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INTRODUCTION: A PROFESSIONAL AGENDA

*Andrew L. Kaufman**

It was a pleasure to be asked to write the introduction to this Symposium on Professional Responsibility in honor of my friend and former classmate Monroe H. Freedman. He deserves it. Wittingly, and unwittingly, he has done much for the cause of professional responsibility. Like most of us who teach and write in this area, he came to it by chance. The story of his speech¹ and article² in the mid-1960's that led to a hearing to consider disciplinary proceedings has been referred to by others in this issue and need not be repeated.³ For long years, except for a flurry of interest in the early 1950's prompted by the writing of that interesting maverick, Charles P. Curtis,⁴ the field of professional responsibility had lain fallow. Only the Warren Court had been active in the field, and its focus was on removing professional obstacles to increasing the availability of legal services to lower-income groups.⁵

The controversy surrounding Professor Freedman's speech and

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1. Lecture by Monroe H. Freedman, Criminal Trial Institute, Washington, D.C. (1966).

2. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469 n.1 (1966).

3. Lefstein, *The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma*, 6 HOFSTRA L. REV. 665, 671-76 (1978); Selinger, *The Perry Mason Perspective and Others: A Critique of Reductionist Thinking About the Ethics of Untruthful Practices by Lawyers for "Innocent" Defendants*, 6 HOFSTRA L. REV. 631, 632-38 (1978).

4. See Curtis, *Ethics in the Law*, 4 STAN. L. REV. 477 (1952); Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951).

5. See, e.g., *United Transp. Union v. State Bar*, 401 U.S. 576 (1971); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

article renewed interest in lawyers' problems. In its early phases, the discussion was largely in academic circles and centered on specific problems arising out of the obligation of confidentiality. Even the redrafting of the ABA Code of Professional Responsibility (the Code), which proceeded almost unnoticed in the years between 1964 and 1969, and its subsequent adoption by the states, failed to awaken an interest in more general problems of professional responsibility. The Code was not regarded by lawyers as affecting their individual lives very much.

Lawyers' involvement in Watergate changed all this. For the public, it dramatized not only problems of professional responsibility but also the way the profession was carrying out its obligations. Rightly or wrongly, sometimes one, sometimes the other, the profession was often portrayed publicly in the villain's role. For the profession, Watergate became the occasion for introspection and for discussion of problems that had long existed. Even the law schools became interested, to some extent. The focus of the new interest in professional responsibility problems has become more generalized and now extends to matters of access to legal services and to virtually all aspects of the way lawyers do their work. General practitioners, business and "public interest" lawyers, academics, the SEC, Congress, and the Supreme Court, not to mention sociologists, philosophers, and historians, have become sensitized to the profession's problems and have analyzed its resources. It has become a time for reexamination of generalizations, premises, and the structure of the profession. Many within and without the profession think that the time has come to reformulate its governing rules and ideals, and indeed the American Bar Association has appointed a diverse group of lawyers to rewrite the ABA Code of Professional Responsibility. The subject matter of the articles in this Symposium presents, in a general way, a partial agenda of the problems that the activity of the last dozen years has produced for the legal profession, and others, to solve. The purpose of this introduction is to add a few more items to that agenda.

I. THE LAWYER-CLIENT RELATIONSHIP

Obligation to Undertake Representation

One major problem is to adjust the relationship between lawyers and clients. That relationship has two aspects: One is the nature of the obligation of the profession and of the individual lawyer to represent all comers; the second is the extent to which a lawyer

should be obligated to achieve particular client ends or to use particular means when neither the ends nor the means are unlawful, but the lawyer finds them "unconscionable," or "morally reprehensible," to use the two terms in current vogue.

The legal profession in this country has not accepted the "taxi-cab rule" of British barristers under which it would be unprofessional to refuse to take on a client for any reason relating to the nature of the client or his or her cause. Although our governing rules state a general duty of the profession to see that unpopular clients get representation,⁶ there is nevertheless a fair amount of leeway for individual lawyers to decline to represent particular clients and causes on the basis of personal predilection. The uneasy balance between choice and obligation has been coming under increased pressure lately as some segments of the public and even of the profession seek to hold lawyers more accountable for their clients' ends and means, especially in the noncriminal and nonlitigation part of practice. This pressure is reinforced somewhat by developments in conflict-of-interest law that are making it more difficult for law firms to represent a wide variety of interests and that may result in associating firms with particular sides of issues even more closely, in the public view if not in fact. A new look at that balance is an important item on the professional agenda.

Client Objectives and the Lawyer's Conscience

The problems do not cease with the decision to undertake representation. For a very long time, there have been two threads in the ethics of the profession, one emphasizing the lawyer's duties to society and the other emphasizing his or her duty to a particular client. Canon 15 of the former ABA Canons of Professional Ethics (the Canons) intermingled both duties. It began by proclaiming:

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.⁷

6. See ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 & EC 2-27 (1976) [hereinafter cited as ABA CODE].

7. ABA CANONS OF PROFESSIONAL ETHICS No. 15.

With a break to announce that a lawyer should keep silent about personal belief in a client's innocence or the justice of his or her cause, the canon then stated the opposing thread:

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. . . . In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense.⁸

To make certain, however, that the duty to society was not understood as being overborne by the requirement of zeal on behalf of the client, the canon then concluded where it began:

But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.⁹

Canon 15 contained strong statements of the duties to both client and court. When these duties seemed to conflict, one could not draw comfort from the general language of the Canons about the preeminence of either.¹⁰ Except in a few cases, there was no specific language to resolve this difficult question. Lawyers had to choose one path or the other as best they could.

The ABA Code of Professional Responsibility adopts a somewhat different philosophy. Its great length, as compared to the Canons, assures that it covers a great many more subjects. Its format, the division between disciplinary rules and ethical considerations, was a largely unsuccessful effort¹¹ to set forth minimum enforceable standards for some specific situations and then aspirational goals for those and a number of other situations. In the process, however, more than the rhetoric of obligation disappeared. The former balanced statement of duties became obscured to the point where

8. *Id.*

9. *Id.*

10. *See also id.* No. 32.

11. *See* A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 30-31 (1976).

many thoughtful commentators have concluded that a new order has been created.¹²

By chance or design, the drafters of the Code found it possible and desirable to state the lawyer's obligation with respect to client objectives in the disciplinary rules. The obligation to represent a client zealously is stated cogently and broadly in DR 7-101(A): "A lawyer shall not intentionally: (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B)."¹³ The exceptions stated later in the provision all relate to matters of etiquette. Relying heavily on this rule and on the restrictive nature of the rules relating to withdrawal from representation,¹⁴ some commentators have concluded that a lawyer who has undertaken representation is required in the litigation context, and to a large extent in the nonlitigation context, to seek to achieve all the client's objectives by reasonably available means, the only restriction being that nothing "unlawful" is perpetrated.¹⁵

The lawyer's societal obligations in these matters, on the other hand, are not contained in the disciplinary rules but are scattered throughout the ethical considerations. One must look very hard in the present Code to find language comparable to that in former canon 15 telling the lawyer to avoid "chicane" and to "obey his own conscience."¹⁶ But it is there, albeit not so clearly as it was in canon 15. EC 7-8 tells the lawyer that in a nonadjudicatory matter he or she may withdraw if the client "insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules."¹⁷ More importantly, buried in EC 1-5 is the statement that a lawyer "should refrain from all illegal and morally reprehensible conduct."¹⁸

It is difficult to know what the committee that drafted the ABA Code of Professional Responsibility had in mind with respect to the balance of duties that was stated in former canon 15. Many

12. See, e.g., Bellow & Kettleon, *The Mirror of Public Interest Ethics: Problems and Paradoxes*, in PROFESSIONAL RESPONSIBILITY: A GUIDE FOR ATTORNEYS 219, 258-65 (1978); Schwartz, *The Missing Role of Professional Conduct*, 52 L.A.B.J. 10, 11-12, 15 (1976).

13. ABA CODE, *supra* note 6, DR 7-101(A) (footnotes omitted).

14. See *id.* DR 2-110.

15. See authorities cited note 12 *supra*.

16. See text accompanying note 9 *supra*.

17. ABA CODE, *supra* note 6, EC 7-8.

18. *Id.* EC 1-5 (footnote omitted).

courts that have dealt with problems of professional responsibility in recent years state quite clearly that there are still strong conflicting duties that must be reconciled in specific situations.¹⁹ High on the agenda of the new committee that is studying the Code ought to be a restatement of these duties, hopefully one that recognizes the importance of both, and also provides more guidance about the factors that ought to enter into resolution of the conflict in particular cases.

II. DISCRETION

In looking at possible accommodations in problems concerning lawyers' duties to clients, another major problem appears. One approach is to tell lawyers quite precisely what their obligations to prospective and current clients are. Such an approach, however, may pressure a lawyer to act in a way that he or she regards as "immoral." It is one thing for a lawyer to defend a client believed or even known to be guilty of a heinous offense against criminal charges brought by the state. It is quite another, at least for many, to be told that one must, under pain of disciplinary action, assist a "hate group" to incorporate; or assist a business to produce a dangerous but not outlawed product if that "group" or business is "unpopular" and unlikely to be able to find satisfactory representation; or assist a client to achieve an unjust but lawful solution to a dispute when the client desires it.

Such pressure has already contributed to the unwillingness of many lawyers to participate in the criminal process, although some see that situation as an argument against allowing lawyers freedom in choice of representation. But a more thoroughgoing pressure that forced lawyers to act against their consciences too often might well change the profile of the profession by forcing out the most sensitive practitioners. A wide discretion, on the other hand, will increase the number of situations in which the choice of lawyer may be crucial to attainment of a client's "lawful" objectives and will also tend to increase the public association of lawyers and clients. The same problem of narrow versus wide discretion exists with respect to those situations where breach of a client's confidences may be in order. A primary item on the professional agenda is analysis

19. See, e.g., *People v. Belge*, 50 App. Div. 2d 1088, 376 N.Y.S.2d 771 (4th Dep't 1975), *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 337, 390 N.Y.S.2d 867 (1976); *In re A*, 276 Ore. 225, 554 P.2d 479 (1976).

of different situations to mark out those where more precision is required from those where substantial discretion seems advisable.²⁰

III. CONFLICT OF INTEREST

The most litigated questions of professional responsibility at present are those involving conflict of interest. Although conflict issues, unlike so many others, are publicly visible, their preeminence in litigation is doubtless due, at least in part, to the strategic consideration of getting opposing counsel disqualified. The presence of that motive should not, however, detract from the importance of the problem. It involves, at one level of abstraction, our view of the appropriate adversariness of the legal system and, at a different level, an accommodation between the desire to lower legal costs, both generally and to particular clients, and our notions of the loyalty and independent judgment to which a client is entitled. While it has been suggested that the present rules are designed largely to further the profession's self-interest in providing more work for lawyers,²¹ my instinct is that to the extent professional self-interest is a factor, it works more in the opposite direction. Lawyers hate to send a client elsewhere and very often will attempt to represent differing interests when they should not. At the very least, this is another of those situations where it is difficult to ascribe a professional rule to individual self-interest. Depending on the content one gives that phrase, self-interest is in both scales.

There are two conflict-of-interest issues that should concern the profession. The obvious one is substantive resolution; the second is the impression that many students have that the level of professional sensitivity in this matter is amazingly low. One would like to think that these questions are inextricably intertwined, that the present rule would work well if only lawyers were more educated to its nuances. To some extent they are intertwined, but financial pressures work against the educational process to affect lawyers' decisions in this area probably as much or more than in any other.

The progression from the old Canons to the present Code has been in the direction of a greater tilt away from representation of

20. For further discussion of such discretion, see Frankel, Book Review, 43 U. CHI. L. REV. 874, 877-82 (1976) (ABA Code of Professional Responsibility (1975)). See also A. KAUFMAN, *supra* note 11, at 613-15.

21. See Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 727-28 (1977).

multiple interests when there is doubt. One recent effort, the proposal of the Legal Ethics Committee of the District of Columbia Bar with regard to former government lawyers and the "revolving door," has even eschewed sole reliance on general rules in favor of some mechanical, temporal restrictions on employment.²² On the other hand, with more interest and litigation has come more sophisticated analysis of the various factors that go into conflict-of-interest decisions, thus increasing pressure for balancing these factors on an even more ad hoc basis, and providing, incidentally, greater discretion for lawyers.²³

A subsidiary issue is whether the recognition of "public interest" considerations that has played such an important role in devising the much disputed "screening off" rules for the former government lawyer should carry over into other areas of conflict-of-interest law. One typical situation arises when the current rules are read to deny a legal aid office with several branches the ability to represent, say, both the indigent husband and wife in a divorce matter. The likely result is that one party will have no representation at all.²⁴ Another situation arises when a law firm member does work for, or sits on the board of, certain kinds of legal service offices. A too literal application of current conflict-of-interest rules might stifle that promising relationship.²⁵

Finally, even if the current rules are thought to be just right, there are two other problems to which attention should be given: the adequacy of the current rules about the nature of disclosures that should be made by a lawyer seeking consent to multiple representation and the effect of seeking consent itself. One does get the impression sometimes that the disclosures made are very sketchy and that a form of words, with some examples, ought to be

22. These proposals are reprinted in *DISTRICT LAW*, Winter 1977, at 46.

23. See, e.g., *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975); *THE COMM. ON PROFESSIONAL AND JUDICIAL ETHICS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, OPINIONS*, No. 889 (1976), reprinted in 31 *REC. A.B. CITY NEW YORK* 552 (1976).

24. Compare *COMM. ON ETHICS, BOSTON BAR ASSOCIATION, OPINIONS*, No. 76-2 (1976) (permitting such representation under certain conditions) with *Borden v. Borden*, 277 A.2d 89 (D.C. 1971) (forbidding such representation); compare *ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL OPINIONS*, No. 1233 (1972) (operation of Indian reservation legal aid office) with *id.* No. 1235 (operation of Coast Guard legal aid office).

25. See generally *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976). Compare Barnett, Book Review, 90 *HARV. L. REV.* 648, 654-56 (1977) with Kaufman, *The Lawyers' New Code*, *HARV. L. SCH. BULL.*, October 1970, at 19.

found that will inform lawyers more fully of their responsibilities in that regard.

The consent issue is more serious. Consent is not always the easy, obvious solution to a conflict problem. In many cases, it is simply a way of shifting a conflict problem from the lawyer to the client. Worse than that, the situation may be such, or appear to the client to be such, that consciously or unconsciously the client is coerced to consent. A client who has invested time and money in a relationship with a lawyer may be unwilling to jeopardize that relationship by refusing to grant permission to his or her lawyer to represent a client with a differing interest. Somehow the problem of the coercion that may be involved in seeking consent must be brought more into the forefront of lawyers' consciousness.²⁶

IV. PROVISION OF LEGAL SERVICES

Another large issue on the profession's agenda is the proper stance to be taken toward the provision of legal services to the populace at large. The existence, nature, and extent of unmet legal needs have been debated and investigated for some time, and a recent study has developed a good deal of data on the subject.²⁷ The amount of society's resources that ought to be spent on the provision of legal services is also a matter of current governmental interest, especially in connection with annual appropriations for the National Legal Services Corporation. But attention has begun to focus on the specific nature of an individual lawyer's obligations, and the Special Committee on Public Interest Practice of the American Bar Association has recommended that a specific quantified obligation be required in public interest work, as that term is defined by that committee.²⁸ The clash of "public interests" involved—the "service" as opposed to its "compelled" nature and infringement on a lawyer's "personal liberty"—assures that the battle over this issue, which has surfaced on the profession's agenda so recently, will be heated.

Attention has also begun to focus on the judicial system itself,

26. For a good discussion of current conflict problems, see Fordham, *Limitations on Representation of Clients in Litigation*, 33 BUS. LAW. 1193 (Special Issue Mar. 1978). Many other issues of professional responsibility are discussed in other articles in this special issue of *The Business Lawyer*.

27. See B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* (1977).

28. See ABA SPECIAL COMM. ON PUBLIC INTEREST PRACTICE, *IMPLEMENTING THE LAWYER'S PUBLIC INTEREST PRACTICE OBLIGATION* (1977).

and some suggest that part of the solution to society's legal needs may well be found in creating structures outside the legal system.²⁹ The problems posed by these proposals and the relation of such structures to the legal profession are only just beginning to be explored, but the suggestions are bound to receive serious consideration in the future, especially if the judicial system does not succeed in resolving its own administrative problems better than it has in the recent past. These are also important items for our professional agenda.

V. COMPETENCE

The past ten years have seen growing interest in the profession in that category of issues subsumed under the heading of competence, including competence as related to admission, and especially as related to discipline and to specialization. Professor Cohen's provocative article³⁰ in this Symposium raises a number of the issues. The great problem is to achieve a satisfactory accommodation between the achievement of the democratic ideals that ought to govern not only admission to the profession but also the way in which the profession provides lawyers who can relate to the legal problems of the great masses of the American people and the achievement of sufficiently high standards of competence to handle the increasingly more technical requirements of a corporate regulatory state. "Elitism" is a dirty word in democratic circles, and there is no doubt that prejudice has played, and still plays, a role in the professional hierarchy. But "elitism" in its striving for quality work is the essence of professionalism, and critics should avoid slipping into a too easy equation of high standards with a cover for exclusiveness and prejudice.

The law schools themselves have been struggling with the same problem not only at the admissions level but also in the expectations of achievement that they set as goals for students. If it is true that the new emphasis on humaneness, rapport, and popularity in the classroom has been accompanied by lowered expectations of student achievement, if it is true that most second-year and third-year students do not work on academic subjects as hard as they must to achieve an understanding of the subject matter, then

29. See, e.g., ABA, REPORT ON THE NATIONAL CONFERENCE ON MINOR DISPUTES RESOLUTION 11-20 (1978).

30. Cohen, *Certification of Trial Lawyers—The Judicious Structuring of the American Legal Profession*, 6 HOFSTRA L. REV. 793 (1978).

that is a condition the law schools need to remedy. One recent suggestion for academic malaise—shortening law school to two years—seems counterproductive. The substantive law foundations for a lawyer's whole career, including a sense of the mission of law, are laid in law school. Students need more education, not less, to prepare them to serve the public properly.

A new appreciation seems to be emerging in the law schools of the necessity to provide a balance in the curriculum among the study of legal doctrine, study of its connections with everything else that is going on in society, study of legal theory, and study of the practical problems faced by lawyers and the profession. But the best curriculum will fail if it is not taught with a sense of confidence in its purpose. That sense, both in the law schools and in the profession itself, seems to be faltering at the present moment. The profession is on the defensive. Indeed, there are some who are suggesting that society would be best served if there were no legal profession at all. That is an old cry, but it is being heard somewhat more insistently today, backed by a good deal of *mea culpa* and self-criticism from within the profession itself, at all levels, including Justices of the Supreme Court. In such an atmosphere, law can be taught and practiced with satisfaction only by those whose study and contemplation has left them with a confident feeling of the utility of what they are doing. That confident feeling must be justified by service, and by service beyond that for which payment is received. Acceptance of that obligation is all that entitles lawyers to be invested with the title and benefits of a profession. If the title is justified, at least in substantial part, and I am one of those who thinks it is, then even though we see large room for improvement—and where is there not in human affairs?—we should not be so defensive about what we are doing. Perhaps a renewal of confidence should be the number one item on the profession's agenda.

