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SOCIO-ECONOMICS: WHAT IS ITS PLACE IN LAW PRACTICE?

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I. Introduction

The term "socio-economics" has been used in different ways over the years, but a recent systemic formulation of socio-economics[1] has inspired growing attention and activity among university scholars and increased reference to socio-economic principles in scholarship.[2] This article focuses on this new formulation and considers its special relevance to law practice. In light of the professional responsibilities of lawyers, I conclude that socio-economics provides an attractive alternative systemic approach to understanding important connections between economic behavior and law.

II. Overview of Socio-Economics

There is no single widely-accepted definition of socio-economics or complete articulation of its methodology. This is not surprising for an organizing concept proposed by scholars from diverse disciplines who are dissatisfied with the adequacy of existing interdisciplinary approaches to arrive at a realistic, useful, and morally sound understanding of economic behavior. In examining the connection between socio-economics and the law, I will inevitably add my own conceptions of socio-economics, which may not be shared by others.

***612** Socio-economics begins with the assumption that an adequate understanding of economic behavior cannot be achieved by the assumptions of autonomy, rationality, and efficiency that stand at the epistemological foundation of neoclassical economics and rational choice theory.[3] Behavior is embedded in society, polity, and culture.[4] Rather than assuming that people act optimally, rationally, or that they pursue only self-interest, socio-economics seeks to advance an interdisciplinary understanding of economic behavior. This understanding is open to the assumption that individual choices are shaped not only by rational self-interest but also by emotions, social bonds, beliefs, expectations, and perhaps most important, a sense of morality.[5]

Socio-economics regards competitive behavior as a subset of human behavior. This behavior exists within a societal context that enables and constrains competition and cooperation. Drawing upon "core disciplines" (including economics, sociology, political science, psychology, biology, anthropology, philosophy, history, law, and management) socio-economists hope to develop a more rigorous and helpful understanding of economic behavior.

Socio-economics must be understood as an explicit response to the growing influence of the neoclassical economic paradigm. It recognizes the pervasive and powerful foundational influence of the neoclassical economic paradigm on twentieth century thought, and seeks to examine and test its assumptions and predictions, develop a rigorous understanding of its limitations, improve upon its application, and develop alternative, perhaps complementary, approaches.[6]

Socio-economic concerns about the influence of neoclassical economics are both positive and normative. On the positive side, socio-economists note that the neoclassical economic model has serious limitations in application and rests on

assumptions of efficiency that appear contrary to fact. When tested against experiments and actual ***613** events, the neoclassical economic model is a weak predictor of events and a dubious basis for the formation of policy. It leaves anomalies unexplained and decision-makers with theories based on unrealistic assumptions that are essentially not falsifiable.[7] As a consequence, normatively, socio-economists are concerned with the effect of undue faith in the neoclassical economic paradigm on the formulation of law and social policy, and on society in general.

Socio-economists thus conceive of their approach as both a positive and a normative science. Like other social sciences, socio-economics is dedicated to empirical testing. It respects both inductive and deductive reasoning. It respects the importance of falsifiability, consistency, predictive power, and explanatory power. But it also openly recognizes the policy relevance of teaching and research and seeks to be aware of its normative implications rather than maintaining the mantle of an exclusively positive science. Although it sees questions of value inextricably connected with individual and group economic choices, socio-economics does not commit to any one paradigm or ideological position. Like a good lawyer, a socio-economist is sensitive to the foundation upon which reasoning is based, and upon which evidence is gathered and analyzed.[8]

Faithful to the scientific method, socio-economics offers a paradigm neutral, value conscious environment open to diverse approaches to economic behavior and to a balanced exploration of the moral implications of research and knowledge. It aspires to a holistic understanding of economic behavior, one that is more scientifically rigorous and value conscious than the neoclassical economic paradigm. ***614** Although socio-economics owes a substantial debt to scholars already identified with well-established disciplines and schools of thought, it is more than a new label for one or more pre-existing schools of thought. It is a synergistic response to the cumulative understanding derived during the twentieth century from social and economic events and developments in a world where many problems require greater depth and breadth to comprehend and solve.

The same sociological, political, and real-world economic factors at work in the other core disciplines of socio-economics are also at work in law. The undue influence of the neoclassical economic paradigm on economics and other social sciences is even more pronounced in the mainstream law and economics movement. In mainstream law and economics, neoclassical economic analysis frequently assumes a connection among micro-economic efficiency, wealth maximization and growth.[9] Additionally, neoclassical economics assumes that distributional issues are exogenous to positive questions of wealth maximization,[10] and can be affected by government only in ways that are likely to compromise efficiency.[11] But such assumptions turn out to be controversial as a ***615** matter of positive science.[12] Much of law and economics assumes that markets are efficient when many economists believe they are not.[13]

As a result of the attempt to separate distributive and moral issues from an understanding of economic behavior, there is much criticism of mainstream law and economics. Critical Legal Studies, Critical Race Theory, Feminism, Communitarianism and other movements all take exception to the neoclassical economic paradigm, and each has at its core a normative foundation or activist agenda.

Socio-economics does not entail a commitment to any one paradigm or ideological position. Rather, it offers a positive value conscious approach that treats economic behavior as involving the whole person and all facets of society. Given (1) an appreciation of the important role the lawyer has to play in identifying, explaining and securing the rights and obligations of clients and others within the legal system, and (2) respect for the importance of both (a) economic behavior in shaping the formulation, administration, and enforcement of law and compliance therewith, and (b) law in facilitating or suppressing competitive and cooperative behavior, a socio-economic approach will be much more useful to lawyers than a restrictive neoclassical economic analysis.

*616 III. Relevance of Socio-Economics to Law Practice

The emergence of socio-economics as a systemic positive and normative response to the growing influence of neoclassical economics and rational choice theory has particular relevance to law practice. In explaining this special relevance, I adopt a conservative, historical model that sees law as a cluster of constitutional values and processes, largely stable but in a state of evolution, by which rights and obligations, freedoms and their limitations, are recognized and enforced if necessary by government power. One essential feature of the American system is the role of the lawyer, governed by rules of professional responsibility, as a fiduciary guardian of personal and property rights within an adversary system.[14] Increasingly, important

factual determinations require recourse to expertise from other specialties and disciplines.

In developing essential facts concerning economic behavior, where should the lawyer turn? The neoclassical economic paradigm rarely tells the whole story; if exclusively relied upon, it will rarely present enough understanding of economic behavior. Even though the neoclassical economic approach presently dominates economic analysis in the legal realm, socio-economics exists as a practical alternative and enjoys growing support from academics and other professionals.

A. The Broadening and Deepening of Law and Economics

The importance of socio-economics to law must be understood in the context of a broadening and deepening of law and economics. Law and economics has increasingly come to recognize norms,[15] anomalies that do not conform to neoclassical economic models,[16] the value shaping function of legal rules,[17] comparative institutional analysis,[18] game ***617** theory,[19] and relative utility and its implications for Pareto optimality.[20] It has also displayed a growing commitment to empiricism. From a socio-economic perspective, these developments represent a welcome affirmation of respect for empirical reality, pedagogical balance, and common sense. The socio-economic approach, however, offers more than a broadening of economics because it provides a foundation more open to the relevant insights and analytical approach of all disciplines.[21]

B. Socio-Economics and Legal Methodology: A Special Fit

Lawyers are required to determine client objectives, get the facts straight, understand the practical limitations of evidence, know the law, serve clients competently within the bounds of the law, and improve the legal system for clients and society. Compared to the use of economics in legal analysis, the socio-economic approach is more in keeping with the professional responsibilities of lawyers. Socio-economics deals even-handedly with all disciplines that have something important to contribute to an understanding of economic behavior.

Consistent with socio-economic methodology, a good lawyer is not wedded to a single discipline. Rather, she draws from all relevant disciplines to help inform her decisions. Good lawyers are sensitive to the effect of values, morality, emotions, beliefs, expectations and irrationality on the economic behavior of clients, adversaries, third parties, lawyers, and judges. The good lawyer assumes people are not atomistic, one-dimensional profit maximizers. Instead, she realizes people ***618** are inextricably connected to others in a way that cannot be fully explained or predicted by a one-dimensional utility function, no matter how broadly conceived. Thus, the application of neoclassical economic principles to particular legal rules must be understood in a broader context that integrates other perspectives.

C. The Ethical Rules and Codes Governing Lawyers

The socio-economic approach is supported by the codes of professional responsibility. In giving students a quick overview of lawyers' ethics, I sometimes refer to the five "c's": competence, candor, confidences, conflicts, and conscience. Not everything is included in this list, although "conscience" can be a rather broad catch-all. In this article, I will briefly discuss questions of competence, candor, and conscience.

Competence means many things in many contexts. Competent lawyers must know the law,[22] understand their clients and their expressed objectives,[23] know the facts, consult with other experts as necessary, provide holistic advice, and provide legal services accordingly.[24]

Candor requires truthfulness in dealing with clients, adversaries,[25] third parties[26] and courts,[27] with important exceptions to protect information that is privileged or confidential. A lawyer should exert "best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations."[28]

Conscience is the broadest category of all. It raises the distinction between professional and personal ethics. In situations where lawyers may, but are not (as a matter of external discipline) required to act, discretion must be exercised; and discretion is to be guided by conscience. Also, conscience imposes a duty to improve the law and the legal system, not only for the benefit of clients, but for the general welfare and the public good.[29]

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***619** Before consideration of the relation of competence, candor, and conscience to socio-economics, several preliminary observations are noteworthy. Lawyers are not considered atomistic profit maximizers, and they are specifically enjoined from thinking of themselves as such. The Preamble to the Model Rules provides:

> A Lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.[30]

In similar fashion, the Preamble to the Model Code provides:

> Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system.[31]

As participants in a regulated industry, with barriers to entry and consequent monopoly profits, licensed attorneys enjoy benefits that impose obligations. According to the Rules and Code, lawyers are connected with clients and others in a way that obligates them to act according to behavioral standards above those applicable in an open market.

Lawyers are ethically obligated to obey laws apart from a comparative cost-benefit analysis of compliance and non-compliance, with penalties and other "disutilities" discounted by the probability of getting caught. The ethical rules assume that penalties for ethical violations will be insufficient to achieve the optimal level of attorney professional responsibility. Thus, they both recognize that penalties may be thought of as prices to some extent, but do not believe market principles will achieve the desired output. The ethical standards command specific enforcement, not an efficient level of unethical behavior.

1. competence

a. Understanding clients and their objectives

The ethical rules require lawyers to achieve an adequate understanding of their clients and their objectives.[32] A lawyer who ***620** misunderstands client objectives denies legal representation to that extent. The ethical rules assume that clients may act not only in rational self-interest but also for altruistic, emotional, irrational, self-destructive reasons, and for reasons that defy all categorization. Good lawyers are required to represent the whole client, not merely the client's rational self. To understand a client and her objectives even in a "purely economic" sense, a socio-economic approach is generally necessary.

b. Providing holistic advice

Lawyers are cautioned that advice restricted narrowly to legal issues raised by clients may fall short of the fulfillment of the lawyer's responsibilities.[33] The Model Rules provide:

In rendering advice, a lawyer may refer not only to law but to other . . . moral, . . . social, and political factors, that may be relevant to the client's situation.[34]

The rule is permissive, not mandatory; but Comment [2] warns
Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant. . . . [M]oral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.[35]

Like the socio-economist, the good lawyer is to treat morality as a special consideration that may have decisive influence in the decisional process.

c. Ascertaining the facts

The duty to determine and establish the facts necessary to optimize clients' interests within the bounds of the law is an essential function of the lawyer. The adversary system assumes that there is more than one way to look at things. Frequently,

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differences over facts are related to differences over values, interests, and underlying paradigms that shape what questions will be asked, what evidence is relevant, and what conclusions may be "rationally" advanced, supported, negotiated, and defended. Different perspectives stemming from different foundational ***621** assumptions arise not only in litigational and other adversarial contexts, but also in contexts of deal making and cooperative planning. The socio-economic approach is structured to facilitate and integrate understanding based on multiple perspectives.

The special obligation of lawyers to ascertain the relevant facts and inform the client is fundamental to the role of lawyers in maximizing the client's autonomy and participation within the legal system. The adversary system also assumes that truth can best be discovered with the benefit of multiple perspectives and a broad range of methodologies, rather than a single perspective and methodology. Because of their special responsibility to distinguish facts from mere theory, lawyers are required to be especially sensitive to determining which theories can be falsified as applied, and which theories cannot.

d. Consulting other disciplines as necessary

One responsibility of lawyers is to know when they do not know, and to seek advice from others when necessary to provide legal services.[36] Like socio-economics, law is inherently interdisciplinary in this respect. In the very process of getting the facts straight, lawyers are required to consult with experts in other fields.[37] Before relying on expertise from other disciplines, lawyers are required to examine underlying assumptions, to apply and critique inductive and deductive reasoning, and to be mindful of the robustness of evidence according to applicable evidentiary standards. When borrowing theories from other disciplines, lawyers must be sensitive to whether the theories are falsifiable, have predictive and explanatory power, and whether there are better theories when judged by these criteria.

In this context, socio-economists question implicit and explicit neoclassical economic claims of efficiency, wealth maximization, and distributional neutrality because they are neither falsifiable as presented nor supported by unambiguous evidence; they frequently have questionable predictive power and low explanatory power. Accordingly, like socio-economists, lawyers should be open to other theories of wealth maximization and distribution beyond those advanced by the neoclassical paradigm.

*622 2. the duty of candor

In litigation, negotiation, counseling, and other representation, lawyers must keep their clients sufficiently informed to make intelligent decisions. If additional expertise beyond what the lawyer can provide is necessary, the lawyer should so advise the client.

3. the duty to improve the law

Lawyers have the responsibility not only to represent clients competently, but also to discover ways to improve the law not only for the client's benefit but also for the benefit of society.[38] Fulfilling the duty to improve the law requires an understanding of how law changes. Understanding how the law changes and how it can be improved for clients and society requires appropriate analytical tools. The tools of neoclassical economics and rational choice theory may be helpful but are incomplete, and therefore partially misleading. Thus, they must be balanced, supplemented, and even replaced if they fail to provide the foundation for understanding and promoting beneficial change.

Lawyers' obligation to improve the law requires them to revisit the obligation of candor to clients. The desire for reform on the part of those disadvantaged depends on their understanding of the true limitations and potential of the system and their place in it. The socio-economic approach, with its concern for the exogenous and endogenous issues of norms and distribution, its respect for all disciplines, its value in predictive and explanatory power, and its sensitivity to issues of falsification, will serve clients better than the neoclassical approach.

IV. Conclusion

The professional codes require (1) a holistic, interdisciplinary, empirically rigorous approach to subject matter with an

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awareness of both the strengths and weaknesses of other disciplines, (2) a broad understanding of human beings, not limited to rational and atomistic conceptions, but grounded in the reality of connections to family, friends, and institutions, and a decisional process shaped by morals, values, emotions, beliefs and expectations; (3) candor that requires lawyers to assist clients in understanding the problems they face and the objectives they would achieve; and (4) a duty to improve the law that necessitates a realistic understanding of the economic problems that require law reform, and the theories that shape law reform. These considerations call ***623** for an approach more encompassing than the neoclassical approach of mainstream law and economics. Socio-economics provides such an approach.

Footnotes

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[1] See generally Morality, Rationality, and Efficiency: New Perspectives on Socio-Economics (Richard M. Coughlin ed., 1991); Socio-Economics: Toward a New Synthesis (Amitai Etzioni & Paul R. Lawrence eds., 1991); Richard M. Coughlin, Whose Morality? Which Community? What Interests? Socio-Economic and Communitarian Perspectives, 25 J. Socio-Econ. 135 (1996).

[2] See, e.g., 20-26 J. Socio-Econ. (1991-1997).

[3] Amartya K. Sen, Rational Fools: A Critique of the Behavioral Foundations of Economic Theory, 6 Phil. & Pub. Aff. 317 (1977).

[4] See supra note 1. The emphasis on the full social and institutional context of economic behavior has roots in the works of a number of great thinkers. See, e.g., John R. Commons, Legal Foundations of Capitalism (1974).

[5] "[T]he 'moral dimension' ... [is] a separate, irreducible factor existing alongside self-interest." Coughlin, supra note 1, at 142. For a valuable exploration of the moral dimension in various contexts, including "the firm" and generally regarding social policy from various socio-economic perspectives, see the authorities cited in supra note 1.

[6] In this respect, socio-economists are more narrowly focused than many involved in Law and Society and the AALS Section on Law and the Social Sciences who in their teaching, scholarship and service do not find it necessary to address systemically the neoclassical paradigm.

[7] Robert Solo explains:
The economics paradigm traces an isle of the solvable in a sea of the inexplicable. It cannot account for, explain or predict a host of economic phenomena and events. With its assumption of rational, self seeking individualized choice it leaves out of account the economic consequences of variations in attitude, value, culture and ideology, or variation in the institutional context of choice, or class struggle and collective behavior....
In some instances theories, even whole schools of thought have developed outside the paradigm to explain the effects on economic phenomena and events of these excluded variables. Thus the Institutionalist School of John R. Commons brings into account the effects of the law as the context of transaction in the determination of economic event.
Robert A. Solo, The Philosophy of Science, and Economics 42 (1991).

[8] For a good example of how paradigm consciousness can greatly enrich law and economics, see Nicholas Mercuro & Steven G. Medema, Schools of Thought in Law and Economics: A Kuhnian Competition, in Law and Economics: New and Critical Perspectives 65 (Robin Paul Malloy & Christopher K. Braun eds., 1995).

[9] See, e.g., Richard A. Posner, Economic Analysis of Law (3d. ed. 1986). Posner explains:
It is necessary to clarify the concepts of growth and of subsidy. The rate of economic growth is the rate at which the output of a

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society increases. Since growth is fostered by using resources efficiently, there is a sense, but a rather uncontroversial one, in which the common law, insofar as it has been shaped by a concern with efficiency, may be said to have fostered growth. Society can, however, force the pace of growth by compelling people to consume less and save more and by increasing the returns to capital investment. If the common law played any role in accelerating economic growth it must have been by making capital investment more profitable.
Id. at 234.

10 See Posner, supra note 9. Posner explains:
But the efficiency ethic takes the existing distribution of income and wealth, and the underlying human qualities that generate that distribution, as given, and within very broad limits (what limits?) is uncritical of the changes in that distribution that are brought about by efficient transactions between persons unequally endowed with the world's tangible and intangible goods.
Id. at 241.

11 See, e.g., id. at 240-41 ("The major ... problem [caused] by an efficiency approach to the common law is ... the discrepancy between efficiency maximization and notions of the just distribution of wealth.... Efficiency and redistribution are antithetical ....").

12 E.g., John Maynard Keynes, General Theory of Employment, Interest and Money (1936); Paul A. Samuelson & William D. Nordhaus, Economics (13th ed. 1989); Lester C. Thurow, The Future of Capitalism: How Today's Economic Forces Shape Tomorrow's World (1996); Lester C. Thurow, Generating Inequality: Mechanisms of Distribution in the U.S. Economy (1975). See generally Ken Cole et al., Why Economists Disagree: The Political Economy of Economics (2d ed. 1991).

13 See 3 The New Palgrave: A Dictionary of Economics 837-38 (John Eatwell et al. eds., 1987). The entry "perfectly and imperfectly competitive markets" notes:
First, [there is] ... a large volume of work ... that, for the most part, suggests that perfect competition corresponds to an extremely special, limiting case of a more general theory of markets. Second ... no important market fully satisfies the conditions of perfect competition and that most would not appear even to come close. Third, the received theory of perfect competition is a theory of price competition that contains no coherent explanation of price formation. That such a fundamental incompleteness does not severely limit the value of the theory is striking.
Id. Nevertheless, the entry notes, "[i]n the competition between economic models, the theory of perfect competition holds a dominant market share: no set of ideas is so widely and successfully used by economists as is the logic of perfectly competitive markets.... [A]ll other market models ... are little more than fringe competitors." Id. at 837. The entry concludes that the dominance of perfect competition theory is not the result of its strength, but rather "a reflection of the weakness of imperfectly competitive analysis. There is in fact no powerful general theory of imperfect competition." Id. at 838. John Roberts wrote the entry. Id. at 841.

14 See generally Monroe H. Freedman, Understanding Lawyers' Ethics (1990).

15 See Robert D. Cooter, Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant, 144 U. Pa. L. Rev. 1643 (1996) (discussing situational adjudication, and recognizing that some norms are efficient but do not survive the market, and therefore should be fortified with law).

16 See Thomas S. Ulen, Rational Choice and the Economic Analysis of Law, 19 Law & Soc. Inquiry 487 (1994); see also Richard H. Thaler, The Winner's Curse: Paradoxes and Anomalies of Economic Life (1992) (recognizing the importance of research pointing to anomalies in neoclassical predictions, and calling into question assumptions of self-interest, rational expectations, unbiased information processing, wealth neutrality, and decisions on probability and utility).

17 See Kenneth G. Dau-Schmidt, An Economic Analysis of the Criminal Law as a Preference-Shaping Policy, 1990 Duke L.J. 1 (1990).

18 See Neil K. Komesar, Imperfect Alternatives (1994).

19 See William W. Bratton, Jr., Game Theory and the Restoration of Honor to Corporate Law's Duty of Loyalty, in Progressive

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Corporate Law 139 (Lawrence E. Mitchell ed., 1995); William W. Bratton, Jr., The New Economic Theory of the Firm: Critical Perspectives from History, 41 Stan. L. Rev. 1471 (1989); see also Wayne Eastman, Everything's Up for Grabs: The Coasean Story in Game-Theoretic Terms, 31 New Eng. L. Rev. 1 (1996); Jason S. Johnston, Strategic Bargaining and the Economic Theory of Contract Default Rules, 100 Yale L.J. 615 (1990) (discussing the inefficiency of threat bargaining). Game theory can be traced back hundreds, even thousands, of years, with recurrent publications beginning in the early part of this century, and continuing with greater frequency.

[20] See Jeffrey L. Harrison, Egoism, Altruism and Market Illusions: The Limits of Law and Economics, 33 UCLA L. Rev. 1309 (1986); see also Richard H. McAdams, Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination, 108 Harv. L. Rev. 1003 (1995).

[21] In this regard, it is noteworthy that in 1991, the Journal of Behavioral Economics changed its name to the Journal of Socio-Economics. 20 J. Socio-Econ. (1991). This change reflected the editorial board's institutional judgment that behavioral economics, although a highly desirable broadening of economic theory in many important contexts, is not a broad enough foundation to contain the full scope of the socio-economic perspective.

[22] See Model Rules of Professional Conduct Rule 1.1 (1995) [hereinafter Model Rules]; Model Code of Professional Responsibility DR 6-101(A)(1) (1989) [[[[[hereinafter Model Code].

[23] Model Rules Rule 1.2.

[24] Id. Rule 2.1; Model Code EC 7-8.

[25] Model Rules Rule 3.3.

[26] Id. Rule 4.1.

[27] Id. Rule 3.3; Model Code DR 7-102.

[28] Model Code EC 7-8; see also Model Rules Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

[29] Model Rules pmbl. [5]; Id. Rule 6.1(b)(3); Model Code EC 2-25.

[30] Model Rules pmbl. [1].

[31] Model Code pmbl.

[32] Model Rules Rule 1.2; Model Code DR 7-101(A).

[33] Model Rules Rule 2.1 cmts. 2, 4 & 5.

[34] Id. Rule 2.1.

[35] Id. Rule 2.1 cmt. 2; see also Model Code EC 7-8.

36 Model Rules Rules 1.1, 2.1.

37 Id. Rules 1.1 cmt. 2, 2.1 cmt. 4 (suggesting that a competent lawyer should consult with other professions about matters beyond strict legal questions); Model Code EC 6-3.

38 Model Rules pmbl. [5]; Id. Rule 6.1(b)(3); Model Code EC 2-25.

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