

2017

Louis Brandeis's Arc of Moral Justice

Katherine A. Helm

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Judges Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Helm, Katherine A. (2017) "Louis Brandeis's Arc of Moral Justice," *Touro Law Review*. Vol. 33: No. 1, Article 9.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol33/iss1/9>

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

LOUIS BRANDEIS'S ARC OF MORAL JUSTICE

*Katherine A. Helm**

I. INTRODUCTION

Louis Dembitz Brandeis, as a Justice of the Supreme Court, is an infamous figure in American jurisprudence. “As in the case of many justices, Brandeis was first a practicing attorney; a professional that had to face the daily nuances of conflict that inhere in one’s legal practice.”¹ Brandeis was a devoted American, who took his civic duties seriously and who chose to use his status in, and his knowledge of, the law in part to promote social change. As such, he labored too with the overlay of occasionally having publicly promoted policy and governance not always symmetrical with his clients’ causes and the litigative stances he previously took on their behalf. The trajectory of his life as a lawyer made him an uncommon force for change, but still a lawyer that corporate America wanted. As such Brandeis was a provocative figure indeed. He was a man true to himself and, critically here, always an independent contractor – never bowing as a servant.²

Accordingly, when it came to his confirmation by the United States Senate, after President Woodrow Wilson nominated Louis Brandeis to the U.S. Supreme Court, Brandeis faced a considerable

*Katherine A. Helm, J.D., Ph.D., is a senior litigation associate at Simpson Thacher & Bartlett LLP. Her practice focuses on representing clients in complex patent litigation and related intellectual property, antitrust and international arbitration matters. Dr. Helm has published over 50 articles, book chapters and commentary on a variety of legal issues, including as a legal columnist for *Law.com*. A longer version of this article, focusing on legal ethics, appeared in the *Journal of the Legal Profession* in Fall 2010.

¹ Katherine A. Helm, *What Justice Brandeis Taught Us About Conflicts of Interests*, 35 J. LEGAL PROF. 1 (2010).

² Inspiration for this article, and most of the historical accounting on Brandeis’s ethics, came from the following four sources: MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* (Schocken eds., 1st ed. 2009); A.L. TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* (McGraw Hill eds. 1964); John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965); and Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People’s Lawyer*, 105 YALE L.J. 1445 (1996).

uproar from his opponents in the legislature.³ That opposition did not aim its attention at the socio-legal agenda that Brandeis might choose to advocate once on the Court - such as in the case, for example, of more recent nominees like Robert Bork - but aimed instead at the problematic ethical quandaries that might have confronted Brandeis during the course of his legal career, both in the clients and causes on whose behalf he sought to advocate.⁴

Some might argue that, at bottom, Brandeis was scrutinized so severely by the Senate Judiciary Committee not because the issues raised against him were meritorious, but rather because these issues were mere smokescreens fomented by the anti-Semitism of the day.⁵ But whether or not a religious or social bias caused the strict scrutiny into Brandeis's past which he faced, to use the language of today, the raw fact is that Brandeis's conduct as an attorney, rightly or wrongly, did indeed occasionally raise nettlesome ethical questions deserving of analysis.⁶

Setting aside whether the scrutiny of Brandeis was indeed politically motivated, to soften the perceived motives of his attackers and focus on the "lessons learned," the issue addressed in this article is whether his legal conduct would be challengeable through the prism of today's ethical mores, and with the benefit of hindsight and perspective over time, now on a more objective level.

How do we, including those of us who do not aspire to a judicial appointment, learn from and modify our conduct as attorneys when faced with the conflicts that faced Brandeis? Stated otherwise, on the major issues that faced him in the Senate concerning client conflicts of interest, did Brandeis behave ethically? There were

³ See UROFSKY, *supra* note 2, at 437-38.

⁴ In the candid words of Sen. Ted Kaufman (D-Del.), member of the Senate Judiciary Committee, during a June 26, 2009 interview, "[t]he big difference was, after [Robert] Bork, the process became like the Super Bowl." Interview, *The National Law Journal*, *Q&A With Sen. Ted Kaufman* (June 29, 2009), <http://legaltimes.typepad.com/blt/2009/06/qa-with-sen-ted-kaufman.html>. Further, Sen. Orrin Hatch (R-Utah) stated that "[J]udicial appointments have become increasingly contentious." Senate Judiciary Hearing Transcript, *The United States Senate Committee on the Judiciary, The Nomination of Judge Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States Judiciary* (July 13, 2009), <https://www.judiciary.senate.gov/meetings/the-nomination-of-sonia-sotomayor-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states>.

Brandeis's confirmation hearings may represent the one exception to this otherwise generally true statement.

⁵ HELM, *supra* note 1, at 3-4.

⁶ HELM, *supra* note 1, at 4.

several attacks made about Brandeis's legal ethics in practice during his confirmation hearings. This article focuses on the one that consumed the most time and attention on the Senate floor, the issue of prior clients and successive or situational conflicts of interest.

II. ETHICAL OBLIGATIONS TO FORMER CLIENTS

As any attorney with his or her own book of business knows, perhaps the most vexing part of law firm practice is the inevitable problem of client conflicts of interest.⁷ Whether a lawyer can take on a new client depends on what work that lawyer and other lawyers at his or her firm have done in the past.⁸ The prevailing wisdom is that a conflict of interest arises when a lawyer's professional judgment is compromised, or appears to be compromised, due to contrary influences or diverging interests between clients.⁹ In the case law, conflicts often arise when there are competing financial interests between the counsel and the client that could affect the counsel's duty of loyalty to his or her client.¹⁰

Legal ethics rules governing conflicts of interest apply to individual clients and corporate clients alike and are very general, *e.g.*, the American Bar Association ("ABA") Model Rules 1.7 (concurrent conflicts) and 1.9 (successive conflicts).¹¹ These rules aim to provide workable guidelines to help lawyers establish a system for siphoning out clear conflicts and for recognizing when conflicts may be permitted after appropriate disclosure and approval.¹² Practitioners are often frustrated by the open-ended nature of these rules, however, which seem to lend themselves to academic study by law professors on conflicts and other matters of professional responsibility rather than to their actual practical application to assist

⁷ HELM, *supra* note 1, at 10.

⁸ HELM, *supra* note 1, at 10-11.

⁹ HELM, *supra* note 1, at 11.

¹⁰ *See, e.g.*, United States v. Schwarz, 283 F.3d 76 (2d Cir. 2002) (disqualifying a lawyer due to an interest in another client's retainer, which created an actual conflict of interest and violated the defendant's Sixth Amendment right to effective assistance of counsel). A conflict could also arise when the lawyer has some form of ownership interest in the client being represented, *e.g.*, recall when Brandeis was both counsel for and a director of the United Shoe Machinery Company, as discussed *infra*.

¹¹ HELM, *supra* note 1, at 11.

¹² HELM, *supra* note 1, at 11.

and benefit practicing lawyers and their clients.¹³ This article examines the tension between an important conflict rule's intent and its practical implications, as exemplified in a controversy involving Justice Louis Brandeis.

Rule 1.9 of the ABA Model Rules deals with a lawyer's professional obligations to former clients.¹⁴ It sets forth the legal standard under which any practicing attorney should operate.¹⁵ The Rule states that a lawyer "who has *formerly represented a client* in a matter shall not thereafter represent another person in the same or a *substantially related matter* in which that person's interests are *materially adverse* to the interests of the former client" unless the former client consents.¹⁶ The italicized language highlights the three questions for disqualification: Is there a former client; is the new matter substantially related; and are the former client's interests materially adverse to the prospective client's interests.¹⁷ All three of these questions must be answered in the negative before the lawyer can bring the new client in the door.¹⁸

The "substantial relationship test" in Model Rule 1.9 also appears in Rules of Professional Conduct Rule 1.9, the New York Code provision governing former client conflicts. This test effectively serves as a proxy for court inspection.¹⁹ After one client relationship terminates, a lawyer has certain continuing fiduciary duties, with respect to confidentiality, loyalty, disclosure and acting in a client's best interest, which is not rescindable on behalf of a new

¹³ HELM, *supra* note 1, at 11. In the words of Chief Justice Roberts: "[T]he law professors aren't the ones who deal with this question on a day-to-day basis and have to worry about going to jail. . . ." See Transcript of Oral Argument at 39:7-10, *Mohawk Indus. Inc. v. Carpenter*, 558 U.S. 100 (2009) (No. 08-678).

¹⁴ MODEL RULES OF PROF'L CONDUCT r. 1.9 (AM. BAR ASS'N 2009).

¹⁵ MODEL RULES OF PROF'L CONDUCT Scope (AM. BAR ASS'N 2016).

¹⁶ MODEL RULES OF PROF'L CONDUCT r. 1.9 (AM. BAR ASS'N 2016) (emphasis added) (explaining that consent must be informed and confirmed in writing).

¹⁷ The origin of the "substantial relationship" test is generally credited to Judge Weinfeld's opinion in *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953) (explaining the policy reasons why a substantial relationship test exists for former clients but not current clients).

¹⁸ *Id.* at 269.

¹⁹ The test was formulated so that the court need not make the inappropriate inquiry into whether actual confidences were disclosed. *Id.* at 269 ("To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship."). *Id.*

client.²⁰ At the same time, a lawyer has the duty to offer a prospective new client legal representation free of conflicts from the lawyer's prior representation of clients having interests adverse to the prospective client.²¹ The substantial relationship test boils down to a question of whether the lawyer could have obtained confidential information in the first representation that would have been relevant in the second representation.²² It is of no moment whether the lawyer would or could use the information.²³ If the answer is yes, the lawyer cannot sign on the second, successive client, unless the former affected client provides informed written consent.²⁴

The ABA now permits the presumption that confidences were revealed to be rebutted in some circumstances through the use of certain institutional mechanisms at law firms—like screens and ethical walls.²⁵ This presumption is limited though, and generally only applies when a lawyer switches firms and an adversary of a client of that lawyer or his former firm then retains the new firm.²⁶

Nowadays, most large firms require their clients to sign waivers upon retention, which seek to avoid future conflicts by having the client waive certain of their rights in advance.²⁷ Most

²⁰ N.Y. RULES OF PROF'L CONDUCT r. 1.9 cmt. 1 (2016).

²¹ *Id.*

²² N.Y. RULES OF PROF'L CONDUCT r. 1.9 cmt. 3 (2016).

²³ N.Y. RULES OF PROF'L CONDUCT r. 1.9 cmt. 8 (2016).

²⁴ See MODEL RULES OF PROF'L CONDUCT r. 1.9(b)(2) (AM. BAR ASS'N 2016)

A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

²⁵ MODEL RULES OF PROF'L CONDUCT r. 1.10 (AM. BAR ASS'N 2016).

²⁶ The new firm can avoid disqualification by imputation, under MODEL RULES OF PROF'L CONDUCT r. 1.10, by showing that protective steps were taken to prevent confidences from being received by lawyers in the new firm handling the new matter. N.Y. RULES OF PROF'L CONDUCT r. 1.10 (2016). However, not all states permit the uses of screens, while other states recognize screening mechanisms only to avoid disqualification but not as an ethical matter. See, e.g., *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005) (explaining that not every violation of a disciplinary rule requires disqualification because disqualification is only warranted where "an attorney's conduct tends to taint the underlying trial," while ethical violations can be left to federal and state disciplinary mechanisms) (quoting *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979)).

²⁷ See MODEL RULES OF PROF'L CONDUCT r. 1.10(c), cmt. 6 (AM. BAR ASS'N 2016); see, e.g., Merri A. Baldwin, *Risky Business: Identifying, Preventing, and Managing Conflicts of*

clients are familiar with the process whereby once they express interest in retaining a law firm, they receive an engagement letter detailing some of the basic terms upon which the firm would be providing legal services. While some clients or lawyers might prefer less formal methods of confirming the terms of the lawyer-client relationship, it is considered good ethical practice and is infinitely useful to have a letter that lays out the terms of engagement both to the lawyer and to the client prior to beginning work on the matter.²⁸ Moreover, the laws of many states now require engagement letters.²⁹

Typical language in a client engagement letter grants written permission for the law firm to be adverse to that client in all but the same or substantially the same area.³⁰ Some waiver language may grant permission for the firm to represent future clients adverse to them in related areas, under certain conditions but excluding direct litigation against the current or former client.³¹ Other waiver language may grant permission for the firm to represent future clients in related areas only after the present client matter is completed.³² The enforceability of some of the more extensive contractual provisions is often temporally limited and may be either expressly or inherently limited in the context of binding large corporate families.³³ Waivers are not wholesale panaceas, clearly, as the contractual language can vary from client to client and some clients may refuse to waive any rights in advance.³⁴ Whether the law firm will retain the

Interest, AM. BAR. ASSOC. (May 20, 2014), <http://apps.americanbar.org/litigation/committees/womanadvocate/articles/spring2014-0514-risky-business-identifying-preventing-managing-conflicts-of-interest.html>.

²⁸ See MODEL RULES OF PROF'L CONDUCT r. 1.5, cmt. 2 (AM. BAR ASS'N 2016); see, e.g., Marian C. Rice, *Engagement Letters: Beginning a Beautiful Relationship*, AM. BAR. ASSOC. (June 2013), http://www.americanbar.org/publications/law_practice_magazine/2013/may-june/ethics.html.

²⁹ See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 1215.1 (2002) (showing that in New York, engagement letters are required as an ethical matter).

³⁰ Helm, *supra* note 1, at 14.

³¹ Helm, *supra* note 1, at 14.

³² Helm, *supra* note 1, at 14.

³³ For example, the court in *Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F. Supp. 2d 579, 582-84 (D. Del. 2001) found that Apple was sufficiently informed about the conflict in granting a full waiver and not merely a transactional waiver, based on the extent and nature of high-level discussions the firm had with Apple's in-house counsel. *Id.* See Helm, *supra* note 1, at 14.

³⁴ See, e.g., Zusha Elinson, *Wet Blankets: GCs Don't Waiver*, THE RECORDER (June 9, 2008), <http://www.therecorder.com/id=1202422009415/Wet-Blankets-GCs-Dont-Waiver?slreturn=20170020090012> (discussing the trend of Silicon Valley technology

client who has not agreed to the waiver provision depends on a host of factors that includes the amount of business the client brings to the firm and the history of the client's relationship with the firm.³⁵ Moreover, tacit concerns exist about some of the more adhesive waivers and whether potential attempts to contract around ethical obligations are themselves unethical.³⁶

It is hardly surprising that even the best of lawyers can find themselves muddling these ethical obligations when trying to be a good rainmaker and get new clients in the door. None of us is immune from the temptation to just fix the problem later, *i.e.*, to ask for forgiveness instead of seeking permission beforehand. With former client conflicts in particular, the temptation to gloss over ties to past relationships to present oneself as being available for future opportunities can be hard to resist.

III. BRANDEIS'S 1916 CONFIRMATION HEARINGS

The issue of former client conflicts arose in Louis D. Brandeis's Senate hearings on his nomination to the U.S. Supreme Court in 1916.³⁷ Prior to his appointment by President Woodrow Wilson, Brandeis had been the head of a New England law partnership with his law school classmate Samuel Warren for almost forty years.³⁸ Brandeis successfully positioned himself as an expert legal strategist on commercial matters during the Second Industrial Revolution and clients relied on him for sage business advice along with legal counsel during the "great merger wave" that created mega-corporations in many industries at the time including steel and tobacco.³⁹ By all accounts, Brandeis's legacy as a visionary legal mind rests not only on his celebrated judicial works but also his

companies to balk at engagement letters by outside counsel requesting up-front, blanket unconditional waivers of future conflicts of interest). *See also* Helm, *supra* note 1, at 14.

³⁵ Helm, *supra* note 1, at 14.

³⁶ Helm, *supra* note 1, at 14.

³⁷ Geoffrey C. Hazard, Jr., *Lawyer for the Situation*, 39 VAL. U. L. REV. 377, 377 (2004); Helm, *supra* note 1, at 5.

³⁸ Nutter, *Nutter Recognizes the 100th Anniversary of Founding Partner Louis Brandeis's Nomination to the U.S. Supreme Court*, NUTTER (Jan. 28, 2016), <http://www.nutter.com/Nutter-Recognizes-the-100th-Anniversary-of-Founding-Partner-Louis-Brandeis-Nomination-to-the-US-Supreme-Court-01-28-2016/>; Helm, *supra* note 1, at 5.

³⁹ *See* JACK BEATTY, *AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA 1865-1900* 22-24 (Vintage eds. 2008).

common biographical depiction as having been “the people’s attorney” in both his corporate law and litigation practice.⁴⁰ Perhaps because of the inescapable interweaving of public and private issues that occurred as Brandeis advanced both social policy and client positions in a public forum throughout his career, the lawyer faced fierce accusations in his confirmation hearings that he had violated legal ethics in his law practice.⁴¹ Of all the ethical fitness issues the Judiciary Committee raised, the two largest debates focused on client conflicts of interest, and the one that consumed the most floor time was the matter of United Shoe Machinery Company -- Brandeis’s former client.⁴²

The United Shoe Machinery Company was formed shortly before the turn of the century by a consolidation of several smaller companies.⁴³ One of the groups that became a large shareholder in United was Brandeis’s client.⁴⁴ Brandeis subsequently became a director of United and also served United as counsel.⁴⁵ Prior to the adoption of the Sherman Antitrust Act, which Congress passed in 1890 “to protect trade and commerce against unlawful restraints and monopolies,”⁴⁶ United and its predecessors had been leasing their patented shoe machinery for use by shoe manufacturers.⁴⁷ The lease agreements contained “tying” clauses, which required a lessee to use the patented machinery in conjunction only with other patented machinery.⁴⁸ This gave the lessor a considerable monopolistic advantage.⁴⁹

⁴⁰ John Braeman, *The People’s Lawyer Revisited: Louis D. Brandeis Versus The United Shoe Machinery Company*, 50 AM. J. LEGAL HIST. 284, 284-86 (2008-10); Helm, *supra* note 1, at 2.

⁴¹ Hazard, *supra* note 37, at 377.

⁴² See Urofsky, *supra* note 2, at 310, 451 (noting that Brandeis’s allies “understood from the beginning” that the United matter would be the most damaging of all the ethical charges leveled against Brandeis in his confirmation hearings); TODD, *supra* note 2, at 151 (noting that Brandeis’s camp recognized the United matter “as the stickiest part of the combined campaign to defeat the nomination”).

⁴³ John Shepard Wiley, Jr., et al., *The Leasing Monopolist*, 37 UCLA L. REV. 693, 697 (1990).

⁴⁴ UROFSKY, *supra* note 2, at 310.

⁴⁵ Braeman, *supra* note 40, at 287.

⁴⁶ Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 12(a) (2012)).

⁴⁷ Frank, *supra* note 2, at 703.

⁴⁸ Braeman, *supra* note 40, at 289.

⁴⁹ Frank, *supra* note 2, at 703.

At first blush, United's practice of precluding its own customers (shoe manufacturers) from using machinery manufactured by competitors, or put another way, United's practice of forcing shoe manufacturers to use only United products if they used any, seems plainly anticompetitive. However, it is important to consider the prevailing law at the time. In 1895, the Supreme Court refused to apply the Sherman Act to the American Sugar Refining Company, which controlled a large majority of the manufactories of refined sugar in the United States and had a "practical monopoly of the business," on the ground that Congress had the ability to regulate commerce but not manufacturing.⁵⁰ The conservative Court insisted that Congress's power to regulate commerce did not extend to the regulation of manufacturing in numerous cases in the late 1800s and early 1900s.⁵¹ It would be years before the Court shifted and, in the dawning of the New Deal Era, recognized that the effects of many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation.⁵²

Against that backdrop, United operated its lease system relatively safely under a narrow reading of the antitrust laws at the time Brandeis served as its counsel.⁵³ However, the issue was not without debate in the legislatures. In 1906, a bill was introduced in the Massachusetts Legislature to do what the federal Sherman Antitrust Act was not accomplishing and restrict tying clauses.⁵⁴ At United's request, Brandeis reluctantly agreed to appear before the legislature and seek the defeat of the bill that would have outlawed the tying clauses in United's contracts with shoe manufacturers.⁵⁵

Of notable interest was the fact that Brandeis was also counsel to a number of shoe manufacturers at the time.⁵⁶ The conflict had been waived, however, as the shoe manufacturers had consented to the dual representation as part of their agreement with United that they would not support the legislation in exchange for receiving a favorable rate on United's products should the contracts remain

⁵⁰ *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 238 (1899); *United States v. E. C. Knight Co.*, 156 U.S. 1, 16-17 (1895).

⁵¹ *Addyston*, 175 U.S. at 227; *E. C. Knight Co.*, 156 U.S. at 12-14.

⁵² *Wickard v. Filburn*, 317 U.S. 111, 121-22 (1942).

⁵³ Frank, *supra* note 2, at 704.

⁵⁴ Braeman, *supra* note 40, at 294.

⁵⁵ Frank, *supra* note 2, at 704.

⁵⁶ Frank, *supra* note 2, at 705.

enforceable.⁵⁷ Setting aside the reasonableness of that waiver, Brandeis's decision to appear before the state legislature in defense of practices that placed significant restraints on both the manufacturers and competing shoe machineries' right to do business was both legally and ethically debatable.⁵⁸

This was not the issue that got Brandeis into trouble at his confirmation hearings, though. After Brandeis appeared for United, and helped stop the state legislation, he continued to monitor the law and became doubtful about the legality of United's tying arrangements.⁵⁹ He called his opinion to the attention of United's counsel and later that same year tendered his resignation, first as a director and then as counsel for United.⁶⁰ United and its successor corporation continued to employ various tying arrangements in its business.⁶¹ These eventually formed part of the landmark antitrust decision, *United States v. United Shoe Machinery Co.*⁶²

Meanwhile, shortly after Brandeis had ceased working for United, in 1907 the Massachusetts Legislature succeeded in passing a new bill against such leases and tying clauses.⁶³ Brandeis had no role in that legislation and for some years thereafter he refused, on ethical grounds, requests by his remaining shoe manufacturer clients to assist them in opposing United's increasingly sophisticated leasing practices.⁶⁴ In 1910, however, after the Supreme Court had begun to embrace a broader reading of the Sherman Antitrust Act, Brandeis gave an opinion to another shoe machinery manufacturer that tying clauses were illegal.⁶⁵

The following year, Brandeis undertook the representation of the Shoe Manufacturers' Alliance, a consortium of shoe

⁵⁷ Frank, *supra* note 2, at 704.

⁵⁸ Frank, *supra* note 2, at 704.

⁵⁹ Frank, *supra* note 2, at 704.

⁶⁰ ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 219-20 (The Viking Press eds., 1946).

⁶¹ *Id.* at 220.

⁶² 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam).

⁶³ MASON, *supra* note 60, at 220.

⁶⁴ MASON, *supra* note 60, at 221.

⁶⁵ Brandeis's opinion was based on the 1909 Supreme Court holding that a combination of wallpaper companies had violated the Sherman Act by forcing exclusive patronage to the conglomerate and by raising wholesaler and consumer prices, which was detrimental to the public interest. *See Cont'l Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909).

manufacturers opposed to the giant United's market strategies.⁶⁶ The federal government then commenced an antitrust prosecution of United, in which Brandeis had no direct role.⁶⁷ However, during that 1911-1913 time frame, Brandeis testified before several congressional committees and federal agencies in support of legislation that became the Clayton Act,⁶⁸ at the request of his client Shoe Manufacturers' Alliance.⁶⁹ In his appearances, Brandeis cited United's continued oppressive behavior as evidence of the need for changes in the antitrust laws.⁷⁰ This sequence of events is what inspired the harshest attacks on Brandeis's character by Republican senators during his nomination debacle.

The Senate committee viewed the issue as one bedeviled by conflicts.⁷¹ The gravamen of the charge was that Brandeis acted against his former client United, having previously acted for that client in a related matter.⁷² Brandeis defended his position on an ideological level, addressing the inherent difficulties of the "independent lawyer" struggling to break free of a former client's coercion.⁷³ The objectors at Brandeis's nomination hearings constructed some tendentious arguments to sustain their objections to his appointment.⁷⁴

The vast shift in the law between the time when Brandeis represented United in 1906 and when he opposed United in 1911-1913 arguably precluded any direct conflict with a former client.⁷⁵ However, was the matter still substantially related, at least in spirit, so as to mar Brandeis's credibility in acting out against United? If Brandeis were to be reprimanded for his behavior, what message were the senators sending him, as a lawyer? Must all lawyers refuse to embroil themselves in any representation that could even potentially conflict with an earlier representation, in the broadest

⁶⁶ MASON, *supra* note 60, at 223.

⁶⁷ MASON, *supra* note 60, at 223.

⁶⁸ 15 U.S.C. § 12 (1914).

⁶⁹ MASON, *supra* note 60, at 224.

⁷⁰ A colorful historical anecdote illustrates the glacial rate of acceptance of such change by corporate America. In 1912, Andrew Carnegie made the following breezy statement to a congressional committee that was investigating U.S. Steel: "Nobody ever mentioned the Sherman Act to me, that I can remember." See BEATTY, *supra* note 39, at 220.

⁷¹ MASON, *supra* note 60, at 224-25.

⁷² MASON, *supra* note 60, at 224.

⁷³ MASON, *supra* note 60, at 229.

⁷⁴ See TODD, *supra* note 2, at 110-12.

⁷⁵ See Frank, *supra* note 2 at 704.

terms possible and irrespective of an about-face change in the law? That hardly seems reasonable.

Indeed, several witnesses supporting Brandeis's nomination pointed this out, arguing that lawyers' minds must be available to craft all of the best arguments for their clients irrespective of positions they may have taken for former clients.⁷⁶ Many witnesses argued that Brandeis's adaptability of mind made him a superior attorney and would make him an even better justice when he would be called on to apply the law to the ever-changing realities of modern industrial democracy which made him a superior attorney and would make him an even better justice.⁷⁷

Modern ethics rules can inform the aforementioned question, although they may fall short of providing the "right" answer. A lawyer must not act against a former client where the lawyer has relevant confidential information about that client from an earlier retainer, which may be used against the client.⁷⁸ Regardless of whether that information is used or not, the appearance of impropriety is sufficient to bar the future representation, unless the former client consents.⁷⁹ Even if the lawyer did not in fact obtain any relevant or confidential information, the fiduciary duty of loyalty the lawyer owes to the former client extends the lawyer's prohibition on acting against the former client, in the same or a substantially related matter representing interests adverse to the former client, again, absent consent or a waiver of an objection in writing.⁸⁰

That said, a lawyer cannot realistically be forever bound by the interests of a former client for all public and private matters of interest to the lawyer. Brandeis argued, somewhat cagily, that he supported the Clayton Act on a personal level and that he represented

⁷⁶ See MASON, *supra* note 60, at 475, 482.

⁷⁷ See generally TODD, *supra* note 2. For a specific example, one witness testified: "If there is one characteristic of Mr. Brandeis'[s] thinking, it is his capacity to see both sides; it is his capacity not only for judicial statement, but for judicial thought." TODD, *supra* note 2, at 153 (quoting testimony from Henry Moskowitz, Clerk of the Board of Arbitration covering the New York garment industry, which had benefited from Brandeis's arbitration system).

⁷⁸ MODEL RULES OF PROF'L CONDUCT r. 1.9 (AM. BAR ASS'N 2016).

⁷⁹ *Id.* But see Kathleen Maher, *Keeping Up Appearances*, 16 PROF. LAW. 1, 1, 12 (2005) (pointing out that the American Bar Association Ethics 2000 Commission in 2002 removed reference to the "appearance of impropriety" standard because it was "no longer helpful to the analysis of questions arising under this Rule").

⁸⁰ MODEL RULES OF PROF'L CONDUCT r. 1.9 (AM. BAR ASS'N 2016); see MODEL RULES OF PROF'L CONDUCT r. 1.9 cmts. 1, 3-5 (AM. BAR ASS'N 2016).

himself in acting to advance the public interests.⁸¹ In support of this contention was the fact that he took no fee from (actually, he donated his fee back to) the Shoe Manufacturers' Alliance.⁸² He garnered some support from Senators in propounding the notion that a lawyer's opinion on matters of public interest should not be circumscribed by client preferences.

Indeed, it is often acknowledged that it is a mistake to judge a lawyer by the clients he or she represents. A lawyer often find himself accepting legal work on behalf of a client in whose activities the lawyer does not personally believe. Many criminal defense attorneys would be out of work if they did not have the freedom to separate their personal convictions from their professional representations. In concurrence with one author who eloquently defended Brandeis, it would indeed be a tough law practice if the lawyer were required to underwrite the character of each of his clients.⁸³

A temporary incursion on a lawyer's time and life by a pressing client matter is an unenviable but wholly expected and acceptable part of legal practice. A permanent incursion, however, is not. Legal ethics do not require a practicing attorney to become an automaton merely because, at one time, she subordinated her own interests or defined her public persona principally by her client's goals. ABA Model Rule 1.9 recognizes that the "substantial relationship" test does not persist *ad infinitum*.⁸⁴ Confidential information that was or could have been gained in the course of a former client relationship can be rendered innocuous and obsolete by the passage of time or if the information has been disclosed to the public.⁸⁵

The transition of private to public knowledge is, in fact, a fundamental part of legal ethics that allows lawyers to maintain confidences and abide by the other fiduciary duties to their past and current clients, whilst also maintaining a functioning life in public society.⁸⁶ A lawyer has the right to engage in public debate, to take

⁸¹ See Frank, *supra* note 2, at 704-05.

⁸² See Frank, *supra* note 2, at 704.

⁸³ Frank, *supra* note 2, at 686.

⁸⁴ See MODEL RULES OF PROF'L CONDUCT r. 1.9 cmt. 3 (AM. BAR ASS'N 2016).

⁸⁵ *Id.*

⁸⁶ See MODEL RULES OF PROF'L CONDUCT r. 1.9 cmt. 3 (AM. BAR ASS'N 2016); see also Pamela A. Bresnahan & Timothy H. Goodman, *Breach of Fiduciary Duty and Expert Testimony Regarding Attorney Ethics Rules*, PROF. LAW., SYMP. 53, 54 (2003).

seriously his civic duties, and to get involved in political and social justice causes, as do all citizens.⁸⁷ However, lawyers just have to remember to parse out “public” questions from “private” questions insofar as they concern client confidences. Particularly in the case of former client conflicts, confidences can be construed ambiguously. How much information, knowledge and wisdom a lawyer gains from a prior representation that can ethically be construed as a client confidence is a vexatious question.

IV. CONCLUDING THOUGHTS

What is the provenance of a lawyer’s sapience? The issue is existential in nature. Brandeis recognized this, and refused to unduly fetter his public opinions on behalf of his private clients.⁸⁸ Legal ethics should find a way to embrace, rather than shun, this ethos.

Brandeis’s response to the Senators’ upbraiding is emblematic of his character, for two main reasons.⁸⁹ First, Brandeis brought a moral dimension to his legal practice: he regularly engaged in informal *pro bono* practice, refusing compensation for legal work that he believed was in the public interest, he reputedly outright refused to take on paying cases in whose justness he did not believe, and he sternly counseled clients against taking positions in their legal disputes that adopted unfavorable social policy.⁹⁰ Second, Brandeis brought an autonomous lawyering ethic to his practice that was antithetical to the New England clubbiness attitude of legal practice.⁹¹

Brandeis rejected any close alliances with any group, political party, cause, or client.⁹² His independent approach to legal practice epitomizes his aversion to acting as a mere representative for an anterior interest and to retain self-direction in his legal counseling.⁹³

⁸⁷ See John T. Baker, *Citizen Lawyers—the Past, Present, and Future of the Legal Profession*, COLO. LAW. 99, 99 (2009) (defining “citizen lawyer” and stating that “civic responsibility and civic involvement traditionally were the hallmarks of practicing law”).

⁸⁸ See Spillenger, *supra* note 2, at 1470-71, 1474, 1476, 1517-18.

⁸⁹ See MASON, *supra* note 60, at 478-79, 483.

⁹⁰ See Spillenger, *supra* note 2, at 1477.

⁹¹ See, e.g., TODD, *supra* note 2, at 118 (quoting testimony by Boston lawyer Sherman Whipple: “. . . I think if Mr. Brandeis had been a different sort of man, not so aloof, not so isolated, with more of the camaraderie of the bar, gave his confidence to more men, and took their confidence . . . and talked it over with them, you would not have heard the things you have heard in regard to him.”).

⁹² See Spillenger, *supra* note 2, at 1451-56.

⁹³ See Spillenger, *supra* note 2, at 1451.

Indeed, many of Brandeis's legal representations involved advocacy in the legislature on a variety of social policy issues.⁹⁴ As a legal advocate, Brandeis mobilized a stridently nonpartisan voice for the "public interest" that he strongly believed was needed to compete with hard-charging interest groups and political power at the dawning of an age of increased legislation and regulation.⁹⁵ Brandeis prided himself on being a detached, autonomous counselor, free of client dictation, and even depicted himself in his Senate hearings as having been "counsel for the situation," a blunder which served him none too well in extricating himself from the client conflict at hand.⁹⁶

Nonetheless, Brandeis's commitment to seek moral justice outside the conventional confines of the strict adversarial system of law now proscribed by a code of legal ethics is hardly reprobate. Brandeis was an advocate of several public causes and was insightful enough to recognize the benefits of legislative democracy over litigative democracy.⁹⁷ That is, Brandeis may have had the power as an active litigant to make law, or rather, to get law made for his clients and for himself. But he respectfully chose to support the legislative process, imperfect as it may be, to express his political views and to incorporate deliberation and compromise into the law-making process.⁹⁸ We can hardly fault him for embracing the democratic political system in this manner. Brandeis did not try to legislate through lawsuits. It is almost ironic that his policy-making endeavors ended up almost sidelining his chances for a career in the judicial branch of government.

Certainly, we cannot judge Louis Brandeis the attorney for failing to adhere to contemporaneous standards of behavior in the then absence of a professional code of conduct, nor can we deem immoral his methods without apt respect for the then zeitgeist – the spirit of the times – and the manner in which other lawyers comported themselves at that time. Giving fair value to the objections made by the Senate committee members in 1916, however, is Brandeis's alleged shirking of certain of his ethical duties to hereinafter be disparaged and dismissed as dated behavior that

⁹⁴ See Spillenger, *supra* note 2, at 1487.

⁹⁵ See Spillenger, *supra* note 2, at 1487 (citing DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY*, 380 (Princeton Univ. Press eds. 1988)).

⁹⁶ See Spillenger, *supra* note 2, at 1449-51.

⁹⁷ See LUBAN, *supra* note 95, at 380.

⁹⁸ See Spillenger, *supra* note 2, at 1488-89.

would simply not be a best practice for a lawyer in being accountable to his former and successive clients? The applicable legal ethics rule, indeed even now, is not a paragon of clarity on the issue. To what extent must a lawyer subordinate his or her own views on policy to persuasive advocacy on behalf of not even a current but a former client's interest? Must every lawyer be so scrupulously cautious at the outset when engaging a new client to have prospectively considered and rejected the possibility that such representation might lead the lawyer to make arguments that could compromise his or her credibility on all other public issues of personal interest?

If so, what does that say about how we want lawyers to behave today--- to stop thinking independently once we retain our first client, to give up all of our outside interests, and to slavishly serve them forevermore? Indeed, the all-encompassing culture of BigLaw suggests as much.⁹⁹ But on an ideological level, do the ABA Model Rules serve to promote and foster milquetoast lawyers acting as mouthpieces for unchallenged client preferences? Even when those clients are former clients? If so, we need to seriously think about reevaluating the desirable balance of interests in the lawyer-client relationship. The legal ethics rules simply do not provide sufficient distinction between a lawyer's public and private life to allow a practicing attorney to maintain both public autonomy and lawyerly zeal in the context of the lawyer-client relationship. Particularly in this day and age of strong and powerful corporate clients, where zealous representation is the industry standard, young attorneys entering private practice nowadays should think carefully about advertising themselves as single-minded gladiators, pursuing a single client's interest without repose. Practicing attorneys should maintain the values of freedom in choice and action, for their purpose is not only to maintain peace and order but also to bring the public administration of justice into touch with changing moral and political conditions so as to promote progress in society. It would have been what Brandeis wanted.¹⁰⁰

⁹⁹ See generally Anonymous, *What's It Like to Work at An Ultra Elite Law Firm*, FORBES (Nov. 2, 2012), <http://www.forbes.com/sites/quora/2012/11/02/whats-it-like-to-work-at-an-ultra-elite-law-firm/#61db7586ee1f>.

¹⁰⁰ See Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 Sup. Ct. Rev. 299, 313-14 (1985).