Sensational Reports: The Ethical Duty of Cause Lawyers to Be Competent in Public Advocacy

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SENSATIONAL REPORTS: THE ETHICAL DUTY OF CAUSE LAWYERS TO BE COMPETENT IN PUBLIC ADVOCACY

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It seems that for some advocates, being invisible and not drawing attention to their issue is seen as a kind of strategy. . . . Many others know . . . that reticence and invisibility are the problem, not the solution.

-Lawrence Wallack

I. INTRODUCTION

Some hundred years ago, Roscoe Pound complained that the administration of justice was hampered by "sensational reports" from the media regarding events that would ultimately be decided in the courts. For Pound, public advocacy was not the province of lawyers and he decried the lawyer who was an "experienced player of a politico-procedural game . . . ." Lawyers were best when they were highly educated, disciplined, and focused on their responsibilities to carry a client’s case successfully through trial. It is likely that if asked directly, Pound would have opined that an ethical lawyer’s only duty of competent advocacy was in the courts on behalf of a particular client. Pound would not have accepted that the profession could include lawyers who committed themselves not to particular clients, but to particular causes, nor accepted that it was appropriate for any lawyer to have a broad goal of social change.

For those practicing in the legal profession now, cause lawyers are familiar and regularly-encountered. Yet, there has not been much consideration about the role of public advocacy for a cause lawyer. Is Pound’s proscription against public advocacy appropriate for cause lawyers and should cause lawyers’ advocacy be limited to courtrooms? Or, like

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1. Senior Research Scholar, and Clinical Lecturer of Law, Yale Law School.
5. Id. at 601-03, 636-37.
6. See Jules Lobel, Courts as Forums for Protest, 52 UCLA L. Rev. 477 (2004) (providing historical examples of cause lawyers, including abolitionists and suffragists); see also Deborah J. Cantrell, A Short History of Poverty Lawyers in the United States, 5 LOY. J. PUB. INT. L. 11 (2003) (detailing the rise of cause lawyering in the 1960’s). Certainly there were lawyers active during Pound’s lifetime whom we would label “cause lawyers,” but the idea of a specialty bar dedicated to social change is a more recent development. See id.
Pound’s narrow vision of the profession, has his narrow view of advocacy been passed by? This Article will argue that Pound’s narrow view of advocacy is inappropriate when applied to cause lawyers and cause lawyers behave unethically if they do not integrate a public advocacy strategy into their practice. This Article first suggests a working definition of “cause lawyer.” It will then consider two sources of competency duties for cause lawyers: the Model Rules of Professional Conduct, and the goals of social movement work. This Article concludes that despite some concerns about appropriate line drawing, all ethical cause lawyers must be skilled in public advocacy; two examples are provided that detail cause lawyering organizations with competent public advocacy campaigns.

II. A STARTING POINT: WHO ARE CAUSE LAWYERS?

Prior to arguing that cause lawyers have special competency requirements unlike those of other lawyers, one must understand what the label “cause lawyer” means. The phrase, coined by Austin Sarat and Stuart Scheingold, does not have a definite meaning agreed upon by all. However, one important component is that cause lawyers are “lawyers who commit themselves and their legal skills to furthering a vision of the good society” and are lawyers who “give[] priority to political ideology, public policy, and moral commitment . . . [and to whom] [s]erving the client is but one component of serving the cause.” At its core, “[c]ause lawyering . . . is not about neutrality but about choosing sides. . . . [C]ause lawyers are focused on the broader stakes of litigation rather than on the justiciable conflict . . . or on the narrow interests of the parties to that conflict.”

In contrast, the standard conception of a lawyer is someone who has a professional duty of loyalty to a particular client, who has agreed to be the partisan of the client, but who remains unattached to, and not accountable for, the client’s particular goals or moral decision-making. Unlike cause lawyers, traditional lawyers remain neutral regarding the “rightness” of the client’s “cause” while remaining wholly partisan in service of the client’s

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7 See Austin Sarat & Stuart Scheingold, Cause Lawyering and the Reproduction of Professional Authority: An Introduction, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITY 1, 5 (Austin Sarat & Stuart Scheingold, eds., 1988) (hereinafter “CAUSE LAWYERING”). Defining “cause lawyer” continues to generate a robust discussion and this definition reflects the author’s own experiences as a cause lawyer, a clinician and a teacher reflecting with students about what it means to work for social change as a lawyer.

8 Id. at 3-4.

9 Stuart Scheingold, The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle, in CAUSE LAWYERING at 118.

efforts to fulfill the cause. So long as the client is not asking the lawyer to assist in a crime or fraud, the traditional lawyer passes no judgment on the client’s goals.\footnote{See \textit{Model Rules of Prof'L Conduct} R. 1.2(d) (2006) ("A lawyer shall not . . . engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . .")}.

The second distinguishing feature of cause lawyers is that they frequently consider themselves to be part of a social movement and strategize along many advocacy dimensions, including lobbying, organizing, and social protest, as well as traditional lawyering in the courts.\footnote{See Austin Sarat & Stuart Scheingold, \textit{What Cause Lawyers Do For, and To, Social Movements: An Introduction}, in \textit{Cause Lawyers and Social Movements} 1-12 (A. Sarat & S. Scheingold, eds., Stanford University Press 2006); see also Michael McCann & Helena Silverstein, \textit{Rethinking Law’s “Allurements:” A Relational Analysis of Social Movement Lawyers in the United States}, in \textit{Cause Lawyer} 261, 266-72 (Austin Sarat & Stuart Scheingold, eds., Oxford Univ. Press 1998).} They do not understand themselves to be technicians called in by a client to create a legally-cognizable document or to competently guide a matter through the court system. Instead, they understand themselves to be part of a group mobilizing for social change requiring a comprehensive, sophisticated strategy that makes full use of a variety of advocacy tools.\footnote{See, e.g., McCann & Silverstein, supra note 12, at 266-74.} Cause lawyers actively embrace the political and policy dimensions of their work and understand the importance of mobilization related to the “cause.”\footnote{Id.}

Certainly occasions exist when traditional lawyers are also called upon to consider the political and policy dimensions of a particular matter on which they are working for a client. Consider, for example, the work of lawyers representing tobacco manufacturers in negotiations with states’ attorneys general to settle pending litigation,\footnote{See, e.g., Michael Givel & Stanton A. Glantz, \textit{The “Global Settlement” with the Tobacco Industry: 6 Years Later}, 94 Am. J. of Pub. Health No. 2 218-224 (2004) (describing the terms of the tobacco settlement and the defeat of implementing legislation).} or the example of an attorney working on a case in which the defendant is a notable political figure or charged with a politically-sensitive crime.\footnote{See, Elizabeth Amon, \textit{Defending Detainees}, \textit{The American Lawyer}, September 1, 2004, available at http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=109018035542. Neal Katyal is a recent example of such an attorney. \textit{Id.}} Furthermore, it is not always clear when an attorney is acting as a cause lawyer or as a traditional lawyer. At times, a lawyer may be doing both.\footnote{See, e.g., Margareth Etienne, \textit{The Ethics of Cause lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers}, 95 J. Crim. L. & Criminology 1195 (2005) (describing instances in which criminal defense lawyers act as both traditional lawyers in service of a particular client and as cause lawyers in service of reforming the criminal justice system).}
Nonetheless, traditional lawyers generally engage with the political, policy and mobilizing dimensions solely as part of their technical service to help a client reach a particular goal. While traditional lawyers may at times behave like cause lawyers, their intent is different. The traditional lawyer intends to be an exemplary technician in service of the particular client, and achieving the client's individualized goals is the attorney's goal. A cause lawyer intends to be an effective advocate on behalf of the cause and to craft a global advocacy strategy in service of the cause. Achieving a goal for an individual is the goal of a cause lawyer only if the individual's goal is in harmony with the cause's goal.

III. COMPETENCY AS A CAUSE LAWYER: ASSESSMENT AND SOME POSSIBLE COMPONENTS

The above description of cause lawyers, and its contrast with that of traditional lawyers, raises two questions: what standards should be used to assess the competency of a cause lawyer, and what constitutes a competent cause lawyer? Given that the legal profession is regulated primarily under state systems based on the ABA Model Rules of Professional Conduct ("Model Rules"), those Model Rules are an important starting point. The Model Rules may not be the only method of evaluating the competency of a cause lawyer. A cause lawyer, situated within a broader social movement, could also be evaluated along dimensions particular to the goals of a social movement. For example, a cause lawyer working on litigation as part of the feminist movement with a goal of restructuring the power hierarchy might be evaluated both for her competency as a litigator and for her competency in restructuring the power hierarchy in her own workplace.

In fact, as this Article will develop more fully below, because of the more expansive goals of cause lawyering, competency requires more of cause lawyers. Cause lawyers commit to integrating the legal, political, policymaking and mobilizing work related to their cause. Cause lawyers are not neutral representatives of the cause, but are integrated members who commit as much to practicing behavior that moves their cause forward as they do to using their legal skills on behalf of the cause. Thus, a cause lawyer working on a living wage campaign, which does not pay its own staff the proposed living wage, loses credibility and becomes a liability for the campaign.

The knotty challenge for cause lawyers is appropriately calculating what constitutes the baseline for competent behavior. Does a cause lawyer working to unionize laborers have to be a skilled community organizer? Does a cause lawyer working to promote open access to new technology have to be a computer engineer? This Article may not resolve such

\[18 \text{ See Model Rules of Prof'L Conduct (2006).} \]
\[19 \text{ See infra notes 22-39 and accompanying text.} \]
particular questions, but it will stake out at least one area in which all cause lawyers, regardless of their causes, must be competent – integrating a public advocacy campaign into their cause work.

Note that the argument for competency is one of minimum expected behavior, not one of possible and permissibly creative behavior. Put another way, this Article argues that cause lawyers are behaving unethically if they do not integrate a public advocacy campaign into their cause work. Since cause lawyers affirmatively opt into work that is designed to push for social change, they are working in an arena that may require different behavior of them than would be required of a traditional lawyer.

The discussion will turn first to the Model Rules to consider what they provide regarding competency, whether the Model Rules acknowledge differences between traditional lawyers and cause lawyers, and whether the Model Rules provide any specific guidance to cause lawyers about what counts as competent behavior for them. The discussion then considers whether the broad goals of cause advocacy help delimit certain behavior that is required of cause advocates in order for them to be competent.

A. Competency Under Model Rule 1.1

Model Rule 1.1 provides that "[a] lawyer shall provide competent representation to a client", and that to be competent, a lawyer must have the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The commentary to the Rule specifies that the relevant factors in determining whether a lawyer is competent to handle a matter include "the relative complexity and specialized nature of the matter .... Furthermore, for a particular matter, lawyers should use the "methods and procedures meeting the standards of competent practitioners ...." in those kinds of matters.

Model Rule 1.1 understands that what constitutes competent representation can vary across kinds of work and acknowledges "specialized" matters, and differing "methods and procedures." Thus, Rule 1.1 envisions that lawyers are required to act in differing ways depending on the kind of work they are doing. Rule 1.1 rejects the notion that competency is a uniform concept across all kinds of law and all kinds of lawyers.

Furthermore, the inquiry about competency is calibrated to the field of practitioners doing the particular work at issue. Competency in a
medical malpractice case is judged by looking at the “reasonably prudent”
lawyer who handles medical malpractice cases, not the reasonably prudent
lawyer who practices family law or even the reasonably prudent lawyer who
handles automobile-related personal injury cases.27 If Rule 1.1 requires
malpractice lawyers to assess their competency by looking to the reasonably
prudent lawyer in that field, then cause lawyers should assess their
competency by looking at reasonably prudent cause lawyers, and not by
looking at traditional lawyers. Nothing in Rule 1.1 permits a cause lawyer to
limit the scope of competency by saying “lawyers traditionally don’t do
that.”

However, nothing in Rule 1.1 or other Model Rules directly
acknowledges that there is any kind of lawyer except for a lawyer who is
focused on representing a particular client. Rule 1.1 talks only of lawyers
providing competent representation to clients and is contained in the section
titled “Client-Lawyer Relationship.”28 The Model Rules consider “client” to
include individuals and organizations,29 but are silent on whether causes or
social movements could be “clients.”30 At best, the Model Rules create some
space for lawyers to be more than just lawyers. For example, the Preamble
acknowledges that lawyers are “public citizen[s]” who “should seek
improvement of the law, access to the legal system, [and] the administration
of justice . . .”31 Under the Model Rules, a lawyer’s “day job” is to work
with clients, and other social change work is to be done on one’s own time.

Thus, in a fundamental way, the Model Rules provide little guidance
to cause lawyers on what counts as competent behavior. The cause lawyer is
told to look out to the community of cause lawyers, find someone who is
reasonably prudent and use that lawyer as a model. The cause lawyer should
use appropriate methods and procedures, and the cause lawyer should adjust
his or her actions based on whether the work involves a specialized matter.

27 MODEL RULES OF PROF’L CONDUCT R. 1.0(h) (2006). “Reasonably prudent” is
the phrase used by the Model Rules to define “reasonable” or “reasonably” as it relates to a
lawyer’s conduct. MODEL RULES OF PROF’L CONDUCT R. 1.0(h) (2006).
29 MODEL RULES OF PROF’L CONDUCT R. 1.13 (2006) (listing an organization as a
client).
30 There are some who argue that the Model Rules’ silence is not caused by lack
of attention, but by a specific decision that lawyers work best in our legal system if they act as
an advocate for a particular client involved in a particular transaction or dispute. See, e.g.,
Spiro Agnew, What’s Wrong with the Legal Services Program, 58 AM. BAR ASS’N J. 930
(1972) (noting that, while not mentioning the Model Rules in particular, Agnew argues that
the fundamental point of the attorney-client relationship is for the attorney to work in service
of a particular client and to avoid social reform work). Others have well-articulated the need
for cause lawyers, and this Article will not restate those arguments. This Article starts from
the proposition that cause lawyers are legitimate legal actors. See, e.g., Margaret Etienne, The
Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as
Cause Lawyers, 95 J. CRIM. L. & CRIMINOLOGY 1195 (2005) (arguing in support of cause
lawyering and examining whether criminal defense lawyers act as cause lawyers).
Given that the Model Rules provide only general guidance, a cause lawyer must look elsewhere for guidance on what particular behavior will be required for the cause lawyer to behave competently. Because a cause lawyer is embedded in the "cause," it is appropriate to look at the goals of cause lawyering and its methods and procedures, to determine whether certain behavior is called for by cause lawyers that would not be required of non-cause lawyers.32

B. Competency Derived from the Goals of Cause Lawyering

Broadly considered, the goal of cause work is to bring about systemic social change through multiple methods that are based on strategic assessments regarding which method is most likely to be effective at a particular time. At any given time, cause advocates may be pursuing strategies which include community organizing, educational outreach, legislative advocacy and legal advocacy.33 Each strategy requires certain skills to be effective. For example, community organizing requires the organizer to be a good listener in order to competently hear the concerns of those with whom the organizer is working.34 Public education requires the advocate to be skilled in adult learning techniques and to properly assess the level at which to set teaching materials.35 To be a competent cause advocate - meaning to effectively bring about social change - the cause advocate must understand and learn the particular skills required by the advocacy method to be used.

The common thread among the strategies mentioned above is that each has some public element. Therefore, cause advocates may frequently find themselves in a variety of public spaces including courtrooms, state houses, community centers, newspapers, and the internet.36 Cause advocates

32 This Article starts the conversation about competent behavior that can fairly be assigned to all cause lawyers, regardless of the particular cause served. However, one would refine that analysis by also looking to the goals, methods and procedures of the particular cause being served by the lawyer, just as traditional lawyers who have a specialty look to their particular area of the law for refinement.

33 See, e.g., Institute for Justice, http://ij.org/ (last visited Feb. 23, 2007). An example is the work of the Institute for Justice on eminent domain where the organization has focused on litigating eminent domain cases, but includes grassroots mobilizing (the Castle Coalition) in its overall strategy. Id. The Institute’s website seamlessly moves between information about litigation and organizing. Id.


35 See Deborah J. Cantrell, Justices for the Interests of the Poor: The Problem of Navigating the System Without Counsel, 70 FORDHAM L. REV. 1573 (2002) (arguing that pro se materials must be tailored to be effective for particular audiences).

36 See, e.g., Robert C. Post & Reva B. Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel, 110 YALE L.J. 441 (2000) (describing an argument for liberal Supreme Court justices to use dissenting in cases in which conservative Justices found that Congress had not acted appropriately under Section 5 of the
must not squander their time in public space and must be skilled in crafting an effective strategy to benefit from these opportunities. Furthermore, cause lawyers often are the advocates in the public space. By virtue of licensing requirements, they are common voices in the courtrooms. By virtue of training, they are common voices in the legislatures. By virtue of accessibility (among other reasons), they are common voices in the press. To be a cause lawyer means that one should expect to be a public voice on behalf of the cause.

As such, cause lawyers must be competent in public arenas. Lawyers expect to be competent inside the courts, as that is their traditional and expected arena. Lawyers are not surprised if called upon to be competent negotiating in legislative backrooms or speaking in the legislative chamber given the high percentage of lawyers involved in legislative work and given the similarity of that work with traditional lawyering. Lawyers, however, have not generally understood that competency requires them to craft a “public voice” outside their traditional forums. For cause lawyers to properly serve the goal of social change, they must ensure that their particular work includes a public advocacy strategy and that they, as frequent voices for their cause, have the necessary skills to see the public advocacy strategy through.

IV. SOME PUSH BACK: ARGUMENTS AGAINST CAUSE LAWYERS AS PUBLIC ADVOCACY STRATEGISTS

Lawyers have had a somewhat contentious relationship with being public voices, especially media voices, and there are three primary concerns that may be raised in opposition to lawyers as public advocacy strategists. First, if a lawyer’s advocacy work will be of interest to the public, is it not a better course for a lawyer to hire an expert in public relations to handle that aspect of the work? Second, are not cause lawyers restricted from too much public advocacy work by the ABA’s Model Rule 3.6 regarding trial publicity? Finally, if a lawyer must be competent in public advocacy, does

Footnote:

37 See McCann & Silverstein, note 12, supra, at 262-74. Critics of cause lawyers complain that lawyers too often dominate movement strategy and confine it too narrowly to litigation. Id. However, research suggests that cause lawyers do not so constrain movement work. Id.

38 See, e.g., The National Center for Public Policy Research, available at http://www.nccp.org/lobby.pdf (last visited February 23, 2007) (stating that in state legislatures, lawyers are the largest occupational group at, on average, 15%).


that not open the door to requiring lawyers to be competent in many other non-legal skills, ultimately making the role of the lawyer unmanageable?

**A. Why Lawyers and Not a Public Relations Expert?**

The first argument against cause lawyers as public advocacy strategists is one of specialization. There are trained professionals whose job it is to work with the public, including the media, and to craft a public advocacy strategy. Is it not better to have such an expert doing the work than to have a lawyer who is not an expert doing the work? The argument concedes that public advocacy work is important in cause advocacy, but does not put the responsibility for a public advocacy strategy on the cause lawyer.

First, nothing prevents cause advocates from having a public advocacy strategist as part of the advocacy team. In fact, most cause lawyers understand themselves to be part of a larger group of strategists, all of whom are cooperating to determine appropriate movement goals and advocacy campaigns. Thus, cause lawyers are free to look to public advocacy experts to help craft such strategies.

Nonetheless, as noted above, cause lawyers are often the public voice for the cause by virtue of the places in which they perform their advocacy work. When a cause lawyer walks out of the courtroom after winning a case or legal argument, and the media is waiting, it is the cause lawyer who must be prepared and competent to answer the media’s questions. When a cause lawyer goes to a community center to teach a “know your rights” class, it is the cause lawyer who is the public face of the advocacy effort. In many situations, the cause lawyer cannot duck the responsibility of being part of the public voice on behalf of the cause. Thus, while cause lawyers need not be the only advocates skilled in public advocacy, they at least must be part of the group of advocates with such skills.

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41 See, e.g., McCann & Silverstein, supra note 12, at 274-76 (discussing the integration of lawyers, client and other movement advocates).
42 For example, the cause advocacy organization, Legal Momentum, has a vice-president of communications who is not a lawyer. See Legal Momentum, http://legalmomentum.org/legalmomentum/aboutus/2006/03/maureen_mcfadden_vice_president_communications.php (last visited Feb. 27, 2007).
43 See, e.g., Institute for Justice: Private Property Rights Cases: Kelo v. New London, http://ij.org/private_property/connecticut/index.html (illustrating in an eminent domain case that, in addition the lawyer's need to be competent on the courthouse steps, the client, as a particular “face” for the cause, must be prepared for that role and be visible and accessible to the media).
44 See Deborah J. Cantrell, The Obligation of Legal Aid Lawyers to Champion Practice by NonLawyers., 73 FORDHAM L. REV. 883 (2004) (discussing that lawyers are not the only cause advocates who could conduct a “know your rights” class, but it is often lawyers who will be called upon to lead sessions in which the parameters of legal rights are being discussed – in part because the audience may expect to hear from an expert, and in part because of concerns that non-lawyers may be accused of unauthorized practice of law).
B. The Restrictions Under Model Rule 3.6

ABA Model Rule 3.6 regulates lawyers' conduct related to trial publicity.\textsuperscript{45} The Rule provides that when a lawyer is “participating or has participated in the investigation or litigation of a matter,” the lawyer is prohibited from making a public statement that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”\textsuperscript{46} Rule 3.6 provides safe harbors for both civil and criminal cases, listing particular information on which an attorney may discuss publicly.\textsuperscript{47} For example, a civil attorney may speak about the claims involved in the case, any information from a public record, or any outcome of a “step” in the litigation.\textsuperscript{48}

What is notable about Rule 3.6 is that, in the end, it restricts an attorney in limited and modest ways.\textsuperscript{49} For example, Rule 3.6 applies only when an attorney investigates or litigates a case.\textsuperscript{50} Attorneys not involved in a particular case are exempt from the restrictions, as are attorneys who are not speaking about a particular case.\textsuperscript{51} Similarly, even when an attorney is litigating a matter, the attorney is permitted to speak about much of what would be of interest to the media, or of what would be necessary to the lawyer in crafting a media strategy.\textsuperscript{52} The lawyer may talk about the facts in the record, the claims of the case and the outcome of any “step” in the litigation, not just court rulings.\textsuperscript{53}

For all lawyers, not just cause lawyers, Rule 3.6 is rarely an obstacle to having a media strategy. In fact, for cause lawyers who are involved in implementing a multi-pronged advocacy strategy, Rule 3.6 is almost irrelevant. Consider an advocacy strategy that starts first with community organizing and community education, and then moves to legislative

\textsuperscript{45} MODEL RULES OF PROF'L CONDUCT R. 3.6 (2006).
\textsuperscript{46} MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2006).
\textsuperscript{47} MODEL RULES OF PROF'L CONDUCT R. 3.6(b)-(c) (2006).
\textsuperscript{48} MODEL RULES OF PROF'L CONDUCT R. 3.6(b) (2006).
\textsuperscript{49} Rule 3.6 is relatively toothless in part because lawyers have successfully challenged more restrictive versions as violating their first amendment rights. A discussion about the first amendment parameters is beyond the scope of this Article, but interested readers may wish to review Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).
\textsuperscript{50} MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2006).
\textsuperscript{51} MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2006). The comment to that Rule notes:

Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 3 (2006).
\textsuperscript{52} MODEL RULES OF PROF'L CONDUCT R. 3.6(b) (2006).
\textsuperscript{53} MODEL RULES OF PROF'L CONDUCT R. 3.6(b) (2006).
advocacy and only in the end moves to litigation. A cause lawyer would have no restrictions on his or her speech under Rule 3.6 until the lawyer began to investigate and prepare for the final advocacy strategy of litigation. Further, even in litigation, the cause lawyer would be unrestricted in speaking about the “cause” unrelated to the litigation. Thus, Rule 3.6 does not impede cause lawyers from crafting a public advocacy strategy, and a competent cause lawyer, under Rule 1.1, will actively participate in the crafting and implementation of such a strategy.

C. The Slippery Slope Problem

The final concern about requiring cause lawyers to be competent in public advocacy is that it moves lawyers down the slope of being required to be competent in non-legal skills. Under the argument, once lawyers start the move down the slope of non-legal competency, there is no way to draw a finish line and lawyers will be saddled inappropriately and unreasonably with too many non-legal responsibilities. As with many slippery slope arguments, the concern raised may be quickly dispensed with.

First, the argument in support of cause lawyers being competent in public advocacy is tied to the specific characteristics of what it means to be a cause lawyer. Recall that Rule 1.1 understood that competency could require different skills depending on the specialty area in which a lawyer practices. Cause lawyers are required to be competent in public advocacy because the particular requirements of cause lawyering make it extremely likely that a cause lawyer will be a public voice for the cause. Because one determines whether a specialty skill is required by focusing on the particular work performed by the specialty lawyer, there is little risk that the inquiry would find that the lawyer must be competent in a skill that is irrelevant to the specialty. For example, a cause lawyer working on drug reform issues would not likely have to be competent in financial accounting. In contrast, a lawyer working on corporate financial disclosure matters may need to be.

In order to refute the slippery slope argument, this discussion need not draw all competency lines for all kinds of specialty attorneys. It need only show that there is a principled way to draw lines. Rule 1.1’s consideration of specialty “methods and procedures” combined with an inquiry about broader goals of the work being performed by the specialty lawyer, provides such a principled rubric. Applied in this case, considering that cause lawyers work for social change through multiple advocacy methods, many of which use public forums, one can draw a line that requires cause lawyers to be competent in public advocacy.

54 This is not to suggest that a cause lawyer may be cavalier about Rule 3.6, and need not consider whether her “cause” talk could be reasonably taken to be about the particular litigation. This Article only argues that Rule 3.6 provides much room in which a cause lawyer can work heavily on a public advocacy strategy.

55 See supra notes 39-40 and accompanying text.
After discussing the concerns about cause lawyers and public advocacy, this Article will now consider some examples of cause lawyers with competent public advocacy strategies.\(^{56}\) What counts as a competent public advocacy strategy? Is it knowing how to craft press releases? Is it getting the name of one's organization in the local paper? Is it moving beyond building "face time" in the media and, instead, considering the role of public opinion in how one achieves the goals of the cause on which one is working? This Article argues for the latter - a broad and comprehensive consideration of the interaction between the media, public sentiment, mobilization, and the social change agenda on behalf of which the cause lawyer is working.

V. TWO EXAMPLES OF CAUSE LAWYERING AND PUBLIC ADVOCACY COMPETENCY

Legal Momentum is a cause lawyering organization whose mission is to "advance[] the rights of women and girls by using the power of the law and creating innovative public policy."\(^{57}\) It articulates its goal for social change as reaching "a society in which women control their own lives and make their own decisions about reproduction, family life and work, and enjoy safety and economic security throughout their lives."\(^{58}\) Legal Momentum includes legal staff, public policy staff, public education and outreach staff, a judicial education staff, and communications staff.\(^{59}\) Legal Momentum is based in New York City, but works nationally.

Institute for Justice is a cause lawyering organization whose mission is to "advance[] a rule of law under which individuals can control their destinies as free and responsible members of society."\(^{60}\) It articulates its goal for social change as working to:

secure economic liberty, school choice, private property rights, freedom of speech and other vital individual liberties and to restore constitutional limits on the power of government . . . [and to] challenge[] the ideology of the welfare state and illustrate[] and extend[] the benefits of

\(^{56}\) See infra notes 57-104 and accompanying text.


freedom to those whose full enjoyment of liberty is denied by government.\textsuperscript{61}

Institute for Justice includes legal staff, strategic research staff, coalition-building staff, and communications staff.\textsuperscript{62} Institute for Justice is based in Washington, D.C., but works nationally.\textsuperscript{63}

\textbf{A. Legal Momentum and Public Advocacy}

For some twenty to twenty-five years, Legal Momentum has advocated on behalf of women working in non-traditional jobs.\textsuperscript{64} For example, Legal Momentum was involved in the 1988 lawsuit filed by women mineworkers in Minnesota that formed the story portrayed in the film, \textit{North Country}.\textsuperscript{65} Similarly, Legal Momentum participated in a sex discrimination class action lawsuit filed by Brenda Berkman against the New York Fire Department ("FDNY"), which resulted in Ms. Berkman joining FDNY in 1982.\textsuperscript{66} Around the time of Ms. Berkman’s lawsuit, Legal Momentum used the media in a limited and predictable way – mainly issuing press releases related to its work and self-producing an organizational newsletter.\textsuperscript{67} Rather than having a campaign that considered public advocacy as one of several strategies coordinated and deployed to achieve its goal of promoting and supporting women in non-traditional jobs, the organization appeared to limit public advocacy to the realm of public relations.

In March 2001, Legal Momentum brought on a vice-president of communications.\textsuperscript{68} The organization determined that it needed to better understand and develop a public advocacy component for each of its campaigns and to utilize public advocacy for more than just building name

\textsuperscript{61} Id.
\textsuperscript{64} E-mail from Maureen McFadden, Legal Momentum’s Vice-President for Communications (Feb. 2, 2007) (hereinafter “McFadden Email”) (on file with author).
\textsuperscript{65} Id. See also Jenson v. Eveleth Taconite Co., 130 F.3d 1287 (8th Cir. 1997).
\textsuperscript{66} See Berkman v. City of New York, 812 F.2d 52 (2nd Cir. 1987) (holding that the firefighters’ fitness test was invalid and inappropriately discriminated against women).
\textsuperscript{68} Telephone interview with Maureen McFadden, Vice President, Communications, Legal Momentum (Jan. 16, 2007) (hereinafter “McFadden Interview”) (notes on file with the author). Note that Ms. McFadden is not a lawyer, but is a media expert. This is a good example of a cause lawyering organization integrating a media advocacy expert into its strategy team. For Ms. McFadden’s biography, see Legal Momentum, About Us, http://www.legalmomentum.org/legalmomentum/aboutus/2006/03/maureen_mcfadden_vice_president_communications.php (last visited Feb. 23, 2007).
recognition for the organization. A handful of months after it built out its public advocacy team, September 11 occurred and the organization was presented with an unexpected opportunity to focus the public on the importance of women working in non-traditional jobs.

Of course, women were included among the first responders to the disaster at the World Trade Center — as firefighters, police officers and paramedics. Firefighter Brenda Berkman was one such responder. Before September 11, Legal Momentum had been considering whether it needed to bring a further lawsuit against FDNY to combat continued sex discrimination on the force. However, it was clear after September 11 that New York’s firefighters had suffered tragic losses and that suing FDNY would not be strategically positive. Thus, Legal Momentum instead crafted a sophisticated media strategy to publicize the fact that women work in non-traditional jobs and were to be found among the heroes at Ground Zero. The campaign kicked off with a documentary film produced by Legal Momentum’s communications department called “The Women of Ground Zero.” The documentary film received air time on the national networks and was screened at a reception for Congress.

Using impetus from “The Women of Ground Zero,” Legal Momentum was able to expand its campaign to include women in non-traditional jobs who were involved in rebuilding efforts. It started a campaign called “Women Rebuild” designed both to reach out to women in the trades (such as carpenters, plumbers, and electricians), and to increase visibility of women working in non-traditional jobs. The campaign has been renamed “Equality Works” and the campaign’s director is the vice-president of communications. The campaign is not limited to a media strategy, but includes litigation and public education.

69 See McFadden Interview, supra note 68.
70 See THE WOMEN OF GROUND ZERO, Legal Momentum (on file with author) (a documentary film produced by Legal Momentum).
71 Id.
72 See McFadden Interview, supra note 68; McFadden Email, supra note 64.
74 Id.
75 THE WOMEN OF GROUND ZERO, Legal Momentum (on file with author). “The Women of Ground Zero” included clips from women working in the trades, including a carpenter and an electrician, and noted that not only were women active as first responders, but were also an integral part of the beginning efforts at rebuilding. Id.
77 See Legal Momentum, Equality Works Program - Court Cases, http://www.legalmomentum.org/legalmomentum/programs/equalityworks/court_cases/ (listing the campaign’s legal cases).
Legal Momentum’s Equality Works campaign has integrated its various advocacy methods so that each may be used at the times it will be most effective. Most importantly, the public advocacy component of Equality Works is sophisticated, speaking to many audiences. For example, the documentary film was used: (1) as a way to increase the general public’s awareness of women firefighters; (2) as an advocacy tool for federal legislative work; and (3) as a way to honor and support individual women like Brenda Berkman who have long worked with Legal Momentum on issues related to women in non-traditional employment. Legal Momentum uses public advocacy as part of its attempt to reach the broader goals of its cause - to have women control their lives and enjoy economic security.

Furthermore, having a fully-developed public advocacy strategy has permitted Legal Momentum to piggyback on other events and use those events to promote its own cause-related goals. For example, in March 2006, Legal Momentum wanted to publicize a decision by the Department of Justice (“DOJ”) to expand a race discrimination investigation of FDNY to include sex discrimination. The news media had been uninterested in the story on its own, but Legal Momentum’s vice-president of communications knew that PBS was about to air a documentary about the first women firefighters in New York City. By tying together the DOJ expanded investigation story and the PBS premier, Legal Momentum was able to get the press interested in writing a story. The story quoted Brenda Berkman, Legal Momentum’s vice-president of communications, its legal director, and discussed that the issue of discrimination against women as firefighters was not limited to New York City. The Associated Press picked up the piece and ran it nationally. By having an integrated public advocacy strategy, Legal Momentum was able to capitalize on events that were not particularly related to any of its pending litigation nor related to any specific action the organization had taken. Through public advocacy, Legal Momentum got national coverage and visibility for women firefighters, thereby increasing the possibilities for the general public to consider the ways in which women participate in the workforce.


See McFadden Interview, supra note 68; McFadden Email, supra note 64.

Id.

Id.


See McFadden Email, supra note 64.

See, e.g., Dan M. Kahan et. al, Gender, Race, and Risk Perception: The Influence of Cultural Status Anxiety, 1st Annual Conference on Empirical Legal Studies, available at http://ssm.com/abstract=723762 (last visited Feb. 27, 2007). A critical concern of any media advocacy strategy must be whether the resulting media pieces actually change the minds of readers. Id. That is a question of cognitive psychology and beyond the scope of this Article, but it is an issue that cause lawyers must consider and be knowledgeable about.
B. Institute for Justice and Public Advocacy

The Institute for Justice ("IJ") describes itself as a "libertarian public interest law firm." In describing its advocacy work, IJ states that it "pursues cutting-edge litigation in the courts of law and in the court of public opinion . . . " From the outset, IJ makes it clear that it understands cause lawyers to be equally responsible for advocacy in traditional legal forums and in the forum of public discourse. When IJ started in 1991, it studied existing cause lawyering organizations that had been highly successful, such as the ACLU and the NAACP Legal Defense & Education Fund. IJ noted that those organizations had integrated public advocacy into their work and IJ believed the public advocacy work to have significantly contributed to the organizations' successes. Thus, IJ took that lesson and adopted it for its own cause advocacy agenda.

Because IJ considers itself to be a "litigation shop," its advocacy campaign highlights court-based work, but that work is buttressed by public outreach and strategic research. IJ trains all of its lawyers as media spokespeople, and when hiring a new attorney, considers whether the attorney will be able to competently work with the media. When IJ begins work on a new issue, its advocacy staff crafts a global strategy. Early on, its staff creates a set of "strategic overriding communications objectives" or "SOCO's" related to the particular issue that all advocacy staff, including clients, will learn and use during the course of the advocacy campaign. An example of IJ's integrated advocacy model is its work on eminent domain.

Around 1996, IJ started its eminent domain work by representing Vera Coking in a lawsuit against Atlantic City challenging the city's taking of her property so that Donald Trump could develop the land. In 1998, the trial court ruled against the city finding that the taking was not for a public

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is an active group of psychologists and legal scholars working on issues of cultural cognition and cause lawyers must become familiar with their work. Id.; see also Yale Law School, Cultural Cognition Project, http://research.yale.edu/culturalcognition/component/option,com_frontpage/Itemid,1/ (last visited Feb. 27, 2007).

Telephone interview with Scott Bullock, Senior Attorney, Institute for Justice (Jan. 19, 2007) (hereinafter "Bullock Interview") (notes on file with the author).
After Ms. Coking's case, IJ began receiving an increasing number of inquiries from across the country alerting IJ to similar eminent domain cases. IJ proceeded to litigate selected cases across the country, including challenges in Pittsburgh, Pennsylvania; New London, Connecticut; and Canton, Mississippi.

In 2001, IJ determined that it needed to consider a systemic campaign regarding eminent domain to bolster the individual litigation underway. It began to collect data on the scope of eminent domain proceedings across the country in order to produce a public report. The report ultimately was published in 2003. It provided IJ with a way to quantify the "problem" of eminent domain, and to argue to the public that its various lawsuits were not isolated incidents, but examples of a broad pattern of bad government behavior. With the report, IJ added a global story of eminent domain abuse to its individualized stories - there were Vera Cokings across America, not just in Atlantic City.

While the data collection was proceeding, IJ also launched a public education effort, the "Castle Coalition," as a way to train local citizens in grassroots activism related to eminent domain. Anyone can join the Castle Coalition for no charge and receive a monthly newsletter (called the "CastleWatch"), legislative action alerts, and invitations to training conferences. Those interested may get an "Eminent Domain Abuse Survival Guide."

The Castle Coalition is staffed and maintained by IJ. It reflects IJ's serious commitment of time and resources to integrating media and public education into its cause lawyering. There is a seamless connection between the various advocacy methods that IJ uses to push its eminent domain work, and, more broadly, to push for the social change it desires.

Legal Momentum and IJ illustrate the ways in which cause lawyers build out public advocacy strategies. Each organization has taken a slightly different approach, but underlying both approaches is the understanding that the social change happens more effectively if the organization actively uses public forums. Furthermore, the activities that form the organizations' public advocacy strategy are broad - working with traditional media such as

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96 See id.
97 Bullock Interview, supra note 88.
99 Bullock Interview, supra note 88.
100 Id.
101 Id.
102 E-mail from Scott Bullock, Senior Attorney, Institute for Justice (Jan. 29, 2007) (on file with author).
103 CastleCoalition.org, Join the Castle Coalition, http://www.castlecoalition.org/join/.
newspapers, creating comprehensive websites, self-producing quantitative public reports, self-producing documentary films, and launching grassroots organizing groups. Public advocacy is not just producing a press release or talking to a report on the courthouse steps.

VII. CONCLUSION

Cause lawyers are different. They are specialty lawyers who commit to working on behalf of a cause, not on behalf of an individual. As specialty lawyers, the standards that constitute competent, ethical behavior are set by looking at the methods and practices within their specialty, cause lawyering. The methods and practices of cause lawyering include using multiple advocacy methods in ways that will most effectively bring about social change. Those multiple advocacy methods often include public forums, such as the steps of a government building, streets and sidewalks, community centers, halls of the legislature, or a television talk show. Due to this reality cause lawyers are often called upon to be a voice for the cause, and as competent practitioners, they must be skilled in public advocacy. This is not optional or exceptional behavior; it is baseline, ordinary behavior.