ETHICS *in* PRACTICE

Lawyers' Roles, Responsibilities, and Regulation

Edited by

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Why Lawyers Can't Just Be Hired Guns

ROBERT W. GORDON

My theme in this essay is the public responsibilities of lawyers—their obligations to help maintain and improve the legal system: the framework of laws, procedures, and institutions that structures their roles and work.

Ordinarily this is a theme for ceremonial occasions, like Law Day sermons or bar association dinners or memorial eulogies—when we are given license to rise on the wings of rhetorical inspiration far above the realities of day-to-day practice. I want to try to approach the subject in a different spirit, as a workaday practical necessity for the legal profession. My argument is simple: that lawyers' work on behalf of clients positively requires—both for its justification and its successful functioning for the benefit of those same clients in the long run—that lawyers also help maintain and refresh the public sphere, the infrastructure of law and cultural convention that constitutes the cement of society.

The way we usually discuss the subject of lawyers' public obligations—outside ceremonial rhetoric—is as a problem in legal "ethics." We often hear things like, "Lawyers must be zealous advocates for their clients, but of course lawyers are also 'officers of the court'; and sometimes the duties mandated by these different roles come into conflict and must be appropriately balanced." And indeed some of the most contentious disputes about "ethics" in the legal profession concern such conflicts between the "private" interests of lawyers and clients and their "public" obligations to adversaries, third parties, and the justice system itself—issues like: When, if ever, should lawyers have to disclose client fraud or wrongdoing or withdraw from representing clients who persist in it? When, if ever, should they refuse to pursue client claims they believe legally frivolous? Or act to prevent clients or their witnesses from giving perjured or seriously misleading testimony or responses to discovery requests?

revision; and that in such times lawyers may legitimately feel a calling to a morally activist, framework-transforming politics. There are times when the lawyers' most demanding conceptions of their calling may demand principled resistance to public norms they believe to be unwise or unjust. There are times when fire must be fought with fire, unscrupulous tactics met with fierce counter tactics—though lawyers use this justification far too often as an excuse for antisocial behavior, which might be avoided by collaborative efforts to reform systems. There are times when whole segments of society must be mobilized to overturn an unjust order. Lawyers have played important parts in such movements—like the movements to abolish slavery and racial segregation—and will, one hopes, do so again.

But in our time, even the most conservative view of the lawyer's public functions, that he is to respect the integrity and aid the functioning of the existing system and its purposes, has become controversial—in a way that would really have astonished the lawyers of the early republic, the lawyers of the Progressive period, and leading lawyers generally up until around 1970 or so, who took the idea of their public functions completely for granted.[15] The dominant view of most lawyers today—not all, but seemingly most—is one that denies the public role altogether if it seems to conflict with the job of aggressively representing clients' interests the way the client perceives them.

Yet, as I've said, a legal system that depends for its ordinary enforcement on information and advice transmitted by the private bar, that depends for its maintenance and reform on the voluntary activities of the private bar, and that relies on lawyers to design the architecture of private legislation, cannot survive the repeated, relentless battering and ad hoc under-the-counter nullification by lawyers who are wholly uncommitted to their own legal system's basic purposes. Lawyers in fact probably do serve the civic frameworks better than they occasionally like to pretend; they refrain from pushing every client's case, in every representation, up to just short of the point where no plausible construction of law or facts could support it. But it seems clear that like many other groups in American social life, the legal profession in the last twenty years or so has adopted an increasingly privatized view of its role and functions. The upper bar in particular has come to see itself simply as a branch of the legal-and-financial services industry, selling bundles of technical "deliverables" to clients. There are many reasons for this trend, chief among which is the increasing competition among lawyers (and in European markets, between lawyers and accountants) for the favor of business clients. That competition has brought many benefits with it in more efficient delivery of services, but one of those benefits cannot be said to be incentives to high-minded public counseling or the expenditure of time on legal and civic reform.

Our legal culture, in short, has mostly fallen out of the habit of thinking about its public obligations (with the significant exception of the obligation of pro bono practice, which has gained increasing attention from bar associations and large law firms). I expect therefore that if the idea of lawyers as trustees for the public good—

the framework norms and long-term social contracts that keep our enterprise afloat—is going to stage a comeback, the impulse will have to come from some set of external shocks, such as legislation or administrative rules or rules of court that explicitly impose gatekeeper obligations on lawyers as independent auditors of clients' conduct. We have seen some steps taken in that direction already, in rules regulating tax shelter lawyers, securities lawyers, and the banking bar.

It would be much better, however, if the impulse were to come from the legal profession itself—especially to build and to finance organizations in which lawyers can carry out their public function of recommending improvements in the legal framework that will reduce the danger of their clients' and their own subversion of that framework. Many of the existing bar organizations, unfortunately, are losing their capacity to fulfill that function. Even the august American Law Institute has become a place which lawyers, instead of checking their clients at its door, treat as just one more forum for advancement of narrow client interests.[16]

Think of lawyers as having the job of taking care of a tank of fish. The fish are their clients, in this metaphor. As lawyers, we have to feed the fish. But the fish, as they feed, also pollute the tank. It is not enough to feed the fish. We also have to help change the water.

Notes

An early version of this essay was given as a Daniel Meador Lecture at the University of Alabama School of Law. Thanks to Deborah Rhode for helpful comments.

1. See Jon Elster, *The Cement of Society: A Study of Social Order* (Cambridge: Cambridge University Press, 1989), 192–95.

2. Henry Hart and Albert Sacks Jr., *The Legal Process: Basic Problems in the Making and Application of Law* (Westbury, N.Y.: Foundation Press, 1994; William N. Eskridge Jr. and Philip P. Frickey, eds.; prepared for publication from 1958 Tentative Edition), 183–339.

3. The best account and critique I know of this "dominant view" is in William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge: Harvard University Press, 1998), 30–46.

4. James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little, Brown, 1950), 352–56; Mark C. Miller, *The High Priests of American Politics: The Role of Lawyers in American Political Institutions* (Knoxville: University of Tennessee Press, 1995), 57–75.

5. Joyce Appleby, *Liberalism and Republicanism in the Historical Imagination* (Cambridge: Harvard University Press, 1992), 271–76, 304–19, 326–39.

6. This phrase, and the content of much of the paragraph that follows, is taken from William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

7. See generally Novak, *People's Welfare*; and Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774–1861* (Cambridge: Harvard University Press, 1969).

8. Alexis de Tocqueville, *Democracy in America* (New York: Alfred A. Knopf, 1946; Phillips Bradley, ed., Henry Reeve, trans.), 1:208, 272–80; 2: 98–99.

9. In this century lawyers have been displaced from their once near-total dominance of

legislative and appointive positions, policy elites, and reform vanguards. They now share these roles with other public actors, such as economists, think-tank intellectuals, issue and area specialists, lobbyists, and grass-roots organizers. Nonetheless the role of lawyers, as public officials, public-interest advocates, and private lawyers advising clients, remains critical, especially as translators of public initiatives into legislative form, administrative rule and procedure, and practical enforcement.

10. For an epic history, see David Montgomery, *The Fall of the House of Labor* (Cambridge: Cambridge University Press, 1987).

11. See Louis Brandeis, "The Opportunity in the Law," in Brandeis, *Business: A Profession* (Boston: Small, Maynard, 1914), 329, 340–41.

12. See Deborah R. Hensler et al., *Compensation for Accidental Injuries in the United States* (Santa Monica: Rand, Institute for Civil Justice, 1991).

13. The literature on the tort "crisis" is enormous. For useful surveys of the data and assessment of the various positions, see Marc Galanter, "Real World Torts: An Antidote to Anecdote," 55 *Maryland Law Review* 1093 (1996); and Deborah Rhode, "Too Much Law, Too Little Justice," *Georgetown Journal of Legal Ethics* (forthcoming).

14. The NCF has been sharply criticized, with reason, as a basically conservative organization that promoted Workers' Compensation schemes in large part to co-opt and blunt the edge of movements for more generous industrial-accident compensation schemes. See, e.g., James Weinstein, *The Corporate Ideal in the Liberal State, 1900–1918* (Boston: Beacon Press, 1968). It takes something like the partisan posturing of belligerents in the current battle over the tort system to make the NCF look good.

15. One of the best statements to be found anywhere on the lawyer's public functions appeared in the report that launched the American Bar Association's 1969 Model Code of Ethics. "Professional Responsibility: Report of the Joint Conference [on Professional Responsibility of the American Bar Association and Association of American Law Schools, Lon L. Fuller and John D. Randall as co-chairs]," 44 *American Bar Association Journal* 1159 (1958): "Thus partisan advocacy is a form of public service so long as it aids the process of adjudication: it ceases to be when it hinders that process, when it misleads, distorts and obfuscates, when it renders the task of the deciding tribunal not easier, but more difficult. . . . [The lawyer as negotiator and draftsman] works against the public interests when he obstructs the channels of collaborative effort, when he seeks petty advantages to the detriment of the larger processes in which he participates. . . . *Private legal practice, properly pursued, is, then, itself a public service*" [emphasis added]. "Professional Responsibility," 1162.

16. On politics within the American Law Institute, see Alan Schwartz and Robert E. Scott, "The Political Economy of Private Legislation," 143 *University of Pennsylvania Law Review* 595 (1995).