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Rumpole and the Dissatisfied Client: Lessons on Justice From Four Case Studies in Client Objectives v. Lawyer Means

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ARTICLE

Thomas N. Bulleit, Esq.

Rumpole and the Dissatisfied Client: Lessons on Justice From Four Case Studies in Client Objectives v. Lawyer Means

Abstract. Fictional barrister-at-law Horace Rumpole is a skillful, tenacious, and even fearsome courtroom advocate for his criminal defense clients. He cares deeply about winning. But Rumpole departs from the stereotypical heroes and antiheroes of fictional courtroom drama in that he typically complies fully with the ethical constraints on advocacy and the truth-finding process. When Rumpole does occasionally stumble, it is in the other direction: by losing track of his client, and presenting often unwanted truths to elevate victory above other needs or interests that the client considers just as, or sometimes much more, important than a favorable verdict.

Using several of John Mortimer's *Rumpole of the Bailey* short stories to illustrate, this Article explores the sometimes-awkward interaction of the client's right to control decisions about the objectives of a legal representation, with the lawyer's duty to make decisions about the means. The Article tries to show how this interaction surfaces client self-determination as a positive, if not always properly-appreciated, principle of justice in our legal system, and closes with a discussion of lessons the Rumpole stories may have for so-called movement lawyering.

Author. Mr. Bulleit recently retired from an almost forty-year career as a Washington, D.C. lawyer, the last decade as a partner at Ropes & Gray, LLP. His interest in legal ethics stems from his teacher, the Honorable Wade McCree who, after a distinguished career that included serving on

the United States Court of Appeals for the Sixth Circuit and later as Solicitor General of the United States, taught his first-year legal ethics class at the University of Michigan Law School. It is only coincidental that his guilty pleasure in the Rumpole stories began the same year. The author thanks his almost lifelong friend, Professor Bernie Burk, for his good-humored wisdom, guidance, and editorial assistance in the preparation of this Article.

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“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”¹

“[A] lawyer [has the] obligation zealously to pursue and protect the client’s legitimate interests, within the bounds of the law.”²

“You b**tard, Rumpole! You’ve joined the con-o-sewers!”³

I. SETTING THE SCENE

It seems axiomatic that lawyers should want to win their cases, especially obtaining acquittals for clients in criminal cases. But even clients facing criminal conviction may have other interests: stories about societal injustice that they want told, or personal secrets that they do not want told. What do the rules of legal ethics tell us about when the lawyer’s zeal for winning may conflict with the client’s other interests?

The late author John Mortimer’s fictional barrister-at-law, Horace Rumpole, provides several useful windows into this question. This Article will contend that Mortimer’s treatment of the topic makes for more than just enjoyable fiction, because it demonstrates an important principle of justice—that of client self-determination—and, as discussed in Part VI below, also has real-life implications for so-called movement lawyering.

1. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (AM. BAR. ASS’N 2023) (citing Rule 1.4).

2. *Id.* preamble ¶ 9. *See also id.* R. 1.3 cmt. 1 (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”); *Id.* preamble ¶ 2 (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”).

3. JOHN MORTIMER, *Rumpole and the Genuine Article*, in *THE SECOND RUMPOLE OMNIBUS* 193, 236 (1987) [hereinafter *OMNIBUS 2*].

To illustrate, let us begin with a client interested in fame. In defending Harold Brittling, an artist charged with the sale of an allegedly forged painting, Rumpole, calls as a witness the defendant's long-estranged wife, Nancy. Her testimony, with complete credibility, establishes that the painting, acknowledged by all to be a work of artistic genius, is genuinely the work of master painter Septimus Cragg, not a forgery by Brittling.

Rumpole knows—indeed, he tells the jury—that his client, whose wife had an affair with Cragg when she sat as a subject for the painting many years ago (“He painted me in the nude, my Lordship . . . I was a bit of something worth painting in those days!”),⁴ was prepared to run the risk of conviction because even an ambiguity about whether he (Brittling) was the painter would burnish his own reputation as an artist. Rumpole also knew that for both of these reasons, Brittling would not want the witness called. In response to Rumpole's closing remarks ranking Brittling with being among “the merely talented” as an artist, Brittling blurts out the sentiment in the third quotation above, but is acquitted of the crime.⁵

Putting aside that this highly dissatisfied client is unlikely to be a return customer or reference, does Brittling have a valid complaint to Rumpole's Inn of Court—for this purpose, the barrister's equivalent of an American state bar's disciplinary body—that Rumpole breached his ethical obligations by calling the unwanted witness? When a criminal defense lawyer has exculpatory evidence that will acquit his client, but the client does not want the evidence admitted, what is the lawyer's duty? More grandly, how much does a proper view of justice require the lawyer to respect the client's interest in self-determination when that makes a criminal conviction more likely?

Because this Article is addressed to an American audience, the sacred text is the American Bar Association's Model Rules of Professional Conduct.⁶ Three sets of rules come into play. Rule 1.2 describes the allocation of final decisional authority between the respective roles of lawyer and client in the representation.⁷ Rule 1.4 discusses the obligation of the lawyer to communicate with the client, including the obligation to consult with the client about material means to be used in the representation.⁸ Under these Rules, the

4. *Id.* at 234.

5. *Id.* at 236.

6. *See infra* Section IV (discussing the text of the rules).

7. MODEL RULES OF PROF'L CONDUCT R. 1.2.

8. *Id.* R. 1.4.

client has absolute control over the representation's *objectives*. Where the *means* of achieving the client's objectives in the engagement (rather than the *objectives* themselves) are at stake, the lawyer has the final authority to decide on those means, and the obligation to "consult" is a requirement only to reasonably solicit and listen to the client's views, not necessarily adhere to them.⁹ Rule 1.3—and to a greater extent language in the Preamble and Commentary to the Model Rules—describe the lawyer's obligation of diligence in advancing the client's legitimate interests.¹⁰

The Rumpole canon contains several stories addressing the tension between the roles of the client, who controls the objectives of the representation, and the lawyer, who is responsible for choosing the means to obtain those objectives. The stories are instructive because they demonstrate how the lawyer who cares too much about winning at trial may betray interests that the client considers more important than winning and, in the process, may do a disservice to a proper view of justice. This Article will discuss how Rumpole's choice of means for winning at trial may get in the way not of the truth, but of his own client's objectives—or at least deeply-held desires—for the representation, and explore when that may rise to the level of an ethical failing.¹¹

II. AN INTRODUCTION TO RUMPOLE

For the uninitiated, Mortimer's chronicles of the later career of Horace Rumpole have delighted television and reading audiences since the first BBC television special, *Rumpole of the Bailey*, iconically starring the late Leo McKern, aired in 1975.¹² There followed a TV series on Thames Television that ran from 1978 until 1992, all later adapted to books (mostly short stories) published in roughly the same years.¹³ Mortimer wrote additional Rumpole stories after 1992 that, sadly, never made it to television. The

9. See generally BERNARD A. BURK ET AL., *ETHICAL LAWYERING: A GUIDE FOR THE WELL-INTENTIONED* 151–57 (2022) [hereinafter *ETHICAL LAWYERING*] (discussing further the allocation of decision-making authority between the client and lawyer).

10. MODEL RULES OF PROF'L CONDUCT R. 1.3.

11. In fairness to Horace Rumpole, he was never subject to the Model Rules, and thus cannot be legally faulted for violating them. It is beyond the scope of this Article to consider how the ethical rules applicable in Rumpole's courtroom haunts would apply to the situations discussed below. Nevertheless, the Model Rules are intended to, and often do, have deep roots in a basic sense of moral fairness and justice, and Rumpole's exploits are well suited to exploring them.

12. *Rumpole of the Baily* (BBC television first broadcast Dec. 17, 1975).

13. *Id.*

shows and the books are cozies, not hard-boiled legal dramas, evoking not Sam Waterston in *CSI* nor even Raymond Burr in *Perry Mason*, but instead the heroes of more gentle mysteries, like most of David Suchet's *Poirot*, or John Nettles' portrayal of Tom Barnaby in *Midsomer Murders*.¹⁴ Each episode is a self-contained and usually gently ironic exploration of how Rumpole's life at the Bar imitates the rest of his life, with some story of office politics or home life paired with a legal representation on a similar topic.

For example, in the very first episode, *Rumpole and the Younger Generation*,¹⁵ Rumpole defends Jim Timson, the teenaged son of a family of South London petty criminals in his first arrest, while simultaneously dealing with his slightly older son Nick, home from boarding school. Both boys are on the cusp of decisions whether to go into what might be called the *Family Business*—for the Timson family, non-violent property crime, and for the Rumpoles, the law. Rumpole's lack of success in convincing his young client to break away from a life of petty crime influences his decision to support Nick's choice to likewise abjure the family business, and study sociology rather than law at university.¹⁶

Rumpole is a formidable advocate who cannot be accused of anything less than “zealous” representation of his clients, almost always defendants at the Old Bailey, London's central criminal court (as observed by his father-in-law, “not exactly the S.W.1. [London's most posh zip code] of the legal profession”).¹⁷ There can be no doubt that he meets that ethical standard. He is exceedingly proud of that reputation and though he sometimes denies it himself, really considers it a calling.¹⁸ Indeed, one fascinating feature of the *Rumpole* saga is that the devoted reader would be hard-pressed to find any instance in which Rumpole's advocacy is less than fully zealous, while at the same time rarely, if ever, straying beyond the rules governing ethical

14. *CSI: Crime Scene Investigation* (CBS television first broadcast Oct. 6, 2000); *Perry Mason* (CBS television series first broadcast Sept. 21, 1957); *Poirot* (ITV television series first broadcast Jan. 8, 1989); *Midsomer Murders* (ITV television series first broadcast June 28, 1998).

15. See JOHN MORTIMER, *Rumpole and the Younger Generation*, in THE FIRST RUMPOLE OMNIBUS 9 (1983) [hereinafter OMNIBUS 1] (discussing Rumpole's impact on Nick and Jim Timson).

16. *Id.* at 47.

17. *Id.* at 19.

18. Compare *id.* at 87 (joking with his son's fiancé stating, “I will stand up in Court for absolutely any underprivileged person in the world. Provided they've got Legal Aid!”), with JOHN MORTIMER, *Rumpole and the Judge's Elbow*, in OMNIBUS 2, *supra* note 3, at 566 (pondering why he would not want to be a judge: “Judging people is not my trade. I defend them.”).

advocacy, such as avoiding misrepresentation.¹⁹ In other words, in presenting his client's case, Rumpole plays hard, but he always plays by the rules, or at least by the rules of advocacy. Instead, as discussed below, the ethical conflicts that most often arise in Mortimer's stories involve the difference between what Rumpole and his client might view as a favorable outcome.

In fact, it could be said that Rumpole hardly thinks of himself as a lawyer at all. In one story, he muses that almost "half a century knocking around the Courts has given [him] a profound distaste for the law."²⁰ Elsewhere he describes his talents as bringing out facts in the courtroom, "cross-examining coppers on their notebooks."²¹ In yet another story, a deadbeat solicitor attempts to flatter Rumpole's wife Hilda (to whom he often refers, both archly and (somewhat) affectionately, as "She Who Must Be Obeyed")²² into compromising fees he owes by calling Rumpole "a fine lawyer." "A fine lawyer? He never told me," Hilda replies. He continues, stating, "[a]nd of course, a most persuasive advocate," leading Hilda to say "[o]h yes. He told me *that*."²³

As an audience, we generally are meant to approve when Rumpole obtains an acquittal, because his clients are either not guilty or are guilty of only minor, nonviolent offenses. In his sympathetic essay on *Rumpole's Ethics*, Professor Paul Bergman describes them as "likeable Runyon-esque thieves."²⁴

In the parallel stories about Rumpole's life outside of court, Rumpole's "clients" are often even more sympathetic and his efforts even more admirable. He is a champion of diversity because it angers him when sex or race

19. See MODEL RULES OF PROF'L CONDUCT R. 4.1 ("In the course of representing a client a lawyer shall not knowingly (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client . . ."); *Id.* R. 3.3 (identifying a lawyer's obligation to correct a client's false testimony); *Id.* R. 1.2 (outlining a prohibition on assisting the client in criminal or fraudulent conduct). See also JOHN MORTIMER, *Rumpole and the Alternative Society*, in OMNIBUS 1, *supra* note 15, at 72–75 (providing an illustration of Rumpole staying in line with the ethical standards). Once Rumpole's client admits to him that she in fact acquired a stash of cannabis in order to raise money to get her brother out of jail, Rumpole advises her that she must plead guilty to the charge of possession with intent to sell, or he must withdraw from the representation.

20. JOHN MORTIMER, *Rumpole and the Blind Tasting*, in OMNIBUS 2, *supra* note 3, at 456.

21. JOHN MORTIMER, *Rumpole and the Genuine Article*, in OMNIBUS 2, *supra* note 3, at 209.

22. JOHN MORTIMER, *Rumpole and the Younger Generation*, in OMNIBUS 1, *supra* note 15, at 9.

23. JOHN MORTIMER, *Rumpole and the Genuine Article*, in OMNIBUS 2, *supra* note 3, at 429 (emphasis in original).

24. Paul Bergman, *Rumpole's Ethics*, 1 BERKELEY J. ENT. & SPORTS L. 117, 119 (2012).

work against individuals whom he believes should be advanced on their merits. His discreet (if not always wholly honest) politicking is responsible for securing jobs in his Chambers for at least two aspiring young women barristers and promoting the career of a third over the course of the series.²⁵ He actively supports the one person of color seeking professional advancement whom he encounters in the series, despite obvious bias from his Chambers colleagues and his client.²⁶

III. RUMPOLE AS A FORCE FOR JUSTICE

Mortimer clearly intends Rumpole's audience to perceive him positively, as a force for justice, writ large.²⁷ And so he has been viewed by the small number of commentators who have previously addressed the ethics of Rumpole's client representations.

Professor Bergman tells us that "Rumpole embodied an 'ethics of caring competence.'"²⁸

[F]or Rumpole professional responsibility was not found in abstract rules. Rumpole's ethics were rooted in his commitment to the presumption of innocence, thorough factual investigation, and compassion for people charged with crimes.²⁹

Professor John Flood concludes in his essay on *Purity and Impurity in Legal Professionalism* that Rumpole "believe[s] in law and justice . . . [but] recogni[z]es that law and justice are not isomorphic, and therefore justice must be seen to trump law."³⁰ Flood sums up:

25. See JOHN MORTIMER, *Rumpole and the Married Lady*, in OMNIBUS 1, *supra* note 15 (befriending Phillida Trant, later Mrs. Justice Phillida-Erskine Brown); JOHN MORTIMER, *Rumpole and the Female of the Species*, in OMNIBUS 2, *supra* note 3, at 324 (employing guile to work the admittance to Chambers of Fiona Always); JOHN MORTIMER, *Rumpole and the Blind Tasting*, in OMNIBUS 2, *supra* note 3, at 443–519 (befriending Liz Probert, who was later admitted to Chambers).

26. JOHN MORTIMER, *Rumpole and the Fascist Beast*, in OMNIBUS 1, *supra* note 15, at 273.

27. See Bergman, *supra* note 24, at 119 (noting "Rumpole was in no way a buffoon").

28. *Id.* at 118.

29. *Id.*

30. JOHN A. FLOOD, *Rake and Rumpole: Mavericks for Justice—Purity and Impurity in Legal Professionalism*, in LAW, LAWYERS AND JUSTICE: THROUGH AUSTRALIAN LENSES 17 (June 1, 2019) [hereinafter *Rake and Rumpole*].

Rumpole . . . tries to help those who deserve to be helped. There is some ethical fading with Rumpole, but it is always to a well-intended end. Ultimately, Rumpole is good, honest[,] and professional in his own way. He has integrity and understands his profession's rules and how to bend them.³¹

One does not have to be a scholar of legal ethics to observe that equivocation is palpable in both comments. The sympathy, even admiration, expressed by both of these commentators towards Rumpole is addressed to his role as a force for *Justice*, and not an endorsement of his performance under the rules of legal ethics. One searches the Model Rules in vain for any reference to an “ethics of caring competence.”³² Though Professor Flood tries to brush over his observation of Rumpole’s “ethical fading,” he does so by focusing on admirable traits that are not to be found in the rules of ethics: helping “those who deserve to be helped” (rather than helping his clients); being “professional in his own way,” his “own way” including that he “understands his profession’s rules and how to bend them.”³³

Fans of Rumpole, even those of us who are also lawyers, are likely to sympathize with the way these commentators approach the “Old Bailey Hack.”³⁴ Like them, we generally find Rumpole’s results, which almost always comport with rough justice, morally satisfying. We would rather not get bogged down in the rules when the good guys win.

However, while under Rumpole’s approach the good guys usually stay out of jail, they don’t always achieve a result that the clients consider a “win.” The rough justice that results when Rumpole pursues a favorable verdict without sufficiently consulting what his clients themselves have determined to be the right hierarchy of outcomes is a cramped kind of *justice*. It *roughs* them up, sometimes seriously, and in ways Rumpole often could have avoided. Rough justice is likewise not a defense under the Model Rules. It is to those we turn next.

IV. THE RULES

At least one important purpose of the Model Rules surely ought to be reducing larger issues of morality and justice into digestible nuggets that

31. *Id.* at 20.

32. Bergman, *supra* note 24, at 119.

33. *Rake and Rumpole*, *supra* note 30, at 20.

34. JOHN MORTIMER, *Rumpole and the Younger Generation*, in OMNIBUS 1, *supra* note 15, at 9.

govern lawyer behavior. The rules addressed in this Article deal with an important element of justice different than simply obtaining criminal acquittals: the client's interest in self-determination. These rules address the lawyer's ethical duties in circumstances such as these, specifically, where the client has interests or objectives that may include, but are not limited to, winning the case, and may even include the risk of loss to protect those other interests.

A. The Roles of Lawyer and Client: The Client's Control of Objectives

To begin with the rules addressing the roles of lawyer and client, these set forth as ethical requirements the surprisingly elusive details underlying the commonplace lay understanding that the lawyer works for the client. Model Rule 1.2(a) broadly states that the client selects the "objectives" of a legal representation, by which the lawyer "shall" abide, but the lawyer retains considerable leeway in choosing the "means" to attain those objectives.³⁵ "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."³⁶ The Rule goes on to provide four specific examples of objectives:

A lawyer shall abide by a client's decision [1] whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to [2] a plea to be entered, [3] whether to waive jury trial and [4] whether the client will testify.³⁷

The "shall" makes these clear and non-negotiable client objectives. Preamble commentary to Rule 1.3, which sets forth the lawyer's duty of diligence, states a different but related "obligation zealously to protect and pursue the client's legitimate *interests*, within the bounds of the law."³⁸ Note that

35. MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

36. *Id.*

37. *Id.*

38. *Id.* preamble ¶ 9 (emphasis added); *Id.* R. 1.3. Rule 1.3 itself does not use the word zeal: "A lawyer shall act with reasonable diligence and promptness in representing a client." *Id.* As discussed at some length below, the client may have "legitimate interests" as to which the lawyer only "should" act with zeal to support, that do not rise to the level of "objectives" over which the client exercises control and which the lawyer "shall" abide by under Rule 1.2. What makes the Rumpole canon interesting is that in all of the cases discussed, the "interest" is of profound importance to the client and exposes the tension between when the lawyer "must" or only "should" follow the client's wishes.

this language is more nuanced—stating that the lawyer has an “obligation” to pursue and protect client interests, but not that the lawyer “shall abide” by client decisions as to the client’s interests.

In the case of a criminal trial, it generally should be presumed that an objective is acquittal.³⁹ But may the criminal defendant not also have other “legitimate interests” that constitute “objectives” that the lawyer is obligated to pursue within the bounds of the law? What if the criminal defendant cares as much, or even more, about avoiding a substantial personal embarrassment, or scandal, than being found not guilty? What if the defendant wants to use the trial to make a truthful statement about issues larger than the self? Pushing a little further, what about defendants who are willing to sacrifice themselves to create an untruthful impression? Is there a point, short of actionable fraud or criminal behavior, at which the client’s interest or objective becomes sufficiently “illegitimate” that the lawyer is not bound to pursue it on the client’s behalf? And if there is such point, what is the lawyer’s obligation?

An important take-away, one that perhaps many lawyers may not consider often enough, is that before getting to *means*, and even thereafter since a client’s views may change in the course of litigation, lawyers should be sure they have appropriately investigated the client’s *objectives*.

B. *The Roles of Lawyer and Client: The Lawyer’s Control of Means*

Rule 1.4(a)(2) tells us a bit more about means, stating that in choosing them, the lawyer is obligated to “reasonably consult with the client.”⁴⁰ The reasonableness test indicates that the obligation to consult is not for every tactical decision, but for decisions that the lawyer knows or should know

39. *But see infra* notes 77–81 and accompanying text (describing how one of Rumpole’s clients desired to be found guilty at trial).

40. MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(2) (“A lawyer shall . . . reasonably consult with the client about the means by which the client’s objectives are to be accomplished . . .”).

the client would consider material to the representation.⁴¹ Logically, materiality would include decisions to which the lawyer knows or should know the client would have a serious objection.⁴²

Commentary to Rule 1.4(a)(2) also addresses the situation where the lawyer and the client disagree about means.⁴³ If after consultation, the lawyer and the client have a “fundamental disagreement,” and cannot reach a “mutually acceptable resolution,” the commentary says that the lawyer is *permitted* to withdraw.⁴⁴ But under the letter of this Rule, the ultimate decision as to the means is the lawyer’s. That is, the lawyer is ethically permitted to ignore the client’s wishes as to means if consultation has occurred and no mutually acceptable resolution can be reached. To be sure, this situation would rarely arise, because if confronted with the lawyer’s intransigence on a means decision, the client may (and often does) fire the lawyer. Most of the reported cases in which the lawyer imposes a means decision on a dissenting client involve either public defenders, who are considerably more difficult to discharge than a lawyer the client has chosen, or a client’s objection to a lawyer’s means decision near or during trial, when the court frequently exercises its discretion not to allow counsel to be discharged.⁴⁵

41. *Id.* R. 1.4(b). The “knows or should know” standard should apply because of the status of the lawyer as the client’s fiduciary, and Rule 1.4(b)’s mandatory duty of candor: the lawyer must “explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation.” *Id.* As fiduciaries, lawyers have to go out of their way to understand what their particular clients would consider necessary to make an informed decision.

42. The duty to consult as to means has to have a materiality standard or the lawyer could never get anything done. Without a materiality standard, the lawyer’s every step in moving the process forward, no matter how inconsequential, would require prior consultation with the client. The ABA has provided helpful guidance regarding *how* “material” a means decision has to be to require consultation. *See* ABA Comm. on Ethics & Pro. Resp., Formal Ethics Op. No. 18-481 (2018) (concluding information is material if it is “reasonably likely to harm or prejudice a client” or “of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice”).

43. MODEL RULES OF PROF’L CONDUCT R. 1.4 cmt. 3.

44. *Id.* R. 1.2 cmt. 2 (“On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client’s objective [In such cases,] [t]he lawyer should also consult with the client and seek a mutually acceptable resolution If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation.”).

45. *See id.* R. 1.16(c) (“A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.”). For an exceptionally lucid discussion of the dynamic between the lawyer’s power to make means decisions and the client’s power to discharge counsel, see ETHICAL LAWYERING, *supra* note 9, at 157–62.

This emphasizes the importance of early-and-often consultation. Without it, the client would not have the opportunity to make means preferences known to counsel and, at least for nonindigent clients, dismiss the lawyer bent on pursuing a means to which the lawyer knows, or should know, that the client objects.

V. RUMPOLE AND THE UNWANTED WITNESSES

Rumpole only infrequently encounters situations in which his usually sensible instinct to win the case conflicts with his clients' other interests. But when he does, his conduct is instructive in thinking about how the rules of ethics should be applied and achieve a just result.

In each of the cases discussed below, the client has instructed Rumpole to defend, and probably like most lawyers, Rumpole considers that to be a sufficient statement of the objectives of the representation that he normally does not inquire further into what other needs and interests, including Rule 1.2 objectives, the client may have. In each case, his troubles arise from this failure of inquiry, as he pursues a means to winning—specifically, calling a witness or introducing other evidence conducive to acquittal—to which he may reasonably be charged with some degree of knowledge that the client might object.

However, the different circumstances of each case present different outcomes as to whether Rumpole has violated of the Model Rules.

A. Rumpole and the Family Pride:⁴⁶ The Helpful but Probably Unnecessary Witness

We begin with a case in which the developing facts may support charging a crime, but which takes place in a coroner's court, and not a criminal trial. In this case, the personal and professional stories overlap, since Rumpole's client, Lord Sackbutt, is a distant relative through the marriage of his wife's niece.⁴⁷ Sackbutt, not a particularly likeable character (evidencing all the charm of the discordant medieval musical instrument with which he shares a name), engages Rumpole to represent him in the coroner's investigation of the death of an apparently homeless woman who drowned in the lake on

46. JOHN MORTIMER, *Rumpole and the Family Pride*, in RUMPOLE ON TRIAL 114 (1992) [hereinafter ROTL].

47. *Id.* at 122.

the Sackbutt estate.⁴⁸ The coroner, who plainly dislikes His Lordship, is convinced that the woman was Sackbutt's mother, who had run off with a lover many years ago, but whom his father advised him had died when Sackbutt was a boy away at boarding school.⁴⁹ The coroner seeks to establish the cause of death as a deliberate drowning that Sackbutt engineered to avoid the embarrassment of having the estranged, adulterous mother return and show his beloved father to have been a cuckolded liar.⁵⁰

There is some circumstantial evidence in support of the coroner's theory. A photograph of Sackbutt and his parents is found on the deceased's person, and a witness testifies that he saw His Lordship speaking to her, which Sackbutt denies.⁵¹ Rumpole's cross-examination raises doubt about the witness's certainty, leaving the photograph as the only really persuasive physical evidence.⁵² Rumpole locates the mother and calls her to testify, removing any motive for murder and saving his client from the potential of a criminal trial and possible conviction, but causing deep personal embarrassment to Sackbutt.⁵³

Rumpole clearly knows that his client has at least two objectives. First, protecting Sackbutt himself and the property, which is operated in part as a tourist destination, against legal liability, whether for negligence or, perhaps more seriously, for a deliberate murder. Second, attempting to avoid a scandal that would embarrass the family or adversely affect operation of the tourist business. Rumpole is also aware that Sackbutt worshiped his deceased father, and Sackbutt's testimony makes clear his certainty that his father told him the truth of his mother's demise many years before.⁵⁴

At the same time, it would not be fair to say that Rumpole knows or should know that his client has as an *objective* not resurrecting his mother. Since he is pursuing the undoubted objective of avoiding civil or criminal liability, it thus would not be fair to charge Rumpole with a violation of Rule 1.2.

48. *Id.* at 127.

49. *Id.* at 144–46.

50. *Id.*

51. *Id.* at 142–44.

52. Of course, today, DNA evidence would solve this dilemma, but in the 1980s, it was a sufficiently undeveloped science that Mortimer may be excused for creating a story where it could not resolve the question.

53. JOHN MORTIMER, *Rumpole and the Family Pride*, in *ROTL*, *supra* note 46, at 146–47.

54. *Id.* at 149.

Rumpole is on shakier ground under Rule 1.4's obligation to "reasonably consult" with his client about material tactical decisions. The decision is material if Rumpole knows or should know that if consulted, the client would consider terminating the representation.⁵⁵

While it is a closer call, let's give Rumpole the benefit of the doubt here as well. For the same reasons that he should not be charged with the knowledge that not calling the mother was a client objective, he should not be charged with knowing that calling her was a *material* means decision calling for consultation.

That is not to say Rumpole *should* not have consulted his client, only that in this case, the failure to do so should not lead to disciplinary consequences. His penchant for focusing just on the objective of winning an acquittal presents larger ethical problems in other cases.

B. *Rumpole and the Right to Silence:*⁵⁶ *An Even Less Necessary Witness, but Higher Stakes*

A real murder charge is tried in this case, in which Clive Clympton, a popular and arrogantly leftist professor of literature at the fictional Gunster University ("The purpose of literature . . . is not to produce tears, but social change!"),⁵⁷ is accused of killing the University Vice-Chancellor, whom he has openly criticized for turning the institution into a business-oriented trade school.⁵⁸ Here there is no physical evidence, only a witness who claims to have overheard the professor yelling at the deceased moments before he fell through a faulty railing to his death.⁵⁹ Rumpole's cross does a good job of creating doubt about that witness's testimony.⁶⁰

The professor also has an interest other than acquittal: he is a closet mason, a member of the Noble Order of Ostlers (horse grooms), and keeping secret his membership in what he would publicly view as a regressive and elitist secret society is of profound importance to him.⁶¹ He is quite con-

55. See *supra* notes 43–45 and accompanying text (discussing the duty to consult with a client regarding material decisions).

56. JOHN MORTIMER, *Rumpole and the Right to Silence*, in RUMPOLE À LA CARTE 80 (1990).

57. *Id.* at 84.

58. *Id.* at 82–83, 89.

59. *Id.* at 91, 106.

60. *Id.* at 107–08.

61. *Id.* at 119.

cerned that his membership in such an organization (to say nothing of publicizing the peculiarly anachronistic fancy dress—leather blacksmith's smock and gloves—that they wear at their meetings) would destroy his reputation as a radical among his students and in the University community.⁶²

Rumpole intuits this from Clympton's refusal to provide an alibi, after his investigation rules out the other most plausible reason for the secrecy (that the defendant was indulging his affair with the Vice Chancellor's wife at the time of the death)⁶³ and reveals that being an Ostler has considerable importance to professional success in the city of Gunster.⁶⁴ Rumpole nevertheless calls as an alibi witness the University Chancellor, a fellow Ostler, this time over a loud in-court objection from the client.⁶⁵ The witness testifies that at the time of the killing, the professor was attending one of their super double-secret meetings, and Clympton is acquitted.⁶⁶

As with Sackbutt's interest in avoiding the embarrassment of his estranged mother's resurrection, surely Clympton's strongly-held *interest* in keeping his masonic status secret is a legitimate one.⁶⁷ But unlike the Sackbutt case, here Rumpole unquestionably is aware of the client's interest. For purposes of Rule 1.2, the question is whether that desire is an *objective* of the representation.

Jumping ahead, in this case, Rumpole clearly violated his duty of consultation under Rule 1.4 as to a material decision on the *means* of representation. He almost certainly actually knew, and certainly should have known, that the client would sooner have suffered a marginally greater risk of conviction than to have his secret known, and if necessary, likely would have sought to discharge him as counsel to avoid it. There also appears to have been ample time before the trial for Rumpole to discuss this strategy with the client,

62. *See id.* at 114–15 (explaining how Clympton would never thank him since he revealed his membership in the Olsters, causing him to have “lost the young”).

63. *Id.* at 100.

64. *Id.* at 113.

65. *Id.* at 112–13.

66. *Id.* at 113–14, 118.

67. Here, the parallel personal story in the episode likewise involves an innocent secret. Rumpole's Head of Chambers (analogous to a law firm managing partner, though that oversimplifies the business organization of a barristers' chambers) had undertaken to lose weight to please his new wife, and chosen a dance aerobics class to do so, something the Head believes would be deeply embarrassing for his wife to know. Ironically, Rumpole understands and maintains this secret, convincing the Head to come clean to his wife, who turns out to be quite sympathetic to her husband's efforts to slim his waistline.

thereby giving Clympton an opportunity to seek his dismissal and bring on new counsel.

Returning to Rule 1.2, is Rumpole's wrongdoing more serious than that? Was calling the Ostler witness also a failure to pursue and protect a known *objective* of the client: keeping his membership in the society a secret? Unlike in *Family Pride*, here there is no physical evidence tying Clympton to the murder, and Rumpole's cross-examination effectively raised reasonable doubt about the testimony of the sole witness. And unlike in *Family Pride*, Rumpole fully understands the extreme importance to his client of not having his masonic life exposed.

On the other hand, unlike in *Family Pride*, this is an actual murder trial, elevating the importance of winning an acquittal, which certainly remains one of Clympton's objectives. So, isn't this merely a *means* decision? It is obviously not one of the enumerated objectives in Rule 1.2: not a settlement, a plea, a waiver of a jury trial, nor a decision about the client's testimony. Nor does it seem very closely analogous to the seriousness of those decisions, which go well-beyond embarrassment or inconvenience.

So, in this case, Rumpole survives a challenge under Rule 1.2—it is very difficult to describe Clympton's strongly-held *interest* in maintaining his masonic secret as an *objective* of the representation as that term is used in the rules—but gets a ding under Rule 1.4, for failing to consult the client about a material tactical decision. He had knowledge that should have led him to consult and had he done so, Clympton might have persuaded him not to use the evidence, or he likely would have had time to engage new counsel before the trial.

C. *Rumpole and the Genuine Article*.⁶⁸ *A More Necessary Witness and an Illegitimate Interest*

Harold Brittling's attempt to use his criminal trial for forgery to advance his own reputation as an artist presents Rumpole with another complicating factor: is the lawyer obligated to pursue with zeal a client's interest if it may

68. JOHN MORTIMER, *Rumpole and the Genuine Article*, in OMNIBUS 2, *supra* note 3, at 236. Here, the personal story is about the ability to separate the phony from the genuine. Post-verdict, the judge claims an infallible "nose" for sensing the truth in a witness before Rumpole catches him in a failure to do just that. *Id.* at 237.

not be, in the words of the Preamble of the Model Rules, a “legitimate interest?”⁶⁹

Here, the Rule 1.4 situation is murkier than in *Right to Silence*. Rumpole only learns of Nancy Brittling’s existence when the trial is in full swing, and after Brittling has given his own testimony, which Rumpole correctly describes as “a disaster” because Brittling deliberately prevaricates about whether he painted “Nancy at Dieppe.”⁷⁰ If he did, it is only a short step to his conviction for forgery. Had Rumpole consulted his client, Brittling would surely have demanded that he not call Nancy to testify that the painting at issue is a genuine Septimus Cragg. But given his own testimony, Brittling is highly likely to be convicted without Nancy’s testimony; so, it is highly unlikely that Rumpole would have assented to this demand. And because they are in the middle of trial, it is at least highly questionable that the judge would have allowed Brittling to dismiss counsel.⁷¹

If we give Rumpole a pass on Rule 1.4—because in the circumstances, his knowledge of his client’s interest amounts to a constructive “consultation,” and the posture of the case in the middle of trial would likely have prevented his dismissal anyway—we must still ask if Brittling’s clear desire and interest in being perceived as a great artist was a permissible client *objective* of the representation. The Preamble suggests the lawyer’s obligation is to pursue the client’s “legitimate interests within the bounds of the law.”⁷² As discussed above, a client’s *interests* are not always going to qualify as *objec-*

69. MODEL RULES OF PROF'L CONDUCT preamble ¶ 9.

70. JOHN MORTIMER, *Rumpole and the Genuine Article*, in OMNIBUS 2, *supra* note 3, at 226 (“Rumpole: “Did you paint that picture, Mr. Brittling?” Brittling: “Me? Is someone suggesting that I did?” Rumpole: “Yes, Mr. Brittling. Someone is.” Brittling: “Well in all modesty, it really takes my breath away. You are suggesting that I could produce a masterpiece like that!” The Court: “I take it, Mr. Rumpole, that the answer means ‘no.’”).

71. For purposes of this Article, Rumpole will also receive a pass on Rule 3.3’s obligation to correct a client’s false testimony, and Rule 1.2’s prohibition on assisting the client in criminal or fraudulent conduct. As to Rule 3.3, Brittling does not testify falsely; he is evasive on the subject of where the painting came from and who painted it, but the judge concludes that the evasiveness amounts to a denial that he painted the painting. See JOHN MORTIMER, *Rumpole and the Genuine Article*, in OMNIBUS 2, *supra* note 3, at 226 (“Featherstone, J. had interpreted Brittling’s answer as a denial of forgery.”). As to Rule 1.2, although Brittling set himself up to be prosecuted by selling the painting through Cragg’s elderly niece and by having his chum, one Blanco Basnet, phone the purchaser to tell her the painting was not a Cragg but was “better than a Cragg,” he ultimately was engaged in the opposite of fraud, since the painting was genuine, and he did not tell an untruth in court. *Id.* at 219.

72. MODEL RULES OF PROF'L CONDUCT preamble ¶ 9.

tives within the meaning of Rule 1.2. Here, the desire to be perceived, erroneously, as a great artist surely is nothing like the Rule's enumerated objectives: the decision to settle, to plead, to waive a jury, or to testify.

So, there is a good argument to be made that Rumpole has violated no ethical rules in this case. Defrauding the court and the art-buying public as to his reputation and talent is very difficult to characterize as a permissible objective of the representation. Additionally, calling an exculpatory witness is a means decision that in this case probably could not have been avoided with a real, as opposed to constructive, consultation.

But *Genuine Article* provides an opportunity to consider a slightly different conundrum under these rules: What is the lawyer's obligation when the client has an arguably *illegitimate* objective? For purposes of argument, let us postulate that a desire for an enhanced reputation could be a client-controlled objective.

Surely the first obligation must be to determine whether the objective is in fact, illegitimate. The modifying phrase "within the bounds of the law" is of little help on this point, because it modifies the lawyer's obligation rather than the client's interest.⁷³ That is, it is the lawyer's obligation to "protect and pursue," which must be "within the bounds of the law," rather than the client's objective.⁷⁴ This seems to give the client's objectives pretty wide berth, so let us take an extreme interpretation and assume *arguendo* that the client may have even unlawful objectives that the lawyer is nonetheless duty bound to "pursue and protect . . . within the bounds of the law."⁷⁵

That reading puts the limitation back on the lawyer. If we assume the lawyer is required to pursue and protect even unlawful client interests, that pursuit must nevertheless be lawful.

Happily for Rumpole, the admonition to act only "within the bounds of the law" should provide salvation under both rules.⁷⁶ Rule 4.1(b) prohibits

73. *Id.*

74. *Id.* Giving the drafters credit for knowledge of the rules of English grammar, had they intended "within the bounds of the law" to modify "legitimate interests" rather than "pursue," they would have omitted the comma (or used a better formulation). CHICAGO MANUAL OF STYLE ¶ 5.33 (16th ed. 2010) ("An adjectival phrase or clause that follows a noun and restricts or limits the reference of the noun in a way that is essential to the meaning of the sentence should not be set off by commas"). Compare "pursue and protect the client's legitimate interests within the bounds of the law" (awkward) with "pursue and protect the client's legitimate interests, so long as those interests are within the bounds of the law" (better). MODEL RULES OF PROF'L CONDUCT preamble ¶ 9.

75. MODEL RULES OF PROF'L CONDUCT preamble ¶ 9.

76. *Id.*

the lawyer from knowingly failing to disclose—read, *obligates the lawyer to disclose*—a material fact when “disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.”⁷⁷ Rule 1.2(d) prohibits the lawyer assisting the client in a crime or fraud.⁷⁸ Here, the fact that Brittling did not paint the painting would not seem to be criminal. Brittling might have avoided criminal prosecution if he had not floated the untruth that he was a forger, but it is hard to think what crime he might have committed by getting prosecuted. Is his conduct fraudulent? A typical broad common law definition of fraud is the “knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.”⁷⁹ Brittling did not misrepresent the progeny of the painting when it was initially sold; he sold it as a genuine Cragg. Accordingly, the purchaser has no complaint about being defrauded in the purchase.

But there is no doubt that Brittling intentionally misrepresented himself as the painter after the purchase, and two different third parties relied on that to their detriment. The purchaser made a criminal complaint in reliance, and suffered the detriments of emotional distress and a waste of her time. One may question whether this alone was sufficiently detrimental to constitute actionable fraud. The court, however, was forced to convene a trial and eat up substantial public resources in reliance on the misrepresentation. If that is not actionable fraud, it is hard to see what would be.

Moreover, Rumpole could not have prevented this fraud by withdrawing from the representation. So, however the Rule 1.4 issue is resolved, it appears that Rules 4.1 and 1.2 save Rumpole from failure to pursue a client objective, because he cannot do so “within the bounds of the law” due to the post-sale fraud.⁸⁰

D. *Rumpole and the Golden Thread*:⁸¹ *When Failing to Follow the Rules Proves Deadly*

In this last story, we observe how following the rules on allocating lawyer–client decision-making is not only a matter of legal ethics, but failure to

77. *Id.* R. 4.1. Similarly, Rule 3.3 requires the lawyer to correct a client’s false testimony, but Brittling did not testify falsely, just cleverly. *Id.* R. 3.3. See *supra* notes 71–72 (describing the possible outcomes of Rumpole’s representation considering the discovery of Nancy).

78. MODEL RULES OF PROF’L CONDUCT R. 1.2(d).

79. *Fraud*, BLACK’S LAW DICTIONARY (11th ed. 2019).

80. MODEL RULES OF PROF’L CONDUCT preamble ¶ 9.

81. JOHN MORTIMER, *Rumpole and the Golden Thread*, in OMNIBUS 2, *supra* note 3, at 239.

do so may have tragic consequences. Here, there is no parallel personal story, except the testing of Rumpole himself.

Rumpole is called to the fictional African republic of Neranga to represent, in a murder case, a former pupil who has returned to his homeland to become an important political leader. In the story, Neranga was a British colony, and post-independence, it appears that it still adheres to most of the workings of the British judicial system—instructing solicitors, wigs, red robes for the judge and black for the lawyers—with a couple of important exceptions: no jury and the death penalty for murder.⁸² David Mazenze, the accused, is the token member of the Apu People’s Party in leadership of the Matatu-majority government.⁸³ There is no physical evidence that David committed the crime, only the testimony of a witness that during a previous and heated argument, David said “I’ll kill you” to the deceased.⁸⁴ David has no alibi for the time of the murder, saying only that he was driving around thinking about an important speech he was to make the next day.⁸⁵

Rumpole becomes aware of a number of facts about the political situation that appear relevant to the trial. He is advised that thousands of armed Apu are prepared to take up arms against the government in the event Mazenze is found guilty.⁸⁶ In response, he has a candid discussion with Mazenze, where he asks, “Are you saying that I was brought out here to lose . . . ?”⁸⁷ Mazenze falls short of affirming that, saying instead that Rumpole has been brought there to make his signature closing speech on the presumption of innocence being the golden thread that runs through “the whole history of our [c]riminal [l]aw.”⁸⁸ In leaving that client meeting, Rumpole says, “Rumpole presumes every case to be winnable until it’s lost. I don’t know any

82. *Id.* at 239, 243, 255. The story is eerily prescient, preceding by just a few years the infamous ethnic genocide of the Tutsi people by militias supporting the ruling Hutu majority that took place in Rwanda in the early 1990s. See History.com Editors, *Rwanda Genocide*, HISTORY (May 19, 2023), <https://www.history.com/topics/africa/rwandan-genocide> [<https://perma.cc/W57L-QNJS>] (providing the history of the Rwanda genocide).

83. JOHN MORTIMER, *Rumpole and the Golden Thread*, in *OMNIBUS 2*, *supra* note 3, at 243–45 (1987).

84. *Id.* at 253, 263.

85. *Id.* at 254.

86. *Id.* at 258.

87. *Id.* at 270.

88. *Id.*

other way of doing them.”⁸⁹ Mazenze does not give him any further instruction, but dismisses him with “Thank you for coming to see me Horace. I appreciate your efforts.”⁹⁰

In this case, Rumpole does not go looking for exculpatory evidence, but it falls in his lap. It turns out that Mazenze has two wives: his acknowledged Apu wife, and an unacknowledged Matatu wife. The latter can alibi him for the time of the murder, and the former introduces her to Rumpole, both of them obviously sincere in the hope of saving their David from conviction.⁹¹ Rumpole calls the witness, over yet another loud in-court objection from his client, she gives credible testimony, he gives his speech, and Mazenze is found not guilty.⁹² A week later, Mazenze is gunned down by what appears to be Apu militia who are angry at his Matatu relationship and at being deprived of their excuse for revolution.⁹³

The tragic consequence of Rumpole’s choice here makes it tempting to want to throw the book at him. As to the client’s objectives, did he not know that his client wanted to be found guilty? And isn’t that awfully close to one of the enumerated client objectives in Rule 1.2, entering a plea, such that calling the alibi witness was a violation of Rule 1.2? Even if he were in some doubt about the legitimacy of the objective of the representation, does he not know enough to know that calling the Matatu wife as an alibi witness was a material decision requiring Rule 1.4 consultation with his client? As in *Genuine Article*, this case is in trial, and Rumpole likely would not have been permitted to withdraw. However, the virtue of consultation is that it might lead to a compromised result. Perhaps mutual respect between this lawyer and his client, and the latter’s larger societal objective might in this instance have led Rumpole to revisit the calling of the witness.

There is a defense to a Rule 1.2 violation. Rumpole advised the client he was going to try to win an acquittal, and his client did not specifically instruct him not to. Aridly technical, to be sure, but especially since the tragic consequence was not reasonably foreseeable, a defense nonetheless.

The Rule 1.4 violation, however, seems unanswerable. Knowing of the acrimony between the ethnic majority and minority, knowing of the political

89. *Id.* at 271.

90. *Id.*

91. *Id.* at 269.

92. *Id.* at 272–75.

93. *Id.* at 279.

situation, and knowing at least that a guilty verdict would not have been unwelcome by the client, Rumpole knew or should have known that calling the witness would be regarded by his client as a material decision.⁹⁴ Even Rumpole's fervor for winning might have been overcome had he engaged in the required consultation.

VI. IMPLICATIONS FOR MOVEMENT LAWYERING

The lessons of Rumpole's drive to win regardless of his client's other interests or needs are pertinent mostly to their own context. These case studies illustrate a tension that perhaps does not often exist: between the criminal defendant who has personal interests—which may or may not rise to the level of Rule 1.2 objectives—beyond (and sometimes inconsistent with) acquittal, and the lawyer who is, quite properly, conditioned to see acquittal as an almost inevitable objective, but is also obliged to understand and advance the client's other goals through the means they choose in the representation. Or at least to give the client the opportunity to find another lawyer who will. But Rumpole's stories, especially *Golden Thread*, also have implications for so-called movement lawyering.

At the risk of some oversimplification, “movement lawyering” (also called “cause lawyering” and in this Article “ML”) in its essence involves using the law to advance social objectives beyond the particular personal interests of the immediate client or clients.⁹⁵ It usually pairs litigation with other forms of advocacy, including community organizing, social protest, legislative and regulatory lobbying.⁹⁶

94. See BURK ET AL., *supra* note 9, at 158 (“Model Rule 1.4 generally requires lawyers to keep their clients informed about material events, to explain what they reasonably need or want to know, and to consult with them about material decisions in the engagement.”).

95. The National Lawyers Guild recently endorsed the following definition: “Lawyering that supports and advances social movements, defined as the building and exercise of collective power, led by the most directly impacted, to achieve systemic[,] institutional[,] and cultural change.” *NLG Statement on Movement Legal Work, Collective Defense, and the Role of Law*, NAT'L LAWS. GUILD (Aug. 15, 2022) [hereinafter “*NLG Statement*”], <https://www.nlg.org/nlg-statement-on-movement-legal-work-collective-defense-and-the-role-of-law/> [https://perma.cc/3WD7-GJW8]. There is a great deal of scholarship on Movement Lawyering. See generally Bertha Social Justice Institute, *Movement Lawyering Legal Guide*, CTR. FOR CONST. RTS. (Apr. 3, 2013), <https://hls.harvard.edu/wp-content/uploads/2022/08/MovementLawyeringReadingGuide.pdf> [https://perma.cc/2TEW-Z44M] (compiling resources on movement lawyering).

96. See generally *NLG Statement*, *supra* note 95 (“Yet, the legal work of supporting movements is about more than just ‘lawyering’ and involves more than just lawyers.”).

Like Rumpole, the focus here will be on movement lawyering in litigation. While there are other historical antecedents,⁹⁷ ML is most recognizable to American lawyers as having its roots in the second half of the twentieth century, beginning with the civil rights movement of the '50s and '60s. ML has long been associated with the political Left—most obviously cases like *Brown v. Board of Education*,⁹⁸ *Loving v. Virginia*,⁹⁹ *Roe v. Wade*,¹⁰⁰ *Obergefell v. Hodges*.¹⁰¹ In recent years, movement lawyers have brought cases to advance interests more associated with the Right—obvious recent examples are the *Dobbs*¹⁰² decision reversing *Roe*, and a plethora of cases emphasizing the First Amendment's free speech and free exercise clauses, while de-emphasizing the establishment clause, and limiting the reach of civil rights laws in the names of free exercise and free expression.¹⁰³

Although Rumpole regularly tries (usually successfully) to confound discrimination based on sex, sexual orientation, color, or national origin in his personal life (in his Chambers and among his acquaintances)—he would also have fought against gender discrimination, but it did not loom large in public discourse when the stories and show came about in the 1980s—his cause is keeping his clients out of jail. We have seen how Rumpole's cause can sometimes lead him to disregard his clients' other interests and his obligation to enable those clients to pursue those interests.

Movement lawyers pursuing particular social or policy goals probably will face this dilemma infrequently. One reason is that the strategy and tactics that we most associate with ML involve recruiting like-minded plaintiffs. The plaintiffs in the wedding cake, free exercise, and website free expression

97. Perhaps the most well-known in America is the John Scopes "Monkey Trial" in which the ACLU and legendary defense lawyer Clarence Darrow defended a schoolteacher who had taught his students the theory of evolution in violation of a state law. See *ACLU History: The Scopes 'Monkey Trial'*, AM. C.L. UNION (Sept. 1, 2020), <https://www.aclu.org/documents/aclu-history-scopes-monkey-trial> [<https://perma.cc/9ZMS-L8VP>] (describing the societal impact of the "Monkey Trial"); see generally JEROME LAWRENCE & ROBERT E. LEE, *INHERIT THE WIND* (1955) (fictionalized account).

98. *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954) (striking down segregation in public schools).

99. *Loving v. Virginia*, 388 U.S. 1 (1967) (striking a law prohibiting inter-racial marriage).

100. *Roe v. Wade*, 410 U.S. 113 (1973) (declaring a woman's right to abort a pregnancy).

101. *Obergefell v. Hodges*, 576 U.S. 644 (2015) (declaring a right to gay marriage).

102. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

103. See 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2322 (2023) (holding First Amendment free expression protects right of business owner not to design website for marriage of gay couple); *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018) (holding First Amendment free exercise prohibits Commission from punishing wedding cake maker for refusing to make wedding cake for gay couple).

cases probably very much supported the agenda of the lawyers representing them.¹⁰⁴ But perhaps not always. Judging from Norma McCorvey's story as the plaintiff in *Roe*, it is not obvious that she wanted to create the constitutional right to abortion that resulted, and she did not even get an abortion herself as a result of her case.¹⁰⁵

More significant Rumpolean lessons may arise in defensive ML. Addressing the lawyering tactic (means) of collective defense when activists are arrested "as a consequence of politically motivated actions [that they consider] part of social movements," the NLG's Statement takes the position that "movement legal work can be both 'client-centered and politically transformative.'"¹⁰⁶ The NLG's Statement goes on to recognize (as Rumpole too frequently does not) that "the Model Rules acknowledge that a client's goals may go beyond judicial outcomes."¹⁰⁷ Rumpole's examples demonstrate the truth of this statement.

But Rumpole and the movement lawyer are both at risk of arrogance, and the same ethical violations, where they fail to fully consult with their clients as to the relative importance of other interests, whether or not they are objectives within the meaning of Rule 1.2. This should be an ongoing obligation because clients initially sympathetic to the lawyer's cause may discover that other issues in the litigation unexpectedly predominate or simply change their minds. Rumpole's elevation of the perceived client objective of acquittal too often causes him to fail in his duty of consultation. On those occasions, he fails to learn and keep abreast of whether his clients have other interests that should preclude a certain line of defense, and to advise them of their options in seeking to satisfy those interests even if Rumpole personally disagrees with them. The movement lawyer in a criminal case generally would have the same dilemma, but in reverse—the risk of elevating the movement's goals at the potential expense of a criminal conviction without the client's full acceptance of the situation.

104. See *303 Creative LLC*, 143 S. Ct. at 2307 (describing the plaintiff's religious views); *Masterpiece Cakeshop*, 138 S. Ct. at 1723 (explaining the plaintiff's "religious opposition to same-sex marriage").

105. See generally Joshua Prager, *The Roe Baby*, THE ATLANTIC (Sept. 9, 2021), <https://www.theatlantic.com/politics/archive/2021/09/jane-roe-v-wade-baby-norma-mccorvey/620009/> [<https://perma.cc/KXV8-ZT62>] (illustrating how "Norma was ambivalent about abortion," but also "ambivalent about adoption, too"); see also Los Angeles Bar Ass'n., Formal Op. No. 505 (2000) (explaining while a lawyer representing a sexual assault victim may not condition settlement on declining a "gag clause," the lawyer may make a waiver of fees contingent on declining such a clause).

106. *NLG Statement*, *supra* note 95.

107. *Id.*

The NLG Statement recognizes this dilemma by (a little grudgingly) coming down on the side of consultation to make sure defendants understand their options. Though it speaks rather disdainfully of “activist-defendants who seek to minimize their individual legal liability at the expense of their comrades by directly cooperating in the prosecution of others, or denouncing comrades in the hopes of gaining a mitigated sentence,”¹⁰⁸ it acknowledges that “[a]ll lawyers have a duty to empower every client to define their own goals . . . [and] should never pressure anyone to engage in collective defense strategies.”¹⁰⁹

To be sure, the limits that these principles of client self-determination on the objectives of a representation place on movement lawyers are severely tested where the alternative is death. It is a little difficult to think of Rumpole as a movement lawyer because his cause is one which we normally associate with good lawyering: seeking an acquittal for a criminal defendant. But in *Golden Thread*, he is (or by the time he calls the Matatu wife as a witness, should be) aware that this objective is not shared by his client, who wants to be convicted to foment a revolution.¹¹⁰ What is the criminal defense lawyer’s ethical obligation when the client chooses to plead not guilty, but either wants (or more likely, is willing to accept) conviction and a death sentence in order to make a point? Real-life examples exist in capital cases, where movement lawyers who oppose the death penalty on principle could butt heads with a client who wants challenges to cease and wants it all to be over.¹¹¹

Maybe an even more difficult case is that of Ted Kaczynski, the infamous “Unabomber.” The evidence was overwhelming, and Kaczynski himself did not contest, that he had killed three people and injured many others by

108. *Id.*

109. *Id.* Rule 1.16(b) protects the movement lawyer’s personal beliefs, by allowing withdrawal from a representation (with the court’s permission) if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.” MODEL RULES OF PROF’L CONDUCT R. 1.16(b).

110. See *supra* notes 75–79 and accompanying text (describing the conflict between a client’s interests in pursuing conviction and the lawyer’s obligation to advance those interests despite wanting to do otherwise). Although Rumpole squeaks by under Rule 1.2 because he was not specifically instructed to that effect.

111. See generally *Execution Volunteers*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/execution-volunteers> [https://perma.cc/2ZRQ-J4EE] (providing a list of “individuals who waived at least part of their ordinary appeals or who terminated proceedings that would have entitled them to additional process prior to their execution”).

placing explosives over a period of years. When captured, he was diagnosed as a paranoid schizophrenic, but refused to plead not guilty by reason of insanity.¹¹² Nevertheless, his lawyers insisted on presenting evidence of his mental illness, and his motion to fire the lawyers and represent himself, because he objected to that defense, was denied. While the procedural posture is complicated—Kaczynski pled guilty with a promise of life imprisonment, but argued that he had been fooled by his lawyers so that the plea was not voluntary, and wanted a new trial in which he could represent himself—a divided panel of the Ninth Circuit upheld the trial court verdict and denied the motion for a new trial.¹¹³ In a dissent that eloquently recognizes the importance to justice of a client's interest in self-determination, Judge David Reinhardt argued that despite the good will of the trial judge and the lawyers—whom he concedes did their best to, respectively, assure a fair trial and secure a sentence other than execution—the record was clear that Kaczynski had been denied his Sixth Amendment right to self-representation.¹¹⁴

Considering this case under the Model Rules, there would seem to be no doubt that his lawyers, with the best of intentions, failed to pursue and protect a strongly held interest of their client: presenting his (albeit psychotic) defense without introducing evidence of mental illness. The desire to present a non-mental illness defense was a decision not about a settlement, a plea, a jury trial or the defendant's testimony. Judging by the standards of Rule 1.2 then, it would seem the lawyers acted ethically. But what about Rule 1.4? Knowing of their client's wishes, were they not obligated, during consultation, to advise him of his right to dismiss counsel and represent himself?

It has been said that hard cases make bad law, and there are profound moral questions to ask about what is right, and what is justice, where the lawyer is representing a defendant facing possible execution. But it is not

112. Kaczynski's own Manifesto, published by the Washington Post in response to a promise from the then-anonymous Unabomber to cease the bombings upon publication, suggests that he thought the killings were justified by reason of the need to extinguish technology and return to a green utopia—a defense that obviously would have been unavailing in a trial for murder. *See generally* Kaczynski, *Industrial Society and the Future*, WASHINGTON POST (Sept. 22, 1995), <https://www.washingtonpost.com/wp-srv/national/longterm/unabomber/manifesto.text.htm> [<https://perma.cc/ETA6-4A7U>] (revealing the 35,000-word manifesto mailed to The Washington Post and New York Times by the Unabomber).

113. *United States v. Kaczynski*, 239 F.3d 1108, 1114–15 (9th Cir. 2001).

114. *Id.* at 1119–28 (Reinhardt, J., dissenting).

hard to understand that the rules of ethics require the client to come first. The lessons of Rumpole's occasional lapses—the lawyer who does not know any other way to handle a case, but to pull out all the stops to win an acquittal—should be well learned by the movement lawyers, who think they understand that their clients' interests are aligned with the movement. Without taking the time to consult regularly on all of the client's interests, objectives or not, and making sure the client has the opportunity to exercise their rights (including to dismiss counsel), lawyers are not doing their job.

VII. SUMMING UP: ADVANCING JUSTICE BY RESPECTING CLIENT SELF-DETERMINATION

The Rumpole stories are, of course, fiction, and one must presume that it will be quite rare for a criminal defendant to be indifferent to obtaining an acquittal, and even more rare for the client to be seeking a conviction. One can only hope that rarer still would be the defendant's death as the consequence of an acquittal. But coupling the remote possibility of a serious consequence, with the much less remote possibility of other harm to the client, should be sobering to lawyers who think they know all they need to about their clients' objectives.

At the risk of seeming to preach from a smallish lay pulpit, these stories are an object lesson in what should not be a difficult concept for lawyers, even in criminal trials: keep close to your client under Rule 1.4 on an ongoing basis so that you know the client's interests, whether or not they are Rule 1.2 objectives, and before taking steps that might damage them, make sure the client has the opportunity to change your mind or replace you with other counsel. Even criminal defense attorneys are not necessarily engaged only to secure an acquittal, and on occasion that may not be the client's objective. Clients also will often have interests, and maybe occasionally Rule 1.2 objectives, other than acquittal, and ethical lawyering requires pursuing and protecting those interests with zeal up to the point of not supporting the client's crime or fraud on another, most especially on the court. The decision to call exculpatory evidence may not always be simply a question of the means of representation.

Zooming out a little further, these stories implicate an important principle of justice. Not the rough justice that results from Rumpole's desire to win his cases, but the notion that a system of advocacy that ignores, or gives insufficient weight to, client self-determination is less "just" than it should

be. Irrespective of whether the rules are violated, lawyers ought to keep in mind this larger concept of justice in planning their representations.

To close on a happier note, *Golden Thread* is the only televised Rumpole story with such a tragic end. Most of them end with the innocent, and often the guilty who are only “likeable Runyon-esque thieves,”¹¹⁵ being acquitted, and more unsavory characters getting a justified comeuppance. Rumpole may not be the best guide to the Model Rules, but most of the time, his insouciant antics and devotion to preventing his clients from being “force[d] . . . into a condemned Victorian slum where [they] can be banged up with a couple of psychopaths and [their] own chamber pot” make for justice and good entertainment.¹¹⁶

115. See Bergman, *supra* note 24, at 119 (discussing how “Rumpole had no illusions about his clients’ moral stature,” but believed in the presumption of innocence).

116. JOHN MORTIMER, *Rumpole and the Genuine Article*, in *OMNIBUS 2*, *supra* note 3, at 196.

