Rethinking Legal Ethics

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THE CONSCIENCE OF A LAWYER. By David Mellinkoff. St. Paul, Minn.: West Publishing Co. 1973. x + 304 pages. $6.50.

If one were to do a book on the conscience of a lawyer in this day and age, one might begin by examining and attempting to reconcile the conflict between person and professional that persists within every lawyer. That conflict is not unique to the legal profession; it is a central dilemma of doctors, accountants, businessmen, clergymen, bureaucrats, union leaders, politicians, and workmen. In a broader sense, it is a dilemma of everyone who must be different things to different people while remaining in some sense true to himself—parent, spouse, neighbor, voter, clubmember, and friend. The dilemma is especially pressing on professionals, however, for their vocations by definition involve a high degree of autonomy in the ways they perform their callings. That autonomy carries with it a correspondingly reduced freedom to attribute vocational behavior to the dictates of external circumstance. There is no "we" or "they" (instead of "I") on whom to fasten responsibility for what is done or to be done. In this respect, law, especially in its quintessential forms of counseling and advocacy, and medicine, especially in its quintessential forms of diagnosis and surgery, are most demanding. And while the choices confronting the medical professional are framed in terms of technological and scientific possibility, those of the legal professional are framed only in the amorphous terms of right and justice.

In exploring this conflict within himself, the lawyer has only limited guidance from external sources. Rules of law governing the lawyer-client relationship tell the lawyer that he is a fiduciary. The particulars of these rules, however, do not tell him much more than that a fiduciary should not steal from his client and should not lie to him except where the client is unprepared to deal with the truth. The rules of law also tell him that he is an officer of the court and in some sense is burdened with an obligation of faithfulness to the law. But these rules do not tell him what it means to be an officer of the court or to be faithful to the law, except that he should not lie to a tribunal or commit a violation of positive law. The rules of professional ethics tell him that he may take account of moral considerations in

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advising his client what to do and that in moral extremity he may refuse to continue in the service of a client. But they do not tell him what aspects of morality are pertinent, nor what moral teaching is most worthy, nor how to conduct his own moral deliberations, nor what fellowship he may look to for counsel and reinforcement in such deliberations. They do not tell him how to deal with the fact that, depending on what he decides to do, other members of his profession may think him a bleeding heart or, on the other hand, a mercenary son-of-a-bitch.

If a lawyer seeks the advice of colleagues in a formal way, they will most likely refer him back to the law and the code of ethical rules. These will remind him of the outer limits—that he may not steal and may not lie. His colleagues may also cite him a general ethical proposition, which, of course, will not decide a concrete case, or several general propositions, which may be even less helpful. As we tell clients, "On the one hand . . . on the other hand . . . ." If he seeks the advice of a colleague in an informal way, he risks opening up painful and potentially embarrassing questions about his standards of rectitude, his sophistication, or his nerve. If he is fortunate, he may find a colleague who can understand what his dilemma is without judging him for suffering it, and who may even be ready to engage in a dialogue.

There aren't many such dialogues in print. The oral ones to which I have been a party wind up with something like the question, "Well, what kind of a person do you want to be?" That question suggests the true nature of the underlying difficulty: what one does as a professional unavoidably becomes part of what one is as a person. For an old professional, any new answer to the question may come too late. For a young professional, both professional self and personal self are still in such formative stages that resolution of a specific dilemma determines only one element of a very complicated simultaneous equation: What sector of the community is my social reference group? What part of the professional community is my ethical reference group? How much difference will it make to my professional standing if I go one way or another on this issue? Am I competent enough and well enough situated professionally to survive any serious consequences? What do the people who talk nobly really do when they get down to the hard choices? What risks can I take on behalf of a family that is dependent on me for its livelihood? What risks can I take on behalf of professional associates who are more or less dependent on me? What risks will they take on my behalf?

It goes without saying that no one can solve this kind of equation for another person. At the same time, a discussion of its components could help, at least to the extent of relieving the isolation that is inherent in

experiencing conflicts between inner self and professional self. In addition, it could establish perspective, dimension, and proportion, thus moderating the tendency toward distortion that also is inherent in such an experience. And if it comes from someone who has been a practicing lawyer and is now a teacher, it could be enlightening.

Then again, if one were to do a book on the conscience of a lawyer in this day and age, one could talk about the conditions of the profession's work that make it so difficult to reconcile the conflict between professional ideal and professional reality. The traditional ethical norms of the profession relate chiefly to the role of courtroom advocate, the role of legal counselor in self-contained transactions, and matters of propriety in attracting private clients.[1] These norms derive from, and are still primarily oriented to, a conception of the profession as a body of practitioners acting individually (even when organized in firms) to provide services to individual persons with reference to specific cases and transactions in a framework of essentially stable rules.

A great deal of the work of the profession still conforms to this conception, but an ever-increasing amount of it does not. About 25 percent of all lawyers now work for government or for private industry, and only about a third (down from 61 percent in 1948) are individual practitioners.[2] More and more, lawyers' work is done in collaboration with others (including paraprofessionals) and is concerned with positive legal adaptation to evolving conditions, including changing the law to fit client needs. Many lawyers have "clients" only in a metaphorical sense: their services are rendered to organizations and interest groups whose identities and capacities are constructs created by the law itself. Among salient elements of the profession—in terms of professional status, public influence, and income—and among its younger cohorts, these tendencies are especially pronounced. The lawyer has become perforce an organization man, serving organizations in an organizational setting and dealing with problems that are organizational rather than atomistic in character.

This change in milieu has had profound and inevitable effects on the autonomy, and certainly the sense of autonomy, of the lawyer. It poses complex new problems of legal and ethical responsibility, merely symbolized by the activities of the many public and private lawyers involved one way or another in Watergate. Few of these problems have been systematically explored. What significance, for example, is to be attached to the claim that a person "acted on advice of counsel" when the advising counsel was in the full-time service of the client? Why should communications to coun-

1. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY.
2. AMERICAN BAR FOUNDATION, THE 1971 LAWYER STATISTICAL REPORT 10–12 (1972).

sel that are integral parts of a transaction be treated as confidential in the same way as retrospective communications concerning a transaction not known to counsel beforehand? If a lawyer's services are performed for an organization, why is he on a different footing for legal purposes—such as liability for wrongful acts of the organization or for representations made on its behalf—than other people in the service of the organization?

The transformation of the lawyer from disinterested adviser and advocate to active participant makes him in a sense the recipient of his own professional services. What responsibility does he have in that capacity? For example:

What is the responsibility of a lawyer serving the "criminal justice system" as a prosecutor who has good reason to believe that those serving the system in the police force aren't being fully truthful in their arrest reports? If he knows that the system's sanctions are most likely ineffectual, or perhaps even merely symbolic? If he knows that the most important single determinant of sentence is which judge in the system decides the question?

What is the responsibility of a defender who knows that almost all of his clients are probably guilty of some crime at least as serious as the one charged? That his clients will, if they think they can get away with it, lie not only to the court but to him?

What is the responsibility of a legal adviser who suspects that his corporate employer or retainer is shading the law, or is even engaged in outright swindle, but is not telling him about it? Who knows that his client's competitors or opposite numbers are doing so?

What is the responsibility of a person associated with a firm or staff of attorneys who suspects that his associates are privy to courses of action that are illegal, overreaching, or subversive of the public good?

These are painful questions, and their pain is felt more or less regularly by everyone who practices law. They imply personal involvements that are terrible to contemplate as occasional experiences, let alone as concomitants of professional life. They are not easy to deal with, but they are before us and demand confrontation. They could evoke a fruitful discourse, especially from someone who has been a lawyer and who is a teacher.

Still again, if one were to do a book on the conscience of a lawyer in this day and age, one could talk about the moral and psychological implications of the fact that a lawyer's interpersonal style affects lay perception of the lawyer and of the legal process itself. In performing his professional tasks, a lawyer necessarily involves himself with clients, public officials, witnesses and other suppliers of information, other parties to the transactions, and other lawyers. The character of that involvement may vary

widely. In relation to the client, the lawyer can be domineering or "democratic," open or closed concerning his feelings and those of the client, relatively hostile or charitable in expressing attitudes about other people, and respectful or disparaging about law and the legal process. Similar variations are possible in the quality of the lawyer's relationships to opposing parties and counsel, witnesses, etc.

The quality of these relationships affects what the law is in a realistic sense and ultimately affects its moral character in the eyes of society. It is not easy to document specific consequences in this regard, for the problem really hasn't received very much attention. Some instances come readily to mind, however. Several years ago a survey of clients of Missouri lawyers indicated that they emerged from the lawyer-client relationship feeling generally confident of the uprightness of their own lawyer, but less so about that of the lawyer for the other side and that of the system of administered justice itself.[3] Quite evidently, the impressions the clients had about other lawyers and the courts must have been chiefly the product of what their own lawyers conveyed to them. As another instance, it is notorious that jurors often feel neglected, even abused, as a result of their experiences as participants in litigation and that witnesses, especially complaining witnesses in criminal cases, feel the same way. The fact that they have been treated more or less as nonpersons by "law people" no doubt explains a considerable part of that impression. Clients likewise often feel abused by the system; Learned Hand's famous dictum that "as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death" was surely not a reference merely to the anxiety arising from litigation's uncertain outcome.

Despite their importance, the problems created by lawyers' interpersonal styles are almost entirely ignored by the profession (except for occasional treatment in connection with special aspects of practice, such as legal counseling in domestic relations matters). Interpersonal style is regarded within the profession simply as a matter of individual idiosyncracy or personality, even though criticism of lawyers from those outside the profession suggests that a neurotic style may be systemic to our profession. In law school, the subject is treated with similar indifference, even though it is probably true that the "tough" style of interpersonal relationship originates in the example of Socratic-method pedagogy.[4] In any case, the subject warrants careful exploration as an aspect of the lawyer's fulfillment of his professional role.

Unfortunately, Professor Mellinkoff hasn't written any of these books.

3. *See* MISSOURI BAR PRENTICE-HALL SURVEY (1963).
4. *Cf.* Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971).

What he has given us is an avuncular epistle on the dilemma facing a barrister whose client, a defendant in a criminal case, has confessed his guilt to his attorney. The lesson is given through a Victorian case, *Regina v. Courvoisier*,[5] in which the butler really did it and then spilled his guts in the middle of trial. The barrister, Charles Phillips, went on with the defense anyway, and lost. Thereafter Phillips suffered obloquy, which is the fate of lawyers because, although "[o]f course there are unsavory lawyers . . . . [A] substantial part of the major criticism of the lawyer . . . is rooted in fundamental misconception of the lawyer's mission."[6] Professor Mellinkoff ornaments his long narrative of the trial with disquisitions on the presumption of innocence and the importance of counsel in criminal cases, and with choice quotations about advocacy of the kind we used to get from the bar presidents on their annual law school pilgrimages.

I liked the book in a way, because it collects much 19th-century liturgy that might otherwise disappear from our professional lore. But it seemed to me no more relevant to our current professional estate, and perhaps less so, than George Sharswood's 1854 *A Compend of Lectures on the Aims and Duties of the Profession of Law*, which Professor Mellinkoff cites amply. Maybe Professor Mellinkoff or someone else will give it another try.

5. 173 Eng. Rep. 869 (Cent. Crim. Ct. 1840).
6. P. 272.