstraction. This leads Luban to what he calls the “exhaustingness objection” to Simon’s

or role-morality should sometimes take second place to well-reasoned, universally justifiable, personal moral principles. For a very helpful discussion of this distinction, see *id.* at 882.

118. Simon prescribes a contextual approach to ethical problems. See SIMON, *supra* note 20, at 139–69; see also William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 217 (1988); William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217 (1996); William H. Simon, *“Thinking Like a Lawyer” About Ethical Questions*, 27 HOFSTRA L. REV. 1 (1998); William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65 (1991). He argues that a lawyer “should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice.” SIMON, *supra* note 20, at 9. Good lawyering, according to Simon, requires weighing competing legal values, not blindly following ethical rules.

Importantly, Simon’s use of the word “justice” is somewhat limited. By justice he means the legal merits at hand. This sets Simon apart from Luban and others who argue for the introduction of personal moral judgment into professional ethics. Simon is focused on tensions and competition *between* legal values, see *id.* at 17, not on tensions between legal ethics and personal morality.

119. I hesitate to lump Luban and Simon together as one critique, given their unique, substantial, and divergent contributions to our understanding of legal ethics. For the purposes of this Article, however, the similarities are more important than their significant differences.

120. Luban, *supra* note 117, at 884.

121. Postema, like others taking a discretionary approach, argues that

[e]ach lawyer must have a conception of the role that allows him to serve the important functions of that role in the legal . . . system while integrating his own sense of moral responsibility into the role itself. Such a conception must improve upon the current one by allowing a broader scope for engaged moral judgment in day-to-day professional activities while encouraging a keener sense of personal responsibility for the consequences of these activities.

Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 82 (1980). Ultimately, Postema argues that we should not have “fixed roles” for attorneys, but instead what he calls “recourse roles.” *Id.* at 83 (“[I]n a recourse role, one’s duties and responsibilities are not fixed, but may expand or contract.”).

view.¹²² Simon consistently expects that lawyers will take moral dilemmas, translate them into the world of legal values, analyze these competing legal values, and arrive at a conclusion about what to do. According to Luban, this simply “places excessive cognitive demands on lawyers.”¹²³

Ironically, the same charge can be leveled at Luban’s own morality-centered Discretionary Critique. One may wonder whether lawyers have the time, inclination, or ability to engage in the reasoning of moral philosophers. They are often untrained in these arts. More importantly, they may be deeply skeptical of the implicit claim that two intelligent and argumentative lawyers will ever agree on the moral choice to be made in a difficult situation. They may doubt that the Discretionary Critique will amount to anything more than handing the henhouse to the fox—that allowing attorneys to use their discretion will lead to anything more than self-interested (or client-interested) rationalizations.¹²⁴

I do not adhere completely to either Luban or Simon’s version of the Discretionary Critique, as will be clear below. Nevertheless, there is no doubt that their work has been both devastating to the Dominant Approach and critical in laying the foundations for the contract model advocated here. For now, let me note a few problems with, and extract a few lessons from, the Discretionary Critique.

The Discretionary Critique has shown quite persuasively that the lawyer’s amorality may be less justified than lawyers and legal ethicists have traditionally assumed. This critique has focused less, however, on proposing alternatives to partisan conceptions of the lawyer’s role or the profession’s uniform rule structures. Neither Luban nor Simon is primarily interested in positive legal ethics—in the codes themselves. Neither has proposed extensive specific code revisions. Instead, each stresses personal discretion or reasoning as the key to reforming the profession.¹²⁵

I disagree with this lack of focus on the legal ethics codes. The codes are of paramount importance in structuring attorneys’ behavior. Lawyers turn to the codes for guidance, and they want to be able to trust the codes when making complex decisions under conditions of uncertainty.

Second, and more fundamentally, however, the Discretionary Critique seems to imply adherence to the principle of regulatory uniformity, just as its target—the Dominant Approach—does. The Discretionary Critique attacks the uniformity of the legal rules, but its response is to call on all

122. Luban, *supra* note 117, at 896.

123. *Id.*

124. See Robert W. Gordon, *The Radical Conservatism of The Practice of Justice*, 51 STAN. L. REV. 919, 928–29 (1999) (raising this objection).

125. For another example of this tendency, see Geoffrey C. Hazard, Jr., *Personal Values and Professional Ethics*, 40 CLEV. ST. L. REV. 133, 133 (1992) (“The essential point is that rules of ethics, such as those embodied in the profession’s ethical codes, are insufficient guides to making the choices of action that a professional must make in practice.”).

lawyers to make discretionary judgments about their choices. This is, ironically, a similarly uniform approach. It assumes a basic similarity between attorneys in terms of their ability and desire to make such judgments. And it assumes, again, that one approach fits all—that the Discretionary Critique will fit comfortably for all attorneys.

This is my primary disagreement with the Discretionary Critique. Lawyers are not all the same, nor are the circumstances in which they practice. To the extent that the Discretionary Critique implicitly adheres to the assumptions about regulatory uniformity found in the Dominant Approach, it misses an opportunity to tailor legal ethics to the heterogeneous realities of the practice of law.

I do not want to overstate the case, however. There are certainly ways in which *any* code will have gaps and ambiguities that require *some* sort of discretion, whether Luban's, Simon's, or otherwise, to reconcile and fill.¹²⁶ No code is perfect. My argument, however, is not to abandon the insights of the Discretionary Critique, but to take them in a different direction. Because the existing legal ethics codes largely embody the Dominant Approach, the Discretionary Critique has relentlessly attacked those codes. It has thus quite naturally underplayed the ways in which the codes themselves could be used to *augment* lawyers' discretion as they make tough choices about how to engage in their work. The point is that the Discretionary Critique has largely ignored the ways in which the codes can—and should—function in lawyers' lives as a positive promoter of making those choices. By attacking the codes as insufficient and indeterminate, the critique has failed to leverage the codes. My argument, in short, is that we must use the codes to facilitate discretion, not use discretion to abandon the codes.

Specifically, the Discretionary Critique does little to solve the bargainer's sorting problem that is the focus here. If lawyers are given the freedom—or take back the freedom—to use their discretion to make tough ethical choices, they may be better able to build the reputations for collaboration that Gilson and Mnookin focus on.¹²⁷ A lawyer, for example, may no longer feel compelled to follow the permissive outlines of Model Rule 4.1, and may instead choose to be as honest as possible in her negotiations. She may even choose, as Luban has suggested,¹²⁸ to disclose material information to an adversary even if the *Model Rules* seem to forbid such disclosure. If personal discretion trumps the ethics codes, the lawyer will have this choice. As a consequence, the lawyer will have the ability to signal to others that she is a committed collaborator.

126. I am grateful to William Simon for reminding me to acknowledge this.

127. See *supra* notes 33–38 and accompanying text.

128. Luban suggests that the “rules be redrafted to allow lawyers to forego immoral tactics or the pursuit of unjust ends without withdrawing, even if their clients insist that they use these tactics or pursue these ends.” LUBAN, *supra* note 98, at 159.

This is good, as far as it goes, but increased reliance on personal discretion does little to solve the sorting problem in contexts without reputational information. A lawyer must be able to signal credibly to both clients *and* to other attorneys that the lawyer will behave collaboratively. The Discretionary Critique offers no mechanism to facilitate this signaling. Instead, it depends on reputational markets to overcome the sorting problem. This, as we have seen, is only a partial solution.

2. The Problem-Solving Critique

A second critique—which I will call the Problem-Solving Critique—attacks the principle of partisan professionalism.¹²⁹ Scholars in this vein—particularly Carrie Menkel-Meadow—argue that a lawyer and client may have various goals that go beyond the traditional ethic of zealous advocacy.¹³⁰ A client may want to avoid litigation, preserve a future relationship with an adversary, or maximize joint gain.¹³¹ She may want to obey the spirit of the law, not just the letter. Even in litigation, a client may be as concerned with minimizing costs, finding the “truth,” enhancing the dignity of all involved, or finding a creative solution to the problem as the client is with “winning” as traditionally conceived.¹³² In Menkel-Meadow’s words,

[r]ules premised on adversarial and advocacy systems, with legal decision-makers, simply do not respond to processes which are intended to be conducted differently (in forms of communication, in sharing of information, in problem analysis and resolution) and to produce different outcomes (not necessarily win-loss, but some more complex and variegated solutions to legal and social problems).¹³³

The Problem-Solving Critique argues that the Dominant Approach undermines client autonomy by encouraging lawyers to impose their own views, assumptions, and legalistic conceptual frameworks on their clients,

129. See Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935, 951 (2001); Carrie Menkel-Meadow, *The Limits of Adversarial Ethics*, in ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION 123, 135 (Deborah L. Rhode ed., 2000) [hereinafter Menkel-Meadow, *Limits*] (arguing for a “problem-solving” approach to legal ethics); Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 161 (1999).

130. For the classic articulation of this critique, see Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 794–801 (1984).

131. Some of this taxonomy borrows from Zacharias, *supra* note 99, at 175 (laying out various goals a client may want to pursue).

132. See, e.g., Menkel-Meadow, *supra* note 77, at 430 (suggesting that ADR’s “underlying principles [are] different” from those that guide the Dominant Approach).

133. *Id.* at 410.

rather than to really listen to their clients.¹³⁴ Clients, the argument goes, do not want amoral and legalistic gladiators—they want to be heard, understood, and accepted on their own terms.

Problem-solving critics have generally attacked the *Model Rules* for setting too low an ethical bar for lawyer-negotiators. Menkel-Meadow has argued, for example, that the misrepresentation permitted by Rule 4.1's Comment 2 undermines collaborative processes. Currently there is “no obligation to volunteer information or to correct misinformation by other parties or lawyers in proceedings unless the duty is imposed by other laws such as state fraud law or rules of civil procedure.”¹³⁵ She has advocated revising the ethics codes to include obligations to inform clients about ADR options, a strengthened duty of candor, and a duty to avoid doing “substantial injustice” to an opposing party.¹³⁶

Similarly, Walter Steele has suggested the following aspirational rule:

[W]hen serving as a negotiator, lawyers should strive for a result that is objectively fair. Principled negotiation between lawyers on behalf of clients should be a cooperative process, not an adversarial process. Consequently, whenever two or more lawyers are negotiating on behalf of clients, each lawyer owes the other an obligation of total candor and total cooperation to the extent required to insure that the result is fair.¹³⁷

Likewise, Alvin Rubin has suggested that a “lawyer must act honestly and in good faith.”¹³⁸ James Alfini has proposed the following revision of Model Rule 4.1. He would eliminate the word “material” from Rule 4.1(a), requiring simply that a lawyer shall not knowingly “make a false statement of fact or law to a third person.”¹³⁹ Finally, Reed Elizabeth Loder has argued

134. See Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399, 405 (2003) (“[T]he conduct, tactics, behaviors, and strategies that serve clients well in the adversary system are often, at best, inappropriate in non-adversarial settings, and in some cases, can even be quite detrimental to achieving the goals and objectives of a non-adversarial proceeding.”). There is some overlap with the Discretionary Approach here. Simon, too, is concerned about the lawyer-client relationship and the ways in which the Dominant Approach influences that conversation. See Simon, *supra* note 92, at 34–39 (discussing these themes).

135. Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 95 (2002).

136. See Menkel-Meadow, *Limits*, *supra* note 129, at 136 (listing ten revisions to the ethical codes for lawyers).

137. Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1403 (1986).

138. Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 589 (1975).

139. James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255, 270–71 (1999). A discussion draft of the *Model Rules* from 1980 similarly had a sweeping provision. It would have included a new Model Rule 4.2, requiring that “[i]n conducting negotiations a lawyer shall be fair in dealing with other participants.” AM. BAR

that the ethics codes should be reformed to impose a uniform duty to avoid deception by omission—in other words, to require lawyers to break silence to correct others' material misunderstandings.¹⁴⁰

I agree with these basic tenets of the Problem-Solving Critique—indeed, I have championed these points elsewhere.¹⁴¹ I disagree, however, with the regulatory reform strategies that these critics have generally taken. Most advocates for the Problem-Solving Critique either doubt whether rule reform will significantly impact the adversarial norms within the legal profession,¹⁴² or, like the Discretionary Critique, they advocate sweeping reforms to the *Model Rules* that would essentially impose a problem-solving orientation on all attorneys. Because of this uniformity, none of these proposals has been sufficiently palatable to the bar to be incorporated into the *Model Rules*. Instead, the rules have continued to regulate lawyers' bargaining in line with the standard conception of the lawyer's role—tolerating a certain amount of deception in order to further the lawyer's ability to zealously advocate for his client.

This is not just a descriptive problem, but a normative one. Although setting a uniform aspirational bargaining ethics rule could theoretically solve the sorting problem if everyone complied, as a normative matter such a rule would be unjustified. The existing Comments to Model Rule 4.1 have it at least partly right—there *are* conventions in negotiation, including a widely recognized norm that permits some bluffing and manipulation. If the bar imposed an aspirational bargaining ethic on all lawyers, some set of clients would stop turning to lawyers as their negotiating agents. That set of clients prefers hard-bargainers, and attorneys would no longer qualify. This is as unacceptable as the existing situation in which the bar's ethics rules serve *only* clients seeking hard-bargainers.

Moreover, revising Rule 4.1 to set a uniform aspirational rule that forbade all misrepresentation would ignore the realities of moral pluralism. Although, as a public relations matter, it would be easier on the bar to completely forbid all lying, I do not believe that, as a community, the bar has—or reasonably *could* have—consensus on that approach to the moral intricacies of bargaining. Instead, some lawyers undoubtedly believe that, so

ASS'N, COMM'N ON EVALUATION OF PROF'L STANDARDS, DISCUSSION DRAFT OF THE MODEL RULES OF PROFESSIONAL CONDUCT (1980).

140. Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 86–88 (1994); see also Longan, *supra* note 84, at 807 (advocating for a uniform duty to tell the truth in negotiation).

141. See MNOOKIN ET AL., *supra* note 21, 38–44 (arguing for increased problem-solving in the legal profession).

142. Carrie J. Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 40 (1996) (“I am skeptical that ethics rules changes can really reform the adversary system. Adversarialism is so powerful a heuristic and organizing framework for our culture, that, much like a great whale, it seems to swallow up any effort to modify or transform it.”).

long as the rules of the game are clear, misrepresentations of the sort permitted by Rule 4.1's Comment 2 should create no moral anxieties. Just as bluffing is permitted in poker, so too should it be permitted in legal negotiations.¹⁴³ I neither have nor have found a decisive argument to prove them wrong—it is not a completely unreasonable position.

To the extent that the Problem-Solving Critique has called for a uniform aspirational ethics rule forbidding all deception by bargaining lawyers, therefore, I think it goes too far. At the same time, the Problem-Solving Critique highlights the moral uncertainties in bargaining ethics. Just as some lawyers may feel comfortable playing poker, others will not. This second group will doubt the power of the principle of nonaccountability. It will want to practice in a more honest, collaborative fashion. It will thus need an ethics code that can facilitate, rather than hamper, such practice by allowing negotiators to know which game they are playing.

3. The Context-Specific Critique

A third critique of the Dominant Approach focuses on the principle of regulatory uniformity, and on the problem of how best to adapt the standard conception of the lawyer's role to the varied contexts in which lawyers actually work.

The central argument of the Context-Specific Critique is that the principle of regulatory uniformity is misguided.¹⁴⁴ Instead, the argument goes, the profession's ethics rules should become more heterogeneous and specific to particular practice areas. Rather than one set of model rules to govern all lawyers, scholars have argued that the profession should promulgate multiple sets of rules tailored to context. Indeed, calling for context-specific alternatives to the dominant legal ethics codes has become something of a cottage industry. For example, codes have been proposed to regulate lawyers representing minors,¹⁴⁵ lawyers appearing in federal

143. For the most interesting discussion of the "rules of the game" defense, see APPLBAUM, *supra* note 112, at 104–08, 113–20.

144. Professor David Wilkins has long attacked what he calls the "traditional model" of the Dominant Approach. See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 515 (1990) ("Because legal culture differs across practice types, general commands addressed to all lawyers can acquire unintended, even perverse meanings."); see also David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, in EVERYDAY PRACTICES AND TROUBLE CASES 68 (Austin Sarat et al. eds., 1998); Fred C. Zacharias, *Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?*, 6 GEO. J. LEGAL ETHICS 903 (1993) (arguing for context-specific regulation).

145. See, e.g., Bruce A. Green, *Foreword: Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281, 1282–83 (arguing for specific codes in this context).

court,¹⁴⁶ and criminal,¹⁴⁷ securities,¹⁴⁸ bankruptcy,¹⁴⁹ international,¹⁵⁰ employment,¹⁵¹ estate,¹⁵² and mass tort lawyers.¹⁵³

In this vein, some proponents of the Problem-Solving Critique have turned to context-specific codes as an alternative to the Dominant Approach. Professor Kovach, for example, has argued that a separate code of ethics should apply when a lawyer represents a party in mediation.¹⁵⁴ In the alternative, she has argued for modifications within the *Model Rules* to guide lawyers representing clients in mediation.¹⁵⁵

The possible advantages of these codes are obvious. By tailoring ethical rules to particular practice areas, codes can provide a level of detail that is impractical in the *Model Rules*. Lawyers facing specific problems—such as custody issues in divorce, fiduciary obligations in the securities context, or

146. See, e.g., Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 468–69 (1996) (arguing for special rules for federal court representation).

147. See, e.g., Roberta K. Flowers, *A Code of Their Own: Updating The Ethics Codes to Include The Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 964–65 (1996) (arguing for specific codes); Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687, 689–90 (1991) (arguing for specific codes in the criminal context).

148. See Simon M. Lorne, *The Corporate and Securities Adviser, the Public Interest, and Professional Ethics*, 76 MICH. L. REV. 425, 469–72 (1978) (arguing for securities adviser role); Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149, 150 (1993) (arguing for special codes for securities practice).

149. See Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45, 49–50 (1998) (arguing for a federal law of bankruptcy ethics).

150. See Malini Majumdar, *Ethics in the International Arena: The Need for Clarification*, 8 GEO. J. LEGAL ETHICS 439 (1995) (arguing that the ABA should clarify an American lawyer's ethical obligations when he or she is engaged in transnational practice).

151. See Gwen Thayer Handelman et al., *Standards of Lawyer Conduct in Employee Benefits Practice* (pt. 1), 24 J. PENSION PLANNING & COMPLIANCE, Summer 1998, 10, 12 (noting that the “lack of uniform ethical rules in multijurisdictional ERISA practice is troublesome”).

152. See Jeffrey N. Pennell, *Ethics in Estate Planning and Fiduciary Administration: The Inadequacy of the Model Rules and the Model Code*, 45 REC. OF THE ASS'N OF THE B. OF THE CITY OF N.Y. 715, 763 (1990) (arguing for creation of a code for estate attorneys).

153. See David Hricik, *The 1998 Mass Tort Symposium: Legal Ethical Issues at the Cutting Edge of Substantive and Procedural Law*, 17 REV. LITIG. 419, 419–20 (1998) (reporting that both the *Model Rules* and the *Model Code* were drafted without considering the mass torts paradigm). See generally Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996) (discussing ethical issues in mass tort litigation).

154. See Kovach, *supra* note 129, at 953 (arguing that “[n]ew rules are necessary”). Others have argued for new codes for lawyer-mediators. Alison Smiley, *Professional Codes and Neutral Lawyering: An Emerging Standard Governing Nonrepresentational Attorney Mediation*, 7 GEO. J. LEGAL ETHICS 213, 234–46 (1993) (arguing for code for lawyer-mediators); Wendy Woods, Note, *Model Rule 2.2 and Divorce Mediation: Ethics Guideline or Ethics Gap?*, 65 WASH. U. L.Q. 223, 231–32 (1987) (same).

155. See Kovach, *supra* note 129, at 960 (“A less radical option is to add a new rule, which would override the current rules governing lawyers who represent clients in mediation.”).

prosecutorial misconduct in the criminal area—can get specific guidance. Such tailored provisions may be easier to access, interpret, and follow—and may thus produce greater behavioral change in attorneys than the more generic *Model Rules* can deliver.

Context-specific codes also create problems. They can be too specific—taking on a statutory quality that may inhibit ethical reflection by lawyers and clients.¹⁵⁶ Some fear that context-specific rules will sacrifice solidarity within the profession, fragmenting it into practice groups and eliminating the unifying advantages of having one shared ethics code.¹⁵⁷ Code proliferation also threatens the practitioner with a “conflicts of laws” problem as codes begin to overlap and contradict.¹⁵⁸ Finally, some have raised the “spill-over” problem: that supposedly context-specific rules will spill over into other areas where they fit less well.¹⁵⁹

There is a more troubling problem with the Context-Specific Critique, however. In proposing context-specific rule structures to govern criminal, corporate, or other types of lawyers, scholars in this vein obviously seek to tailor ethical obligations to the demands of these specific contexts. At the same time, these sub-rule structures are almost always entirely uniform *as applied to that context*. When one looks at the details of the proposed context-specific codes, those codes generally continue to adhere to the Dominant Approach’s principle of regulatory uniformity at that new, more specific level of the profession. In other words, *all* matrimonial lawyers should behave according to the matrimonial rules; all prosecutors according to the prosecutorial rules, etc. How different, then, are context-specific rules from the Dominant Approach?

As a signaling mechanism, context-specific codes will work only if they bind lawyers and clients to a different set of obligations than the existing ethics rules. If lawyers could opt in to a second regulatory regime that the existing disciplinary system could enforce, context-specific codes might serve as a credible signal. But these codes have not been adopted as an alternative in this way—to date they are merely aspirational. The lesson of the Context-Specific Critique is clear—the principle of regulatory uniformity is out of step with the realities of modern practice. At the same time, the regulatory response has also been clear. The bar is, and will likely continue to be,

156. Professor Zacharias has argued against too much specificity while still embracing the importance of context. See Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 237, 249–85 (1993) (discussing the disadvantages of specificity); Zacharias, *supra* note 99, at 205–08; see also Reed E. Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst?*, 1 GEO. J. LEGAL ETHICS 311, 332–33 (1987) (arguing that specific rules can discourage moral introspection).

157. See Wilkins, *supra* note 101, at 1217 (naming and discussing the “communitarian” critique).

158. See Carrie Menkel-Meadow, *Ethics in ADR: The Many “Cs” of Professional Responsibility and Dispute Resolution*, 28 FORDHAM URB. L.J. 979, 979 (2001) (noting the conflicts of laws problem).

159. See Wilkins, *supra* note 101, at 1217.

reluctant to promulgate and try to enforce multiple ethics codes simultaneously. A different solution is needed.

IV. A SOLUTION: THE CONTRACT MODEL OF LEGAL ETHICS

The remainder of this Article argues that the profession should revise its ethics codes, and, more importantly, its assumptions about ethics codes. It proposes a contract model of legal ethics in which the bar promulgates a menu of regulatory options from which lawyers and clients could choose. The menu would not contain individual rules so much as bundles or packages of rules (which I will call “rule sets”). A lawyer could choose between these bundles to fit with the lawyer’s role and approach.

A code of this type would look very different from the *Model Code* or the *Model Rules*. In particular, the contract model would allow for contracts for collaboration that could explicitly trigger public disciplinary sanctions in the event of breach. Such reform would restructure the ideal of lawyers as advocates, and provide in the legal ethics codes for more honest, forthright, collaborative approaches to lawyering. Rather than uniformly altering the standard conception of the lawyer’s role, however, these reforms would allow lawyers to opt in or opt out of various code provisions through contract, thereby tailoring their legal role to their circumstances. At the same time, it would retain *some* control in the organized bar over such tailoring, rather than granting unlimited freedom to a lawyer to craft any LRA she pleased.

This Part introduces the contract model of legal ethics. First, it critiques the Dominant Critiques as a means to outline the conceptual contours of the contract model. It then introduces the regulatory techniques of contractarian law and economics, and explores the interface between existing contractarian scholarship and the contract model proposed here. Finally, it proposes specific revisions to the *Model Rules* to address the bargainer’s sorting problem.

A. *THE CONTOURS OF THE CONTRACT MODEL: CRITIQUING THE DOMINANT CRITIQUES*

As should now be clear, each of the three Dominant Critiques focuses on one of the three core principles of the Dominant Approach. The Discretionary Critique primarily attacks the nonaccountability principle. The Problem-Solving Critique primarily attacks the principle of partisan professionalism. And the Context-Specific Critique targets the principle of regulatory uniformity. The goal of this Part is to introduce the contract model of legal ethics by illustrating that none of these critiques can, on its own, replace the Dominant Approach in theory or in practice.

1. Revisiting the Principle of Nonaccountability

As interesting as existing debate about the moral responsibilities of lawyers is to legal scholars—including myself—I will assert that it is of relatively little interest to practicing attorneys. Practicing lawyers likely have neither the training nor the time to discuss the fine points of the principle of nonaccountability. Even *with* a great deal of time and training, there is remarkable room for disagreement about these issues. Like it or not, we are stuck with moral pluralism—at least when it comes to trying to reach agreement on how to arrange our professional responsibilities. Lawyers and clients can and will take many different, deeply felt viewpoints on the moral intricacies of the legal life.

As a result, most lawyers place great reliance on the safe haven that they perceive the *Model Code* and the *Model Rules* to be. This highlights the greatest failing of the Discretionary Critique (and of others that have labored to undermine the Dominant Approach). Although the critique is arguably right, those to whom it should matter the most are likely to ignore it. Lawyers undoubtedly care about moral reasoning, religious values, and social norms—I believe that most attorneys strive to be good people as well as good lawyers. And they undoubtedly recognize that their work occasionally creates moral dilemmas that challenge these aspirations. In those moments, however, lawyers are most likely to rely on the positive constraints that the profession's ethics codes have imposed upon their work. They are unlikely to turn their backs on those codes in favor of exercising their own moral discretion. When a client calls asking for help and offering to pay for a lawyer's time, that attorney wants to know whether the codes will permit taking action. The lawyer's livelihood is at stake; her family, her mortgage, her reputation. She wants to know what the profession clearly permits or forbids.

As a consequence, the Discretionary Critique is uncomfortable for lawyers. The critique exposes the weaknesses in the principle of nonaccountability, but it fails to establish how a lawyer is supposed to act in its absence.

I am not arguing that lawyers want no discretion at all, nor that they prefer amoral (or immoral) minimalist professional rules that permit any course of action. Quite the contrary—I believe that lawyers want a great deal of discretion to structure their lives and their work as they see fit. Given choices, some will undoubtedly adopt and live up to the highest of ethical standards, while others will not. In my view, however, the key is regulatory predictability. If we want lawyers to exercise their moral discretion, we must provide mechanisms for them to do so in safe ways with predictable disciplinary outcomes.

I am also not saying that because lawyers turn to the codes for guidance (a descriptive or empirical claim), those codes can relieve them of their normal moral obligations by simply declaring that a lawyer's professional

role trumps (the normative claim at the heart of the principle of nonaccountability). That is wrong, in my view. But my view is not the only one, and ultimately the regulation of a profession should turn on facilitating the moral development of its members, not on dictating an artificially soothing moral minimalism to them. My goal is for the ethics codes to promote real accountability by giving lawyers a choice as to what rules they play by.

2. Revisiting the Principle of Partisan Professionalism

The Problem-Solving Critique similarly suffers from impracticality and the impossibility of consensus about its application. This critique encourages lawyers to adopt more problem-solving or collaborative strategies.¹⁶⁰ Many lawyers, however, remain skeptical. Problem-solving may seem too soft, or too likely to lead to unnecessary compromise. How, such lawyers ask, are we to reconcile a desire to problem-solve with a competing desire to protect our clients from exploitation?¹⁶¹ Even if I *want* to collaborate, I cannot (or should not) because it will put my client in jeopardy.

This role conflict is easily ignored, but it is not easily resolved. Many scholars, myself included, have asserted that although adopting a problem-solving or collaborative orientation may sacrifice *some* gains for some clients some of the time, overall it will produce better outcomes.¹⁶² (Generally, such scholars also add that with sufficient understanding of defensive tactics, a problem-solving attorney can minimize the negative consequences of trying to collaborate.) There is little empirical testing of this hypothesis, however, and it may be wrong.¹⁶³ Lawyers who adopt a problem-solving stance may put their clients' interests in more peril than we realize, particularly given that learning new strategies and techniques takes time. As a lawyer experiments with problem-solving approaches, he may implement them incompletely or lack the skill to simultaneously defend himself. In truth, we know little about the developmental path that attorneys take as they implement these approaches, and less about the consequences for clients.

At a more fundamental level, proponents of problem-solving need to re-examine their assumptions about the short- and long-term trade-offs that must be made when an individual lawyer and/or client seeks to adopt a problem-solving approach to bargaining. Many such scholars seem to

160. See *supra* notes 129–143 and accompanying text.

161. See Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 88 (1994) (recognizing that these are “legitimate qualms that gnaw at many lawyers”).

162. See MNOOKIN ET AL., *supra* note 21, at 322 (“[T]he strategies suggested in this book may not lead to the very best outcome for a client in every situation, but they will lead to outcomes that are better for most clients most of the time.”).

163. See generally Schneider, *supra* note 25, at 143 (testing efficacy and incidence of problem-solving and other strategies).

believe—perhaps due to an overly optimistic reading of Robert Axelrod’s famous *The Evolution of Cooperation*—that nice, collaborative strategies analogous to “tit-for-tat” will, over time, come to dominate in sequential play Prisoner’s Dilemma-type situations.¹⁶⁴ The accepted wisdom about Axelrod’s tournament has made it reasonably comfortable for problem-solving scholars to assume that collaborative problem-solvers will do better over time than hard-bargainers, and thus to assume away the lawyer’s role conflict described above.

Such assumptions may be misleading, however. Without digressing into extended game theoretics, it is not at all clear that tit-for-tat dominates other strategies, nor, by analogy, that problem-solving will, over time, do better than hard-bargaining. Other strategies fare reasonably well, and much depends on the initial distribution of strategies across a population.¹⁶⁵ Assuming that most lawyers use adversarial strategies—or at least *believe* that most other lawyers use such strategies—it may be very difficult for collaborative or problem-solving approaches to take hold.¹⁶⁶ At the very least, the profession could profit from additional guidance on how to reconcile a lawyer’s possible desire to problem-solve with the lawyer’s duties to protect her client.

The point is that lawyers, and clients, must be permitted to *choose* what approach they want to take. Some will undoubtedly want to experiment with more collaborative, problem-solving approaches. Others will not. Whatever their motivation, these lawyers and clients will want to continue to adopt the standard conception of the lawyer’s role as a partisan professional. They should have this choice.

To date, the Problem-Solving Critique has been too sweeping in its condemnation of the standard conception of the lawyer’s role, and thus too judgmental, in my opinion, of lawyers generally. Lawyers practice in difficult circumstances, for difficult clients. They face complex decisions, moral and otherwise, for which there are few easy answers. Although the Problem-Solving Critique certainly has a valuable point in arguing for a more collaborative alternative to the Dominant Approach, it reaches too far if it tries to impose that alternative on all lawyers, all the time. It becomes, in

164. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 27–54 (1984) (illustrating that tit-for-tat strategies can prevail in iterative Prisoner’s Dilemma tournaments). In “tit-for-tat,” a player begins a game by cooperating in round one, and thereafter copies whatever move her opponent made in the previous round. Thus, if an opponent cooperates in round one, the player cooperates in round two. If the opponent defects in round one, the player defects in round two. And so on.

165. For an interesting discussion of Axelrod’s experiments and ensuing critique, see KEN BINMORE, *GAME THEORY AND THE SOCIAL CONTRACT VOLUME I: PLAYING FAIR* 194–203 (1994).

166. Compare Schneider, *supra* note 25, with Heumann & Hyman, *supra* note 25, at 255 (finding that seventy-one percent of attorneys adopted a positional or hard bargaining strategy).

short, a form of “ADR” or problem-solving imperialism, just as it has accused the Dominant Approach of adversarial imperialism.

3. Revisiting the Principle of Regulatory Uniformity

The Dominant Critiques have largely assumed that to revise the rules means to replace the existing uniform set of rules with another uniform set of rules. This has led to preoccupation with what is now a standard question in legal ethics: whether the *Model Rules* should be an aspirational ceiling or a realistic floor.¹⁶⁷ This preoccupation unfortunately defers to the principle of regulatory uniformity—scholars in these debates assume that the *Rules* must set a low bar (as in the current Dominant Approach) or a high bar (as in the Problem-Solving Critique) for everyone.

Imagine a code of legal ethics, however, that was agnostic to the foundational principles of the Dominant Approach. In other words, it neither adopted nor rejected non-accountability and partisan professionalism. Instead, this code of ethics was structured around a different foundational assumption: pluralism. It assumed that different lawyers and clients might want different things from the legal profession—that they might want to practice in different ways, with different commitments, for different purposes. What would that commitment to pluralism mean for a code of legal ethics?

This code would have to assume that some lawyers—perhaps most—would want the standard conception of the lawyer’s role to remain undisturbed. These lawyers would welcome an institutional excuse from moral accountability for their clients’ choices, and would feel most comfortable with a partisan, adversarial conception of lawyering. They would want no choice of ethical provisions—indeed, these lawyers might fear that increased ability to structure one’s ethical constraints would merely take time and effort better spent on other things.

The code would also have to make room for other perspectives, however. Some would not have faith in the nonaccountability principle. They would doubt that institutional excuses could justify otherwise immoral behavior. They might seek a way out of the standard conception of the lawyer’s role—perhaps hoping to adopt a more problem-solving approach to lawyering. They would want freedom to choose their professional ethical obligations—freedom to experiment with their professional identity and role in response to market demands, personal beliefs, and client circumstances.

In addition, this code would have to take a new stance toward regulatory uniformity. If one assumes that we live in a pluralistic world, where consensus about complex moral and professional matters is unlikely, then

167. For an example, see LUBAN, *supra* note 98, at 158, for a detailed discussion of revising the ethics codes because of the dilemma created by this binary choice.

one is led to a commitment to *having* an ethical code that can offer guidance and safe haven to practicing attorneys. A code is necessary *because* we disagree—it is more important to have guidelines when you do not all see things the same way than when you do. At the same time that this new approach is committed to the importance of regulatory provisions, however, it must simultaneously be committed to structuring those provisions so as to provide the greatest possible amount of individual freedom within them.

These are the central tenets of the contract model of legal ethics. As a normative matter, the contract model is committed to granting lawyers and clients greater choice in their professional ethics, while still maintaining a centralized, reliable, and predictable ethics code on which they can rely. It is, in short, an argument for constrained pluralism—for abandoning the basic principles of the Dominant Approach without abandoning the ethics codes altogether.

B. THE BEGINNINGS OF AN ALTERNATIVE:
CONTRACTARIAN ECONOMICS AND LEGAL ETHICS

The previous Part introduced the normative commitments of the contract model, derived from the Dominant Approach and the Dominant Critiques. What would such a pluralism-based code look like? To answer that question, the contract model draws from new contractarian economic approaches to legal ethics. It uses contractarian economics, in other words, to implement this revised vision of the legal profession.

Law and economics scholars have recently taken an interest in legal ethics. They have begun to use the conceptual apparatus of contractarian economics, which has had pervasive influence on such contexts as contract law, corporate law, and securities regulation,¹⁶⁸ to explore whether the legal ethics rules are efficient. In particular, this literature has focused on whether, and how much, lawyers and clients should be able to tailor their ethical obligations by “opting in” or “opting out” of professional obligations.

Contractarian economics sorts legal rules along several dimensions, according to what I have elsewhere labeled the “contractarian taxonomy of rule types.”¹⁶⁹ Immutable rules are those that cannot be changed contractually by parties; default rules can be.¹⁷⁰ Majoritarian defaults are

168. See *supra* notes 7–10 and accompanying text.

169. See Peppet, *supra* note 10, at 233. For an excellent overview of this taxonomy, see Painter, *supra* note 10, at 674–92.

170. See generally Ayres & Gertner, *supra* note 7, at 87–88. For example, the *Model Rules* forbid a lawyer to commingle client funds with the lawyer’s own, suborn perjury, misrepresent to a tribunal, or assert frivolous claims, regardless of client consent—these are immutable rules. See Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 290 (2000) (discussing this and other examples of immutable legal ethics rules). The *Model Rules* governing conflicts of interest, however, permit waiver of the rules with client consent—these are default rules. MODEL RULES OF PROF’L CONDUCT R. 1.7(b), 1.8(a)–(b), (g) (2003).

those that set parties' default obligations in the same way in which the parties would set those obligations were they to bargain about them;¹⁷¹ penalty default rules set defaults that parties would *not* prefer, and thus create incentives for parties to bargain around the default.¹⁷²

Contractarian analysis of the ethics codes thus attempts to determine whether the codes appropriately include immutable or default rules, and of what type, or whether the codes unnecessarily restrict the ability of lawyers and clients to contract for different sorts of obligations. For example, some law and economics scholars have investigated the extent to which the *Model Rules* permit tailoring of a lawyer's conflict of interest obligations.¹⁷³ Others have examined the legal profession's confidentiality rules.¹⁷⁴

To date, however, there has been no extensive contractarian analysis of the legal ethics rules that regulate lawyers' bargaining. Some *have* hinted at such an approach. Although he has not taken a contractarian approach to legal ethics generally, William Simon *has* suggested that in codifying his Discretionary Critique (or contextual view), lawyers and clients might do well to contract around the standards in existing professional codes. For example, lawyers and clients could contract around existing confidentiality default rules, agreeing to disclose all material information in bargaining, rather than adhering to the existing "low-commitment" rule that allows a great deal of misleading behavior.¹⁷⁵ Alternately, he has suggested that the ethics codes could include commitment-forcing rules regarding negotiation behavior—setting no default and instead requiring lawyers to choose a particular ethical rule for a particular negotiation.¹⁷⁶

171. See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965, 1005 (1997) (concluding that conflicts rules are majoritarian defaults).

172. See Ayres & Gertner, *supra* note 7, at 96–101, 106–07 (discussing penalty defaults and providing examples). See generally Ian Ayres & Robert Gertner, *Majoritarian v. Minoritarian Defaults*, 51 STAN. L. REV. 1591 (1999) (discussing both types of rules).

173. See generally Painter, *supra* note 170 (discussing proposed Ethics 2000 rules on waiver of future conflicts); Macey & Miller, *supra* note 171 (analyzing conflicts rules using contractarian economics). See also Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 FORDHAM L. REV. 579, 582 (1992) (analyzing conflict of interest rules).

174. Dan Fischel has argued, for example, that the existing confidentiality rules primarily serve the interests of the organized bar and should be abolished. Although the standard conception of the lawyer's role includes a strict duty of confidentiality so as to encourage open and frank lawyer-client communication, Fischel recognizes that some clients may be harmed by the lawyer's ability—and requirement—to keep confidences. As he puts it, "[c]lients who have nothing to hide are harmed by confidentiality rules because they are less able to distinguish themselves from clients who do. The force of this claim would be substantially weakened if clients . . . could waive confidentiality rules to communicate credibly that they have nothing to hide." Fischel, *supra* note 10, at 21.

175. See SIMON, *THE PRACTICE OF JUSTICE*, *supra* note 20, at 210–11.

176. See *id.* at 211 ("Lawyers might be required in any substantial direct negotiations to set forth in writing to the other party the ethical standards they are operating under either

There is an implicit tension, however, between Simon's commitment to the contextual view and his call for ethics codes that could facilitate signaling. Simon suggests that the codes could help parties signal a disposition to what he calls "high commitment" lawyering—that is, to being the kind of lawyer who subscribes fully to the contextual view.¹⁷⁷ In other words, Simon imagines that a lawyer could signal to clients, and other lawyers, a willingness to override positive legal ethics rules when necessary in the interests of justice. That, however, seems somewhat problematic, if not internally inconsistent, for two reasons. First, the lawyer who signals a commitment to the contextual view *is not* tying her hands in any relevant way. She is committing to put her discretion before the ethics rules when necessary, but this may mean that she is *more* free, not less free, to do unpredictable things.

Second, for a signal to work, it must cost the lawyer something if sent falsely. The lawyer must be posting some sort of bond by contracting for high-commitment ethics. Implicit in Simon's view is that the high-commitment lawyer posts a reputational bond. She has invested time, money, and energy in establishing a high-commitment reputation, and she risks losing that investment if she acts contrary to her commitments. My starting challenge, however, is to see whether we can facilitate signaling in reputationally deprived environments. The contract-based alternative offered here recognizes that for the ethics codes to facilitate sorting and signaling, there must be something concrete in those codes to which a lawyer can bind herself and that is independent of reputational information. But that sort of codified disciplinary specificity is the very thing that Simon's contextual view overlooks or rejects.

Richard Painter, who *is* staunchly in the contractarian camp, has made a similar argument in the regulatory context. He has examined the confidentiality rules and proposed that a lawyer should be able to opt in to provisions that allow for whistleblowing in the event that the lawyer discovers client fraud.¹⁷⁸ Rather than set either minimalist or overly aspirational whistleblowing rules, Painter would create a market for disclosure by setting various default provisions that lawyers could trigger by contracting with regulators.¹⁷⁹ Put differently, lawyers and law firms could signal a willingness to collaborate with regulators by contracting into an obligation to freely

generally or with respect to specific issues such as disclosure."); *see also* Simon, *Who Needs the Bar?*, *supra* note 20, at 652–58 (renewing this discussion).

177. Simon, *Who Needs the Bar?*, *supra* note 20, at 655.

178. Richard W. Painter, *Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221, 228–29 (1995) (arguing that lawyers should be able to choose which rules to follow).

179. Painter, *supra* note 70, at 179 (extending this argument).

disclose information to those regulators.¹⁸⁰ Clients using such lawyers would receive the benefit of this signal in the form of increased trust, and perhaps leniency, by the regulators.

Painter has stopped short, however, of proposing that *all* lawyers—not just those dealing with regulators—should be able to contract around the standard conception of the lawyer’s role.¹⁸¹ This illustrates a general tendency within existing contractarian legal ethics scholarship: most such work has avoided sweeping normative proposals for reform of the profession.¹⁸²

C. THE EXAMPLE REVISITED: REVISING THE MODEL RULES
RELATED TO LEGAL NEGOTIATION

Such sweeping reform is needed. Because of its commitments to pluralism and autonomy, the contract model of legal ethics prioritizes allowing lawyers and clients to shape the normative space of legal practice to suit their needs and beliefs. It is willing, in other words, to distance the legal ethics codes from even the most basic principles of the Dominant Approach. Without attacking the standard conception of the lawyer’s role, it is ready to become agnostic vis-à-vis the lawyer’s choice of whether to be an amoral gladiator.

Rather than set a low floor or a high ceiling for all lawyers, or fragment the bar’s regulation of attorneys by promulgating multiple codes, a contract model of legal ethics would supply pre-packaged rule sets that lawyers could trigger contractually. In the Introduction’s medical malpractice example, the lawyers and clients tried to contract as a collaborative signal. Their effort failed, however, because of the existing lack of a disciplinary regime to back up their agreement.¹⁸³

The contract model suggests a different outcome. In this model of legal ethics, the public ethics codes should interface with private contracts. So long as contracting parties correctly invoke the provisions of the public

180. See Painter, *supra* note 178, at 224 (“Allowing lawyers to choose their own rules ... would permit lawyers to decide which rules best suit their practice, their clients, and their ethical beliefs.”).

181. He worries that such contracts would violate existing conflict of interest prohibitions in the *Model Rules*. See *supra* note 70 and accompanying text.

182. The relationship between traditional legal ethics scholars and those using law and economics to analyze legal ethics has been uneasy. See George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 *FORDHAM L. REV.* 273, 299 (1998) (noting that the “natural inclination of those inclined toward the philosophical side of legal ethics might be to disparage the encroachment of law and economics on the field and fear that its blind devotion to self-interested behavior threatens to swallow up whatever remains of professionalism”).

183. These parties could have provided for contract remedies, but that does not solve the sorting problem because it leaves attorneys sanction-free. See *supra* notes 76–78 and accompanying text.

code, their private agreements can trigger disciplinary consequences for the lawyers involved.

Consider the following proposal to modify Rules 1.6, 4.1, and 7.4 of the *Model Rules*:

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

- (1) [Rule 4.1(1) would contain the existing Rule 4.1, as follows:]
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 when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.¹⁸⁴

[then add the following:]

- (2) *A lawyer may opt for a more collaborative engagement with third persons by so designating, by reference to this Rule provision, in a written agreement signed by all clients and attorneys involved in a matter, so long as all parties to the agreement provide informed consent. Lawyers practicing pursuant to this provision agree to:*
- (a) be truthful in all respects regarding the matter for which this section has been invoked;*
 - (b) disclose all material information needed to allow the third person in question to make an informed decision regarding the matter;*
 - (c) negotiate in good faith by, among other things, abstaining from causing unreasonable delay and from imposing avoidable hardships on another party for the purpose of securing a negotiation advantage.*
- (3) *A lawyer may further opt for a more collaborative engagement with third persons by so designating, by reference to this Rule provision, in a written agreement signed by all clients and attorneys involved in a matter, so long as all parties to the agreement provide informed consent. Lawyers practicing pursuant to this provision agree to:*
- (a) refuse to assist in the negotiation of any settlement or agreement that works substantial injustice upon another party;*
- (4) *(a) A lawyer obligated by designation under provision 4.1(2) or 4.1(3) may terminate such designation only by written notice, signed by the attorney and the client, to all relevant parties affected by the matter.*
(b) A lawyer and client may also agree, by so designating by reference to this Rule provision in a written agreement, that a lawyer obligated by designation under provision 4.1(2) or 4.1(3) shall withdraw from representation if unable to comply with the requirements of that provision.

184. Model Rules of Prof'l Conduct R. 4.1 (2003).

Such agreement must be signed by both and all signatories must provide informed consent.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

[add to Rule 1.6(b) a provision (7), as follows:]

“(7) as required by Rule 4.1(2) or 4.1(3).”

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

[add provision:]

(e) A lawyer or law firm may, in advertisements or communications, designate him- or herself or the firm as a “Collaborative” or “Problem-Solving” lawyer or firm so long as that lawyer or firm primarily practices subject to the provisions of Rule 4.1(2) or 4.1(3).

These amendments would accomplish several objectives. They would provide for a standard default provision—Rule 4.1(1)—equivalent to the existing minimalist rule. They would simultaneously permit lawyers and clients to opt, however, for more aspirational provisions. The new Rule 4.1(2) provides that so long as all affected parties so designate by written agreement, the lawyers agree to an honest, open exchange of information and to negotiate in good faith. The Comments to such a rule could detail that Rule 4.1(2) eliminates the current exceptions to the *Model Rules*’ definition of material misrepresentation.¹⁸⁵

Rule 4.1(3) goes further, allowing parties to opt into a fairness requirement. The rule provides that so long as lawyers and clients agree, the lawyers commit to avoiding doing “substantial injustice” to another party.¹⁸⁶ This is obviously a more aspirational, and controversial, provision. It is thus separate from, but amenable to combination with, Rule 4.1(2).

These rules would change existing legal practice. A lawyer could, if she so desired, initiate discussion with her client about using these Rule 4.1 provisions to “opt up” to more collaborative obligations. If her client assented, she would then have to initiate negotiations with the lawyer on the other side to determine whether the other side similarly planned to practice under these heightened requirements. A formal, signed designation of this decision would then follow, assuming that the lawyers and clients deemed it in their best interests.

The parties could then negotiate their disagreements under the obligations imposed by these rules. This does not mean that they would disclose everything to each other immediately, nor that they should. The proposed rules do not require *complete* disclosure—they forbid dishonesty

185. See *supra* notes 82–86 and accompanying text.

186. See Menkel-Meadow, *Limits*, *supra* note 129, at 136 (discussing Menkel-Meadow’s uniform and mandatory proposal to this effect).

and require disclosure of *material* information. Thus, although lawyers would have to disclose all material facts and law, they would not necessarily be required to disclose the priority of their clients' interests, their clients' "bottom line," or their clients' preferences regarding different settlement issues. Collaborative, honest negotiation does not mean laying *all* of one's cards on the table. Under these rules it would simply mean sharing material information about fact and law.¹⁸⁷

Note that the lawyer and her client could later choose to back out of their heightened Rule 4.1(2) or 4.1(3) obligations. Rule 4.1(4)(a) allows lawyers and clients to switch back to the traditional default rule in Rule 4.1(1) mid-stream, even during a negotiation. Effecting such a change requires written notice of the change, however, and this would in itself serve as a strong signal that the opposing side should be "on guard," thus accomplishing the basic sorting objectives of the proposed rule.

1. Why Not Set an Aspirational Default?

One might wonder, of course, why my proposed rule maintains the traditional rule as the default and requires lawyers and clients to "opt up" to its more aspirational provisions. One could set the default in a more collaborative way, thus forcing lawyers to talk to their clients about whether the clients want the standard conception of the lawyer's role. Given the existing culture and mindset, these would be penalty defaults¹⁸⁸—they would create incentives for lawyers to disclose information to their clients about the lawyer's own approach to negotiation, should the lawyer feel more comfortable with the standard conception of the lawyer's role.

Why set the default rules at the standard conception of lawyering, rather than adopt a more progressive or aspirational set of standards right out of the box?¹⁸⁹ There are several reasons.

First, a penalty or information-forcing default that required collaboration unless the parties opted out of the rule would impose serious—and most likely unjustifiable—transaction costs on all lawyer-client relationships and lawyer-lawyer negotiations. Such an aspirational default rule would require a lawyer to discuss the intricacies of the lawyer's role with her client *at the very start* of their relationship. Such a discussion would be

187. Some might argue that such a conversation is not a negotiation. I disagree. Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83, 92–95 (2002).

188. Ayres & Gertner, *supra* note 7, at 91–118 (discussing penalty defaults).

189. There is some danger that in setting the default rule at the status quo rule the rule itself will bias its users. Economic analysis assumes that preferences are exogenous—that is, that the content of a default rule does not affect the preferences of parties as they choose whether or not to bargain around that default rule. Russell Korobkin has suggested the opposite—that default rules impact preferences. Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1588–90 (1998).

critical at this early stage because the aspirational provisions in my proposed Rules 4.1(2), (3), and (4), as well as the modification of Rule 1.6, impact lawyer-client confidentiality. As a result, lawyers would need to explain the costs and benefits of accepting these provisions—if they were the default—or opting out of that aspirational default for the more traditional Rule 4.1(1) provisions.¹⁹⁰

This would mimic one of the central disadvantages of the existing Collaborative Law movement: the need to raise these issues at the beginning of a lawyer-client relationship. That is a vulnerable and sometimes difficult moment, as both lawyer and client try to learn about the other, share information openly, and determine whether they want to pursue a working relationship. Imposing upon that initial conversation and requiring discussion of the intricacies of these rules seems unwise, in no small part because of the inevitable confusion it would often create for many new clients as they approach a lawyer for the first time.

The cost-benefit analysis here turns on whether the benefits created by more honest and collaborative legal negotiations will outweigh these transaction costs in the lawyer-client relationship. This is an empirical question to which I have no empirically based answer, but my assumption is that imposing such transaction costs on *all* lawyers and clients is not justified. It seems likely that many lawyers will be unsure about these new aspirational rules, and more comfortable with their existing Rule 4.1 obligations. They may fear ancillary litigation or other costs if they use the new aspirational rules. As a consequence, one could easily imagine many, perhaps most, attorneys advising their clients to opt out of an aspirational default, particularly when the rule is first adopted. In such a scenario, the rule would impose significant costs with limited benefit.

Second, even if a penalty or information-forcing default rule would be more socially beneficial than maintaining the traditional low-aspiration default, the contract model is not committed solely to efficiency. This is where the contract model adds a normative component that differentiates it from straight contractarian analysis. The contract model is committed to giving lawyers and clients choice. That choice will produce greater

190. One could avoid this negative side effect of an aspirational default by maintaining the traditional low-aspiration default but requiring that lawyers *discuss* the more aspirational options with their clients. This would force an information exchange about a client's options without requiring that the conversation happen at the very start of the lawyer-client interaction (because the traditional default, and its confidentiality protections, would be in place even during such discussions). This middle ground avoids some of the costs of a high-aspiration default, but it continues to impose significant transaction costs on all lawyers and clients. Absent empirical evidence that most lawyers and clients in most contexts would benefit from using my proposed rules—evidence that can only be gathered by adopting the rule and measuring its impact for a period of time—I would be reluctant to recommend even this middle ground approach.

I am grateful to Jennifer Gerarda Brown for her suggestion of this middle ground.

efficiencies, if, for example, it helps to solve the bargainer's sorting problem. It is also desirable because it grants autonomy to lawyers and clients—something that, like the Dominant Approach, the contract model values.

Third, an aspirational default could easily lead to an unnecessary stigma that I do not desire. Lawyers and clients opting out of the aspirational default might be seen as underhanded or dishonest, even if they merely sought to avoid uncertainties about the new rule or were unsure about its application or scope. Rather than facilitating signaling of collaborative intent, the rule could send false signals of adversarial or dishonest tendencies when those opting out actually had no such tendencies.¹⁹¹

Fourth, and finally, as a practical matter any contract-based revision to the *Model Rules* will happen slowly. The legal profession is unlikely to suddenly reinvent itself overnight. Moreover, I have assumed throughout this Article—and continue to assume—that there is not, nor can there be, consensus on the “correct” form for the *Rules* to take. There will not come a tipping point when the profession as a whole stands up and casts off its adversarial, amoral past. Instead, that change will come, to the extent it comes at all, through individual choices to practice differently.

2. Would This Rule Help With The Sorting Problem?

Would these changes to the *Model Rules* help with a collaborator's sorting and signaling problem? I believe they would. Consider the medical malpractice hypothetical described in the Introduction.¹⁹² In that example, neither the clients nor the lawyers knew each other prior to the litigation. These parties, therefore, could not avail themselves of reputations to overcome the sorting problem. Nor were they likely to sign a mandatory mutual withdrawal provision. Would they, however, have made use of these proposed Rules 4.1(2) or 4.1(3)?

191. It is also possible, of course, that my proposed rule would also create a similar stigma: those failing to “opt up” could be branded as dishonest or adversarial. This is an aspect of sorting—one is trying to distinguish the sharpies from the collaborators, and that necessarily imposes some costs on the sharpies. This creates two problems, however. First, some collaborators might choose the status quo default rule for reasons having nothing to do with their negotiation orientation. They might then be branded as sharpies, thereby damaging their reputations unfairly. Second, it is possible that lawyers who did not opt up to the aspirational provisions in my proposed rule might begin to bargain even *harder* than they would under existing Rule 4.1 simply because they would draw negative inferences about each other based on their failure to opt up. In other words, bargaining might become more inefficient and difficult than under the status quo rule, at least for those failing to make use of proposed Rules 4.1(2) and 4.1(3). I am comfortable with both of these possible consequences. Neither seems likely to occur, because I assume that, at least initially, only small numbers of lawyers will choose to opt up. In addition, although it may be that those failing to opt up discover that their negotiations become more difficult as a consequence, they have an easy out—they can avail themselves of Rules 4.1(2) and 4.1(3).

192. See *supra* Part I.

With these rules in place, attorneys could designate themselves as “Rule 4.1(2)” or “Rule 4.1(3)” attorneys. That designation could take place at the start of their interaction, but it could also be delayed until later in their negotiations. The designation is code-based and does not depend upon a limited-retention agreement (as in Collaborative Law). Thus, the designation could occur early on—as in Collaborative Law arrangements—or after some discovery has taken place and the clients have decided that they are serious about settlement.

Would a Rule 4.1(2) or 4.1(3) designation send a credible signal? This depends on the likelihood of detection of cheating, and on the consequences of such detection. Regulating bargaining behavior is difficult in part because such behavior is private—there is little opportunity for disciplinary authorities to monitor negotiations. To make such designations matter, therefore, the *Model Rules* would have to provide, perhaps in Comments, that detected violations of a Rule 4.1(2) or 4.1(3) designation should be considered of very serious disciplinary consequence. A sharpie might try to designate as a problem-solver, but if the sharpie were caught, she would forfeit her legal practice, not just her reputation.¹⁹³

By putting her license on the line, a lawyer would be signaling a desire to collaborate honestly.¹⁹⁴ The lawyers in this medical malpractice situation, for example, might use proposed Rule 4.1(2)(a), (b), and (c) to signal a commitment to disclose all relevant information. The plaintiff-patient’s attorney would be signaling full disclosure of relevant information about the plaintiff’s injuries, the known causes of those injuries, and any pre-existing conditions that might have aggravated the plaintiff’s medical problem during the surgery. The defendant-anesthesiologist’s attorney would be signaling a willingness to avoid gamesmanship and haggling, and to avoid misrepresenting the anesthesiologist’s bottom line. By exposing themselves to professional sanction for violating their agreement to collaborate, these lawyers would be signaling their commitment—and their clients’ commitments—to behave themselves.

Moreover, proposed Rule 4.1(4)(b) provides that a lawyer and client could agree that a designated problem-solving lawyer would have to withdraw from representation if the lawyer felt forced by a client to violate either Rule 4.1(2) or 4.1(3). This “lock-in” provision would up the ante

193. Disbarment would not necessarily be justified, but serious penalties, including suspension, would be. The bar would have to treat violation of these private designations as a serious matter.

194. I am arguing that a simple liability regime will not suffice as a signaling device. In other words, contract-based liability for dishonesty will be less effective as a signal than my proposed property rule, which forfeits the attorney’s license in the event of breach. For an overview of the distinction between property and liability rules, see Michael I. Krauss, *Property Rules vs. Liability Rules*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS VOL. II* 782–85 (2000) (discussing property versus liability rules).

further. It would allow *clients* to signal, much as in Collaborative Law, a desire to collaborate by posting an additional bond—the costs of hiring a new lawyer. It would not, however, introduce the problems associated with Collaborative Law’s mandatory mutual withdrawal provisions.¹⁹⁵ In the medical malpractice hypothetical, one or both lawyers might negotiate with their clients to employ this “lock-in” clause as an additional signal of collaborative intent.

Whether these provisions would succeed in altering the ways in which lawyers and clients negotiate is an open question. This proposal is designed as a low-cost experiment. It would provide a bar-sanctioned mechanism for lawyers and clients to modify their obligations through contract. Perhaps after a few years it would be clear that almost all lawyers found these provisions helpful, and they could be transformed into aspirational default provisions. Perhaps the opposite would become clear, and few lawyers or clients would make use of them. These are questions that we can only answer with experience.

V. IMPLICATIONS

The contract model is more radically contractarian than existing contractarian legal ethics scholarship. It is more dedicated, I believe, to discretion, problem-solving, and context-specificity than the Dominant Critiques. In some ways, it is even more committed to client (and lawyer) autonomy than the Dominant Approach. Here I consider some of the benefits, and problems with, the contract model of legal ethics.

A. THE ADVANTAGES OF THE CONTRACT MODEL

1. More, and More Important, Moral Deliberation

The distinguishing feature, and greatest benefit, of the contract model of legal ethics is that it encourages moral deliberation by practicing attorneys *about* the rules rather than setting that deliberation *against* the rules. By bifurcating the legal profession between traditional adversarial attorneys and more “collaborative” or “problem-solving” attorneys, this proposed code gives lawyers a choice they have not had before: to be a different kind of attorney while still practicing within the explicit scope and intention of the *Model Rules*, and with the full backing of the organized bar. This will have moral, as well as practical, consequences.

One of the most difficult questions in legal ethics is whether, as David Luban has put it, “a person [can] appeal to a social institution in which he or she occupies a role in order to excuse conduct that would be morally

195. See *supra* notes 39–44 and accompanying text (discussing mandatory mutual withdrawal provisions).

culpable were anyone else to do it?"¹⁹⁶ The Dominant Approach has said yes; the Discretionary Critique has said no.

If a lawyer has the freedom to choose—prior to beginning representation—which ethical rule set she wishes to work under, our understanding of this question will change. The moral significance of the *Model Rules* increases exponentially. A lawyer can either opt for the standard conception of the lawyer's role, or she can opt for a rule set that includes more aspirational provisions. If she chooses the standard conception of the lawyer's role, she is at least partially responsible for that choice—along with her client. It seems to me that she is *less* morally free to make a discretionary call in that scenario if she later feels the need to exercise her personal moral discretion. She has agreed to be bound by certain ethical constraints—she has explicitly contracted with her client for those constraints. She may end up doing what she perceives to be an immoral act, but she must live with that. She has chosen to tie her own hands—and to tie her morality to the standard conception of the lawyer's role.

Indeed, it is that *choice* that is of ultimate moral significance in the contract model of legal ethics. This lawyer has opted for a certain type of practice. Unlike under existing ethics codes, she had a choice to do otherwise. Thus, she must live with the personal and moral consequences of that choice, be it a burdened conscience or a damaged reputation.

The discretionary moment of importance, it seems to me, comes earlier than those in the Discretionary Critique have generally assumed. The Discretionary Critique has taken the existing ethical codes as its baseline and assumption, and then built from there. But if those codes could be changed—if they could provide lawyers with an earlier discretionary moment—perhaps the moral analysis would also change. What would matter most would be under which set of rules a given lawyer chose to operate.¹⁹⁷ That choice would say something of great significance about the lawyer's morals—about the kind of person the lawyer chose to be—because it would allow an attorney to at least partially write the rules of the game she wished to play. This is not to say that all attorneys would choose a collaborative rule set, nor that we can expect to reach consensus that they *should*. It is to say, however, that lawyers would be forced to struggle with the moral dimensions

196. Luban, *supra* note 87, at 87.

197. This is not to say that lawyers would be unresponsive to client demands. A lawyer may prefer to practice collaboratively; however, she may chose to abide by the standard conception of the lawyer's role in order to appease (or attain) a certain client. The practical reality of the practice of law is that lawyers may not financially be able to turn down clients who seek an adversarial lawyer. Some lawyers, however, may be able to sustain their practice by only representing clients who want, or will agree to, a collaborative approach. What remains important is that the lawyer has a choice. It is in this that the contract model finds it greatest strength.

of practice, rather than be permitted to hide behind inherited justifications based on inherited rules in which they had no input.

2. More Autonomy for Lawyers and Clients

It is awkward for lawyers to be forced into the standard conception of lawyering. Some relish the role. Others do not. For those who find it ill-suited to their beliefs, temperament, or practice, both the Dominant Approach and the Dominant Critiques put them in an uncomfortable position. On the one hand, they can submit to a role they dislike—the standard conception of the lawyer’s role—and try to put aside their nagging doubts that the standard justification for actions taken while in that role (the principle of non-accountability) may not hold up in the court of public opinion or at the gates of heaven. On the other hand, they can fight against that role, seeking to exercise their moral discretion despite their profession’s exertions to constrain that discretion through uniform and relatively rigid rules. They can, in other words, turn their backs on their profession’s ethical codes—something that few lawyers may feel comfortable doing in any but the most extreme circumstances.

The contract model solves this problem by giving lawyers discretion to revise the standard conception of lawyering by *referencing*, rather than jettisoning, the profession’s ethics codes. This would be a major improvement in the lives of practicing attorneys. To the extent that the ethics codes can facilitate moral choice by lawyers, they will grant attorneys greater autonomy to structure their profession in line with their beliefs.

Finally, the contract model of legal ethics would ultimately grant clients autonomy from the biases of the Dominant Approach to legal ethics. Currently, the legal ethics codes disserve those clients interested in more collaborative, problem-solving legal negotiations. The codes tax such clients—the codes make it easy for sharpies to masquerade as collaborators, and do little to facilitate signaling.¹⁹⁸ If the codes provided for a range of lawyering types, however, clients could more easily find and work with lawyers that had their own orientation.

The contract model is agnostic vis-à-vis the standard conception of the lawyer’s role. It neither attacks nor requires it. If a client desires a collaborative lawyer, the client can search for someone willing to opt in to Rule 4.1(2) or 4.1(3). If the client wants a more traditional, adversarial lawyer, the client is not forced to enter into a contract about the lawyer’s orientation—she can rely on the default provision in Rule 4.1(1). Ultimately, the contract model lets the market decide. If sufficient numbers of lawyers or law firms designate as collaborative or problem-solving, the

198. See generally Fischel, *supra* note 10 (arguing that confidentiality provisions similarly tax clients who have nothing to hide).

market will have pulled the profession in a new direction. If not, there will be no harm done.¹⁹⁹

3. Efficient Pluralism Without Excessive Fragmentation

In addition, the contract model articulated here allows for experimentation and variety without fragmenting the bar and creating multiple ethics codes. The goal is to retain a single code governing all lawyers while introducing contractual tailoring of that code.

This stands in contrast to two existing contractarian suggestions about reform of the profession's ethics. First, Richard Painter has argued that law firms—as opposed to individual lawyers—should create firm-wide ethics codes that opt up to more stringent ethical requirements than those set by the default rules in the existing *Model Rules*.²⁰⁰ In other words, firms should modify the existing rules through intra-firm agreement, rather than wait for the bar to modify those rules for all attorneys.

Painter is not alone in calling for increased attention to the role of law firms. Recent articles have championed this cause, calling for professional discipline for firms in various contexts.²⁰¹ What is unique about Painter's suggestion, however, is that he argues that private firm contracts could be used as a signal of the firm's ethical commitments, and as a way of boosting a firm's reputation in the market for legal services.

I applaud the notion of firms creating ethical codes, mostly because such an exercise might encourage lawyers to discuss ethical issues at the lunch table. I doubt, however, whether such codes will be of much use in solving the bargainer's sorting problem, nor do I think that they send a particularly strong signal to the market. Imagine that in our medical malpractice example the defendant-doctor's lawyer worked at a firm with such a code in place. Imagine further that the firm code stated that its lawyers would be honest and forthcoming in negotiations—much like the provisions in my proposed Rule 4.1(2). Would the plaintiff-patient's attorney be able to depend on that defense firm's public commitment and thereby trust that the defendant's attorney was committed to collaboration?

199. It is certainly conceivable that the reforms envisioned here might eventually lead to the adoption of a uniform aspirational rule for all legal negotiators. If consensus emerged that all forms of deception or manipulation were intolerable, and if all lawyers opted in to the proposed Rules 4.1(2) or 4.1(3), the bar might eventually eliminate the permissive aspects of Rule 4.1 completely.

200. Painter, *supra* note 10, at 732.

201. Professor Ted Schneyer in some ways began this trend. See Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 11 (1991) ("Sanctions against firms are needed as well [as sanctions against individual lawyers]."). His proposals have been much discussed and extended. See, e.g., Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 346–48 (2003) (arguing for the use of in-house compliance specialists to enforce law firm compliance).

Unlikely. Were a firm to announce a commitment to honesty and collaboration, for example, adversaries might doubt that *every* lawyer in that firm was personally committed to such an approach. Moreover, an adversary would know that violation of the firm's ethical code would not lead to professional sanction. At most, it might lead to intra-firm sanction. Although this might add some credibility to the defendant-physician's assertions of collaborative intent, it seems unlikely to overcome the trepidation about collaboration caused by the bargainer's sorting problem.

In short, then, Painter's ethical code solution seems too inclined to leave the status quo ethics rules undisturbed, and to rely on contract to improve them. Such contracts will not resolve the bargainer's sorting problem because the existing ethics codes cannot be used to sanction violation of such firm-wide codes.

Larry Ribstein has suggested a second approach that avoids this problem—but creates another. Ribstein agrees that firms are an appropriate locus for ethical contracting, but he has suggested that firms should opt in to more or less aspirational code provisions by choosing to become licensed in a given state. In other words, he has suggested that different states might adopt different legal ethics codes with different-strength provisions, and that a firm could then choose to be licensed in a given state as a way to signal the market about the firm's ethical commitments.²⁰² Rather than make intra-firm agreements contracting up to stronger ethical provisions—per Painter's argument—firms could make public disclosure of their commitments by becoming primarily licensed in an "ethical state" versus a more permissive state.

This would be a stronger signal than Painter's purely private ethical codes, but it obviously introduces a whole new level of complexity and fragmentation to the bar's regulation of professional ethics. Whereas Painter's suggestion does not change the ethical codes enough, Ribstein's fragments the codes too much.

The contract model of legal ethics suggested in this Article seeks to fragment the profession, but not the profession's ethics codes. It seeks, in other words, to permit multiple professional roles within one set of ethical regulations. By allowing private contracts to trigger aspirational rules, the contract model invokes the power of the public disciplinary process, while acknowledging the reality of professional pluralism.

B. PROBLEMS

I do not want to pretend that the rule amendments proposed here perfectly solve the bargainer's sorting problem. They do not. Nor do I want to pretend that the contract model is a perfect solution to all of the

202. See Ribstein, *supra* note 10, at 1756 (proposing "jurisdictional competition for ethical rules").

problems of legal ethics. It is not. In closing I want to address briefly some of the objections that this approach will likely generate.

1. The Verification Problem

Verification presents the most difficult practical challenge to a contractual solution to the bargainer's sorting problem. Regulators may be unable to detect and verify that a negotiator has violated a contractual agreement to collaborate or disclose honestly. In our medical malpractice hypothetical, for example, how will the anesthesiologist ever learn that the other side misrepresented its bottom line or failed to disclose information during their negotiations? And if the physician does get a tip to that effect, will the violation of the contractual agreement be verifiable?²⁰³

Although formidable, the verification problem does not completely undermine the contract model. First, the profession's commitment to regulating private negotiations may change if it has committed through the rules to bifurcating the profession into traditional adversarial attorneys and more collaborative lawyers. Rather than accepting, as in the existing Comments to Model Rule 4.1,²⁰⁴ that negotiating lawyers will manipulate each other, the contract model envisions a profession that commits itself to facilitating collaboration by like-minded attorneys and their clients. If the profession can gather the will to enact a contract-based code, it may have the will to step up enforcement measures.

Second, self-designated collaborative or problem-solving lawyers are likely to be particularly vigilant in monitoring for sharpie violations of the proposed Rule 4.1(2) and 4.1(3). Although lawyer-to-lawyer monitoring is also imperfect, enhanced supervising by attorneys would certainly help with the enforcement problem. Such vigilance is likely because of the special kind of affront that lawyers will likely take if a counterpart pledges to collaborate honestly through the proposed Rules 4.1(2) or 4.1(3) and then violates that pledge. Although no one tolerates dishonesty, lawyers are even more likely to be intolerant of, and on the watch for, dishonesty that breaches a public pronouncement of truthfulness.

Third, solving the verification problem will rest more on deterrence than on detection. Obviously, a completely undetectable offense cannot be deterred. But no one believes that bad bargaining behavior is perfectly invisible—there is some chance, even if small, that a sharpie will be discovered if she tries to masquerade as a collaborator. To make a contract-based code work in this arena, the bar would have to sanction such attorneys vigorously. This is entirely appropriate. It is a serious affront for an adversary

203. See Gilson & Mnookin, *supra* note 18, at 519–20 (“[V]erification problems make the adequate enforcement of binding general commitments to cooperate in litigation (whether imposed by contract or rule) highly problematic.”).

204. See *supra* notes 82–86 and accompanying text.

to promise explicitly to behave in a certain fashion and then secretly violate that promise. One might be offended if a negotiating lawyer “looked nice but played tough” under the existing *Model Rules*, but one should not be surprised. The ethics codes clearly permit such an approach. If an adversary made explicit promises to collaborate, however, and then violated those promises, the disciplinary consequences should be serious indeed.

In summary, I do not pretend that verification and enforcement of these proposed rules will be easy, nor that it will undoubtedly be sufficiently effective to make opting into these rules a credible signal of collaborative intent. This is an empirical question, and not one that we can answer given that the profession has never had such rules in the past. This Article calls for the profession to experiment with using its ethics codes to facilitate collaboration. The experiment may fail because of verification and enforcement problems, but it may not. It is worth a try.

2. The Pre-Litigation Game Problem, the Ancillary Litigation Problem, and the Problem of Excessive Exposure

The nature of litigation presents another problem for practicing lawyers. If an attorney expects to litigate against an adversary in the event that their case fails to settle, and if the attorney believes it unlikely that the case *will* settle, then the attorney must prepare for the coming war. The attorney may be unwilling to collaborate in the pre-litigation game if she knows that adversarial litigation is likely.

This is a problem that I have discussed elsewhere.²⁰⁵ The threat of litigation, and the desire to maintain an adversarial stance pre-litigation so as not to sacrifice one’s strategic advantages if litigation becomes necessary, certainly present a practical obstacle to a lawyer who wishes to collaborate during negotiation. At the same time, this is not an insurmountable problem. Although collaborative strategies often involve sharing more information than more adversarial strategies, collaboration does not mean revealing *all* of one’s information, preferences, interests, and litigation strategies. Two collaborating lawyers may agree to work through a decision analysis of their claims and counter-claims or arrange for a trusted third party to assist them with valuing their litigation, but they need not reveal their proverbial cards completely. Similarly, they can talk about their clients’ interests without fully disclosing the strength or relative importance of those interests.²⁰⁶ In short, a lawyer may be able to collaborate during negotiations while still maintaining a credible threat of litigation.

Alternatively, a client may choose to hire *two* attorneys or law firms—one to negotiate the matter while operating under the proposed collaborative ethics rules, and one to prepare for litigation. This is similar to

205. See generally MNOOKIN ET AL., *supra* note 21.

206. See *id.* at 40–41, 238–39 (discussing ways to collaborate on distributive issues).

the use of “settlement counsel,” whereby some clients currently hire two attorneys in this way.²⁰⁷ The proposed contractual solution augments this existing practice, however, by allowing the negotiating lawyer to opt in to legal ethics rules that facilitate settlement.

This raises a related, although in some ways opposite, objection: what about the risk of ancillary, strategically motivated disciplinary litigation brought to harass or intimidate opposing lawyers? A lawyer may fear that by self-designating as a Rule 4.1(2) or 4.1(3) attorney she will open herself up to unjustified disciplinary proceedings. She may wonder whether her adversary might try to take advantage of those proceedings. She might fear that the disciplinary system could end up sanctioning her incorrectly—that by self-designating as collaborative or problem-solving she would make herself vulnerable to incorrect disciplinary sanctions.

This is a problem, but not an insurmountable one. A lawyer contemplating self-designation under proposed Rule 4.1(2) or 4.1(3) will certainly have to consider the possibility of unjustified disciplinary proceedings. This threat will undoubtedly make it more likely that a lawyer will use these rules only when some reputational information is available about his adversary. But it will not completely eviscerate the purpose of the rules, even in situations without such reputations or trust. If a lawyer and her client know that they have nothing to hide, and they know that they are willing to act honestly in their negotiations, then the risk of unjustified professional disciplinary sanctions is low.

Finally, a lawyer might fear that using the aspirational rules in proposed Rule 4.1(2) and 4.1(3) would expose the lawyer to excessive liability risk. For example, a lawyer might fear that her client could be lying to her, and thus that she could be unknowingly passing untrue information to the other side. She might not want the exposure that opting up would create.

I have not dealt here with what liability standard these rules would use (e.g., negligence, recklessness, strict liability). I largely assume that a negligence standard would apply, and that a lawyer would not be responsible for her client’s malfeasance. Even with such a standard in place, however, a more realistic solution to this problem is obvious: lawyers will only use these proposed rules with clients that they know and trust. The proposed rules are meant to help solve the lawyer-to-lawyer negotiation sorting problem in situations in which neither the lawyers nor the clients know each other. The proposal does *not* assume, however, that each lawyer does not know her client. Indeed, it seems likely that to avoid unnecessary liability exposure most lawyers will only use these rule provisions with clients whose word they trust.

207. See generally William F. Coyne, Jr., *Using Settlement Counsel for Early Dispute Resolution*, 1999 NEGOT. J. 11 (discussing use of settlement counsel).

3. The Enactment Problem

This Article has argued for renewed focus on the legal profession's ethics rules. To date, our approaches to the rules have shown too little creativity and too much adherence to the principles underlying the Dominant Approach. On the other hand, I do not want to assume naively that rules changes such as those proposed here will be enacted easily.

There are several obstacles to enactment. First, practicing lawyers create the profession's ethics rules, and they generally serve lawyers' self-interests. There is no doubt that the fact that lawyers are the primary drafters compromises the ethics codes. As Deborah Rhode has argued, "[n]o ethical code formulated under such . . . conditions can be expected to make an enduring social contribution."²⁰⁸ This may be a bit strong, but it is certainly suggestive.

In order to survive the enactment process, lawyers must believe that my proposed rules will serve them in the market. Persuading the bar of this will undoubtedly be difficult. Nevertheless, I have hope that a sufficient number of lawyers wish to practice in more collaborative and honest ways to make these proposals viable. Moreover, because these rules do not *require* a change in the status quo, but instead only permit such changes, perhaps they will be attractive to even that part of the practicing bar that has no interest in collaborative bargaining. This Article calls for an experiment in applying the contract model to the legal ethics codes. Even the most traditional portions of the bar may be willing to accommodate that experiment, so long as it does not require anything of them.

A second, and more general, problem, is that enacting rules such as these would require the bar to admit its moral uncertainties. The Dominant Approach to legal ethics is simple and reassuring: so long as lawyers believe in it, they can go about their business without worrying about the moral consequences of their potentially ruthless approach. To enact a contract-based vision of the ethics codes requires acknowledging uncertainty about the principle of nonaccountability and the standard conception of the lawyer's role. Although there are certainly sub-sets of the bar that have embraced that uncertainty, as evidenced by the Collaborative Law movement, there may still be a majority unwilling to reconsider those dominant assumptions.

I have no easy answers to these problems, nor do I think that I should. The contract model of legal ethics proposed here is new and untested. It would upend our dominant understandings of the profession, and our dominant approaches to the legal ethics codes. As with any significant change, some will have reservations, hesitations, and doubts. Others, however, may see that a contract-based approach to legal ethics offers the

208. Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 692 (1981).

profession a chance to recreate itself in a way that both honors the profession's roots and acknowledges the diverse realities of modern practice.

VI. CONCLUSION

Over twenty-five years ago, William Simon prophesied the death of the legal profession and the abolishment of legal professionalism.²⁰⁹ He imagined moving from a system of ethics rules to a system of non-professional advocacy in which lawyers would use discretion to resolve difficult ethical questions. The prophecy, of course, has not come to pass. Instead, the legal profession continues in much the same mode as when Simon first issued his critique. Lawyers continue to obsess about their ethics codes, and to trust in the codes' constant revision as the best means towards a more just, responsible profession.

This Article also prophesies a radical change to the legal profession—a turn towards more heterogeneous regulation of the profession based on ethics as contract. Perhaps this Article is also overly optimistic. Regardless, it aims at nothing less than the end of the legal profession—that is, of one, unified, profession governed by one set of ethics rules that allows for little variation in lawyers' roles—and the beginning of professional pluralism through contract.

209. Simon, *supra* note 92, at 143–44; *see also* Geoffrey C. Hazard, Jr., *Is There an American "Legal Profession?"*, 54 STAN. L. REV. 1463, 1469–70 (2002) (reviewing DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2002)) (asking whether there is still any unified profession remaining, or whether there are multiple professions).