Chapter 9

Law

The Adversary System of Justice: An Ethical Jungle

Informing Clients About Limits to Confidentiality

Pure Legal Advocates and Moral Agents: Two Concepts of a Lawyer in an Adversary System

Can Virtue Be Taught to Lawyers?

Perhaps more than other professionals, lawyers have come under fire for their ethical conduct (or misconduct, as many would say). Through anecdotes, character assaults, and "lawyer jokes," they are said to be dishonest and greedy and to have no concern for justice—only for victory in the courtroom. The degree to which these allegations are true may be difficult to assess, but what can be said is that lawyers, like professionals in all fields, are prone to certain ethical hazards and temptations. There are enticements generated by the financial benefits of being successful in this profession, and lawyers face many of the same organizational issues (such as employee rights) that other professionals confront. In law, however, the main problem has to do with the way the system operates. The Anglo-American system, not just implicitly but in its actual codes, encourages lawyers to win rather than to seek truth or justice. This creates a variety of ethical difficulties that must be sorted out. The rules in existing codes, such as those of the American Bar Association and the Association of Trial Lawyers of America, must be interpreted carefully, so that individual lawyers are able to apply those rules to their particular circumstances. In some cases it may be appropriate to change some of the existing rules. Both sorts of considerations are appropriate issues for the study of professional ethics and for legal ethics specifically.

Allen Taylor explores the nature of the Anglo-American legal system—the so-called "adversary system"—in more detail. The idea behind the adversary system of justice is that the truth will be discovered most effectively when opposing sides (prosecution and defense in criminal trials) attempt to demonstrate the plausibility of their own cases. Lawyers are not supposed to seek truth—that is the task of the judge and jury, who will be most successful in uncovering the truth when they are presented with partisan advocates each putting forth the best possible arguments for their positions. Thus, inherent in the adversary system are several complex questions about the ethical behavior of lawyers, and the answers to these questions may not be in line with commonsense, "everyday" morality. Certain sorts of dishonesty, for example, may not always be ethically wrong and may even be required of lawyers. Taylor reviews various aspects of the American Bar Association's Code of Professional Responsibility, originally adopted in 1970, and considers possible implications of the leeway it gives to lawyers, especially defense attorneys. The main issue, he claims, turns out to be attorney-client confidentiality. Defendants are owed the best possible defense, and the ability of a client to be confident in his lawyer's duty to maintain confidentiality is crucial in guaranteeing the best possible defense. Some have claimed that this duty must be absolute—that if there were exceptions, clients would not be fully forthcoming for fear that an exception might allow their information to become known to all. This would compromise their defense. Taylor concludes by considering some possible limitations to this view, and argues that blatant dishonesty in defense of one's client is not ethical, even if the Code allows for it.

Lee A. Pizzimenti follows up on this issue by pointing out the misperception, fueled by the notion of "attorney-client privilege," that anything told to lawyers will be kept confidential. Pizzimenti maintains there are indeed instances in which confidentiality may be compromised, perhaps even to the point of deceiving one's client. Because there are exceptions, the appropriate ethical strategy for a lawyer to employ is to inform her clients ahead of time about the limitations on her duty of confidentiality. That way, the client can decide for himself whether he wants to share certain information. His consent to do so would then be under conditions of informed consent as the term is used in medical ethics. This duty is appropriate for the reason that it enhances the autonomy of the client—his ability to control his decisions. Pizzimenti also includes some warnings for how this duty should be implemented, and cautions about providing selective information to clients

and about "standardizing" clients rather than seeing each for his own individual circumstances.

Because of confidentiality and other pressures resulting from the adversary system of justice, it is sometimes said that a lawyer must have good moral character if she is to avoid acting unethically. She must, in other words, be a good person if she is to be a good lawyer. Whether someone can be both of these things is questionable, however. In terms of virtue ethics, being a good person and being a good lawyer may require different or even conflicting sets of virtues. Elliot Cohen discusses this tension in his article. Cohen systemically describes the virtues that are characteristic of a good person—the traditional moral virtues, such as honesty, courage, and benevolence—and then considers two views of lawyers in order to see whether either can be compatible with being a morally good person. The first, the pure legal advocate concept, is that a lawyer's sole function is to assist her client. The skills needed by a lawyer to help her client at all costs (since that is her sole function) do not allow for the development of the traditional moral virtues. The second view of lawyers, the moral agent concept, is that assisting one's client is important but cannot be carried out at all costs; rather, the function of a lawyer is to provide this assistance only in certain (morally acceptable) ways. Unlike the first concept of a lawyer, this second conception is consistent with being a morally good person, according to Cohen. It calls for lawyers to be truthful, courageous, and benevolent in their advocacy of clients. The conclusion, then, is that the notion of a "good lawyer" must be revised; while the pure legal advocate concept is what people often envision, the moral agent concept is more appropriate, and if the virtues associated with it can be incorporated into standard legal practice, lawyers will develop good moral habits and become more ethical.

Whether lawyers are indeed able to incorporate those virtues into their practice is debatable. Amy Gutmann examines this question in her article, addressing not two but three conceptions of lawyers. Each has certain desirable elements, even the "standard conception" which parallels the pure legal advocate concept that Cohen criticizes so strongly; being a zealous advocate for one's client is not necessarily bad, but must be balanced by other considerations. On the other hand, she argues that all three conceptions are somewhat inadequate, including the one that parallels Cohen's moral agent concept. The missing element is the skill—the virtue—of being able to deliberate with nonlawyers, particularly clients. This skill is important, since lawyers, in their advocacy of their clients, are morally required to work together with the clients. This will be true on any of the three conceptions of legal virtue, and almost certainly on any other conception one might defend. This is why, in the end, it is not necessary to choose any one conception as morally superior; the importance of the deliberative virtues follows from any of them. Thus, Gutmann concludes, virtue can indeed be taught to lawyers—if legal education emphasizes the deliberative virtues and if the profession can be altered so as to encourage lawyers to deliberate.

The Adversary System of Justice: An Ethical Jungle

ALLEN TAYLOR

SOCIETY'S ATTITUDE toward the legal profession has always been ambivalent. Lawyers are accorded high social status and earn well above average incomes. The American political system has always regarded legal expertise highly; lawyers outdistance any other profession or occupation in representation on legislative bodies at the national, state and local levels. The nation's law schools are annually swamped by applications from among the brightest and most ambitious college graduates. But underneath these manifestations of social approbation, there runs a vein of distrust. While the social utility of lawyers is recognized and widely appreciated, moral approval of the profession has not been high. The average man wants to stay as far away from lawyers as possible except when he is in trouble.

In 1970 the American Bar Association adopted a Code of Professional Responsibility to replace the original Canons of Professional Ethics which had for more than half a century provided guidance to lawyers on how to deal with ethical problems arising out of the practice of their profession. Canon 9 of the new code reminds lawyers of their solemn duty to uphold the honor and integrity of the profession, and to encourage respect for the law and the courts. The preamble of the Code states:

> Lawyers have an obligation to maintain the highest standards of ethical conduct. . . . It is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.

Unfortunately for the self-image of the legal profession, this hoped for respect and confidence has not always been forthcoming.

Why should there be a wide gap between the proclaimed ethical standards of one of society's leading professions and its actual ethical practices? A good place to begin looking for an answer is in the writings of Jerome Frank, law professor and Judge of the U.S. Court of Appeals.[1] Our legal system, Frank wrote, is commonly referred to as the adversary system of justice. The theory is that: the best way for the court to discover the facts is to have each of two opposing sides strive as hard as it can, in a purely partisan spirit, to bring out evidence favorable to that side and to discredit the evidence of the other side.

Under the adversary system, an experienced lawyer does his best to minimize the effect of testimony disadvantageous to his client, even when he has no doubt of the accuracy and honesty of the testimony. He considers it his duty to create a false impression of the testimony of any adverse witness. If a witness is timid, or frightened by unfamiliarity with the courtroom, the lawyer tries to confuse him to weaken his credibility. A skilled advocate can by rapid cross examination ruin the testimony of such a witness.

Experienced lawyers attempt at all costs to keep out reliable evidence hurtful to their cause which would help the court arrive at the truth. If a witness has given inaccurate or perjured testimony favorable to his client, a lawyer will attempt to hinder efforts to expose the untruthfulness. He will attempt to trap the other side with surprise testimony. The purpose of these tactics is to prevent the court from correctly evaluating evidence, and to shut out evidence which would contribute to a verdict based on all the facts. The lawyer aims at victory, not the truth, and not justice as it is commonly defined.

[1]Jerome Frank, *Courts on Trial* (Princeton: Princeton University Press, 1949), p. 83.

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All of these strategems are permitted, indeed compelled, by our legal system, which treats a law suit as a battle of wits and guile. Perjured testimony is all too frequent, because the contentious method of trying a case tends to make partisans of witnesses. They consider themselves not as aides in a truth finding venture but soldiers in a war. In litigation it is customary that both parties are interested in misrepresenting, exaggerating, or suppressing the truth.

Before dealing in greater detail with the actual working of the adversary system in a courtroom, especially in the practice of criminal law, let us take a closer look at the professional code of ethics which is supposed to guide lawyers in the quest for justice. We find that there are two contradictory sets of directions in the code. One set emphasizes the lawyer's duty to his client, the other his duty to the court. The clash between the two creates the ethical difficulties with which this paper deals.

Canon 2 of the new ABA code states that a lawyer should not seek to be excused from representing his client because of his belief that a defendant in a criminal proceeding is guilty. It supports this position by a quotation from Samuel Johnson. Upon being asked by Boswell what he thought of "supporting a cause you know to be bad," Johnson replied:

> Sir, you do not know it to be good or bad till the judge determines it. Your thinking, or what you call your knowing, a cause to be bad must be from reasoning, from supposing your arguments to be weak and inconclusive. But sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it; and if it does convince him, sir, you are wrong and he is right.

Here we confront the ethical problem directly. A lawyer who "knows" his client is guilty is required by the code of his profession to defend him anyway and, as we shall see later, do everything he can within the law to win his acquittal. If he is clever or talented enough to win a not-guilty verdict, the legal profession has been well served—but at the expense of truth. If a defense lawyer's conscience should prick him at the thought that he has defeated the ends of justice by gaining acquittal for a guilty man, he may salve it by applying the balm of Dr. Johnson's belief that the truth is decided by a court's verdict.

It is interesting to see how Dr. Johnson viewed the lawyer's role at the bar. The ABA quotation did not include this passage, which immediately follows the exchange quoted in the code:

Boswell: "But . . . does not affecting a warmth when you have no warmth . . . impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life . . . with his friends?"

Johnson: "Why no . . . Everybody knows you are paid for affecting warmth for your client, and it is . . . properly no dissimulation. The moment you come from the bar you resume your usual behavior. Sir, a man will no more carry the artifice of the bar into society than a man who is paid for tumbling on his hands will continue to tumble on his hands when he should walk on his feet."

Canon 4 states that a client must feel free to discuss whatever he wishes with his lawyer:

> While it is the great purpose of the law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confide in a lawyer. This . . . can be readily available only when the client is free from the consequences of apprehension of disclosure.

Thus the great purpose of the law must yield to a higher imperative—the confidentiality of the lawyer-client relationship.

There is no mention in the Canons of the obligation of a lawyer with regard to knowledge imparted by his client that he has committed a crime. This is a strange omission, especially in view of the fact that by the Canon a lawyer is obliged to reveal the intention of his client to commit a crime and the information necessary to prevent the crime. "Public policy forbids," says the Canon, "that the relation of attorney and client should be used to conceal wrongdoing on the part of the client." This statement refers to a prospective crime, not to knowledge of one that has been committed. Thus an attorney has an ethical obligation to help prevent a crime from being committed by his client if he has knowledge of such an intention and an equally binding—obligation to attempt to prevent his client from being found

guilty of a crime that he knows or has reason to believe he has already committed.

Canon 7 calls upon the lawyer to represent his client zealously within the bounds of the law. This obligation is at the heart of the adversary system. The advocate seeks what is best for his client. He is instructed by this canon not to make his own decision about what is just, since this would be usurping the function of the judge and jury. He must suspend his moral beliefs and his ethical judgment, and in some cases work zealously for a decision he knows will be unjust. The Canon states, "The lawyer is not an umpire but an advocate. His personal belief in the soundness of his cause is irrelevant."[2]

> Any lawyer who presumes to act as a judge of his client's case rather than an advocate is morally irresponsible to the legal profession. A lawyer should never apply his own personal values, whatever they might be, when he represents or advises a client.[3]

> Lawyers are accused of taking advantage of loopholes and technicalities to win. Persons making this charge do not understand that a lawyer is hired to win, and if he does not exercise every legitimate effort in his client's behalf, he is betraying a sacred trust.[4]

An attorney may in fact be held accountable for trial tactics actuated by his conscientious belief that his client should be convicted. A defendant's constitutional rights may be adjudged violated by an attorney who does not zealously work for his acquittal, while believing him guilty.

If the foregoing appears to weigh the balance of the attorney's obligations heavily in favor of the client as against the search for truth, the canons also provide exhortations to the contrary. Canon 5 states that the office of attorney does not permit, much less demand, for any client any manner of fraud or chicanery. It calls upon the attorney to obey his own conscience, not that of the client. According to Canon 32 of the old code of ethics, no client or cause is entitled to receive any service involving disloyalty to the law, or deception or betrayal of the public. Canon 41 instructs a lawyer who discovers a fraud or deception to endeavor to rectify it, first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

It is clear that sanction can be found within the ethical code for widely differing kinds of behavior. There is one other apparent contradiction in the code, relating to criminal cases, which should be noted. The code calls upon the prosecution to seek justice, not merely a conviction, but it issues no corresponding injunction to the defense attorney to seek justice, not merely an acquittal. The prosecution is called upon to disclose to the defense any evidence it has which tends to negate the guilt of the accused. The reasons offered for the distinction are that the prosecutor represents the sovereign and should use restraint, and that the accused is to be given the benefit of all reasonable doubt. Neither reason seems sufficient to justify the differing ethical obligations assigned to the two sides in a criminal case.

In a series of brilliantly iconoclastic law review articles in 1966 and 1967, Professor Monroe Freedman of the George Washington Law School, co-director of the Criminal Trial Institute of Washington, D.C., cut through the tangle of conflicting ethical obligations imposed by the legal code and reached his own conclusions about the ethics required of defense lawyers. These conclusions, which were offered as the logical outcome of the practical application of accepted legal principles, caused a furor in the profession. Freedman was accused of advocating unethical conduct, and underwent a series of hearings by bar committees on charges of conduct injurious to the profession. After nearly a year of investigation, the charges were dropped, but the issues remain. The bar has yet to deal with them satisfactorily.

In almost any area of legal counseling, Freedman wrote, a lawyer may be faced with the dilemma of either betraying the confidence of his client or purposefully deceiving the court. The problem is particularly acute in the practice of criminal law. If the adversary system is to function effectively, it is necessary that each adversary have "entire devotion to the interest of the client and

[2] *American Bar Association Commission on Professional Ethics*, Opinions, No. 280.
[3] Paul Teschner, *Lawyer Morality*, GEORGE WASHINGTON LAW REVIEW 789 (1970), 38.
[4] *ABA Code of Professional Responsibility*, Canon 7.

warm zeal in the maintenance and defense of his rights." The sacred trust of confidentiality must be inviolable, or else the client would not feel free to repose confidence in his attorney. Thus the role of the advocate in the adversary system may require the attorney to withhold truthful information and frustrate the search for justice, because greater damage would be done to the system if clients could not confide in their lawyers.

Freedman posed three ethical dilemmas for defense lawyers. Is it proper to make a witness appear to be mistaken or lying when you know his testimony to be truthful and accurate? Is it proper to put a witness on the stand when you know he will commit perjury? Is it proper to give your client advice about the law when you have reason to believe that the knowledge you give him will tempt him to commit perjury? In many cases, he wrote, the answer to all three questions is in the affirmative. While an attorney *is* an officer of the court, and *does* participate in the search for truth, and *has* an obligation to be candid and not to employ fraud and chicanery, these duties must yield to his obligations to his client.

Freedman cited in support of this contention Opinion 287 of an ABA Committee on Ethics in 1953, which held that a lawyer should remain silent when his client lies to the judge by saying that he had no prior record, despite the lawyer's knowledge to the contrary. A majority of the committee agreed that the ruling did not apply to a situation in which the lawyer learned of the prior record from a source other than the client. A distinguished judge, in a minority opinion, said that in neither case should a lawyer expose his client's lie. Here, said Freedman, was a clear case of fraud, chicanery, and lack of candor with the court, as language is ordinarily understood, and yet the ruling held it was not to be so construed.

Freedman pressed the implications of the adversary system to their logical conclusion, dismissing as hypocrisy attempts to deny their ethical difficulties. He labeled the plea of not guilty entered by a defendant and his lawyer, both of whom know he is guilty, as a lie sanctioned by the system. Some call it a legal fiction, he said, not necessarily meaning not guilty in fact but not legally guilty. But a criminal defense lawyer, he wrote, cannot win cases by trying to prove just reasonable doubt. Effective defense advocacy requires that his every word, action and attitude be consistent with the conclusion that his client is in fact innocent. So the plea of not guilty—a lie—commits the advocate to a trial strategy aimed at proving that his client, whom he may know in fact to be guilty, is in fact not guilty.

Many lawyers refuse to face the ethical problem involved in the not guilty plea. They argue that a lawyer can never be certain of his client's guilt, even when he confesses. He may be protecting someone, or he may be mistaken in his own belief in his guilt. (His gun, unknown to him, was loaded with blanks, and the actual shot, unknown to him, was fired by someone else.) Freedman properly says that for those who are satisfied with this kind of reasoning, further discussion is useless. Others argue that a lawyer can remain selectively ignorant. He may insist, at a first interview, that if the client is guilty, he does not want to know it. But it is inconceivable that he could give adequate counsel without knowledge of all the circumstances. Professional responsibility requires that a lawyer have full knowledge of every pertinent fact. He must seek the truth from his client, not shun it. He must convince the client that full and confidential disclosure to his lawyer will never result in prejudice to his interests by any word or action of his lawyer.

Should a lawyer put his client, who has confessed to him that he is guilty, on the stand to make a perjured plea of innocence? If the defendant does not take the stand, according to Freedman, the likelihood of conviction is enormously increased. Therefore, he argued, an attorney who prevents his client from testifying only because the client confided his guilt to him is violating that confidence by acting in a way to prejudice his client's interests.

It is argued that a counsel may withdraw from a case if he learns that his client is guilty. But the ABA holds it is not ethical to do this unless the lawyer has said at the outset that he will withdraw if he learns that his client is guilty. Once having learned under seal of confidentiality of his client's guilt, he must continue to defend him zealously. If he withdraws on the grounds of his client's guilt, his explanation to the judge of the reason for withdrawal is a violation of confidentiality and subject to condemnation.

Some hold that after unsuccessfully attempting to persuade the client not to perjure himself, and after asking the judge to be relieved (a motion likely to be denied because it would cause a mistrial), a lawyer may then ethically put his witness on the stand. Freedman disagrees with both the effort to persuade and the effort to withdraw, citing damage to the client's chances of acquittal from the first course and the violation of confidentiality in the second. Others hold that an attorney may properly let a perjurious client take the stand if he does not assist him by direct examination, and if he omits reference to the perjured testimony in his closing argument. Freedman calls such omissions flagrant breaches of legal ethics.

In sum, the obligation of confidentiality within the context of the legal system allows an attorney no alternative to putting a perjurious witness on the stand. The legal code makes only two exceptions to confidentiality. One relates to a lawyer who is accused by a client and may disclose the truth to defend himself. The other relates to an announced intention to commit a crime. This cannot logically be understood, Freedman argued, to include the crime of perjury committed during the specific case in which the lawyer is serving. Even when the intention to commit a crime is in the future, Canon 37 does not require disclosure, only permits it. Canon 29 requires counsel to inform the other side if perjury is committed, but this can only refer to perjury by an opposition witness. To disclose one's client's perjury would involve a direct violation of confidentiality. Freedman's conclusion is that an affirmative answer to the three questions posed about a defense lawyer's obligation is warranted by the maintenance of the adversary system, the presumption of innocence, the prosecution's burden to prove guilt beyond a reasonable doubt, the right to counsel, and the confidential nature of the lawyer-client relationship.

Amidst the welter of conflicting claims and obligations, judgments and opinions, one fact is certain. It is the confidential nature of the attorney-client relationship which is at the heart of the ethical difficulties in the adversary system. It is abundantly clear that the privilege of confidentiality is a significant barrier to the search for truth and the attainment of justice. Bankers, accountants and psychiatrists are not entitled to this privilege. Why should lawyers have it? The rationale is that for an attorney to function properly, he must know all the facts; but a client will not reveal all the facts if he thinks they will be used against him. The revelation by an attorney, voluntarily or involuntarily, of evidence of guilt obtained from his client conflicts with the right to counsel and the privilege against self-incrimination.

If a trial is viewed as an irrational process—a substitute for trial by battle—then a lawyer's job is to champion wholeheartedly his client's cause, and Professor Freedman's description of permissible conduct by a defense attorney is accurate. But if a trial is an attempt to reach a rational, informed decision, then his description is wrong. If an attorney's job is to help produce such a decision, he does not do so by abetting perjury or attacking truthful witnesses. To the extent that the concept of confidentiality leads to such acts, it should be restricted. Recent decisions have markedly reduced the adversary role of the prosecutor, who must now respond to the discovery rights of the defendant, is prohibited from suppressing evidence helpful to the defense, and is required to reveal names of material witnesses to the defendant. These advances have reduced the irrational aspects of the adversary system. It is time to apply the same requirements to the defense.

The right to counsel should mean the right to a full defense under law, not the right to a lawyer who will become an accomplice in concealing evidence and defeating justice. The systematic presentation of falsehood or the withholding of knowledge of perjury on behalf of a client is personally demeaning and socially undesirable. Canon 5 says, "A lawyer should obey his own conscience, not that of his client"; but there are many lawyers who believe and act otherwise and who can point with some justification to sections of the code of jurisprudence which support them. The legal system should not put lawyers in the position of continuing to seek the acquittal of guilty clients. To eliminate the uncertainty which now exists about the ethical obligations of lawyers will require the profession to face up to the need for a thorough overhauling of the adversary system as it is practiced today in the United States.

Discussion Questions

1. Explain how the adversary system of justice works.
2. What duties does a lawyer owe to her client? What are her duties to the court? When these duties seem to conflict, how can she determine which duties should be retained and which should be overridden? On what basis might she be able to "weigh" these conflicting duties? What is the relevance of operating in an adversary system of justice?
3. What kinds of ethical difficulties does the ABA code of ethics create for the conscientious lawyer?
4. According to Taylor, Monroe Freedman addresses the ethical difficulties in the ABA code. In your opinion, how does Freedman resolve these problems? What does Taylor think?

Informing Clients About Limits to Confidentiality

LEE A. PIZZIMENTI

THE LEGAL ETHICS RULES concerning the maintenance of client confidences are varied and confusing, and many exceptions exist allowing or mandating the lawyer to disclose confidences. For example, lawyers must disclose client perjury in many states, and they often have discretion to report future crimes or to disclose information necessary to protect themselves or collect a fee.[1] Yet, clients expect lawyers to keep their secrets. Lawyers encourage that belief, either by misstating the scope of protections or by saying nothing to clients and allowing television or friends to serve as the source of information. In one survey of attorneys, Professor Zacharias found that 22.6% "almost never" informed clients abut confidentiality, and 59.7% stated that they informed clients in less than 50% of their cases.[2] In fact, 72.1% of the lawyers surveyed admitted they told clients "only generally that all communications are confidential." As a result, many clients believe that anything they tell their lawyers will never be disclosed to anyone.

Suppose, then, that a lawyer discloses client information. The client may feel that the lawyer has misled him, or, at a minimum, has not provided him with an adequate opportunity to consider whether he should share information with the lawyer. That is, his decision to confide in the lawyer was not an informed one. The question then becomes whether the client should be the one to make that choice, and, if so, whether other considerations outweigh that right.

Rule 1.4 of the Model Rules of Professional Conduct recognizes that lawyers must provide information to the extent "reasonably necessary to permit the client to make informed decisions

[1]See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c) (1980); MODEL RULES OF PROFESSIONAL CONDUCT 1.6(b), 3.3 (1983) (hereinafter MODEL RULES). Confidentiality rules vary greatly among states. See Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 CATH. U. L. REV. 801, 810 n.34, 829 n.126 (1990).

[2]Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989).

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regarding the representation." However, not all decisions are to be made by the client. The traditional approach is that "procedural," or tactical, decisions are to be made by the lawyer, while the client makes "substantive" decisions. The notion supporting this dichotomy is that a lawyer is in a better position to evaluate those tactical decisions requiring professional discretion.

A lawyer may argue that whether a client should be told about confidentiality exceptions demands an examination of personal and professional ethics that transcends the attorney-client relationship. She may support that position by recognizing that client consent is but one of many exceptions to the rule requiring confidentiality. Thus, one could view the decision as akin to a professional, tactical one rather than a substantive client decision.

While it may be concluded after consideration that lawyers should refrain from informing clients about confidentiality exceptions, it is improper to conflate the questions of making disclosures to third parties and giving clients information about that possibility. Just as a lawyer should not decide to disclose client information until after she undertakes a careful balancing of rights at stake, the lawyer should not withhold information from the client until she has made that analysis. I will undertake to consider that question now.

Using the substance/procedure analysis to determine what rights are at stake is not useful, because issues that are ostensibly procedural can have a profound impact upon clients. Professor David Luban provides the example of an innocent client being prosecuted for murder who forbade counsel from calling an alibi witness. While one might claim that choice of witnesses is a tactical matter, the client refused for what he viewed to be a "substantive" reason: the witness was his best friend's wife, who would testify that he had been with her during the time the crime had been committed.[3] A less provocative example might be that a client negotiating a long term contract would prefer that a lawyer be accommodating to the other party to ensure a comfortable working relationship with him, while the lawyer might wish to allow no compromise in order to effect the best possible agreement.

Recognizing the artificial distinction between substance and procedure, commentators agree that the appropriate focus should be on client expectations rather than upon whether the lawyer historically has made decisions of the type contemplated. Instead, the lawyer should consider whether the client would view the information as material to his decisionmaking. This focus is consistent with the doctrine of informed consent in the medical profession and with Model Rule 1.4.9. More important, it helps ensure that the lawyer will treat her client as an individual rather than merely as a means to illustrate her professional skill and standards. Thus, to determine whether it is appropriate to withhold information, one must balance the rights implicated by the failure to allow informed consent against countervailing rights affected if clients are apprised of confidentiality's limits.

A requirement of informed consent is necessary to protect the right of autonomy, which is derived from the Kantian notion of respect for persons as ends in themselves rather than as simply means to another goal. As Gerald Dworkin explains, the ability to make decisions reaffirms our sense that we are individuals able to control our own destiny.[4] Thus, the ability to make autonomous choices reaffirms our status as persons.

To ensure that autonomy, lawyers must recognize their duty of veracity toward clients, which includes not only the duty to refrain from misstatements, but also the affirmative responsibility of candor. Veracity is critical to the maintenance of autonomy, because a lack of it creates two obstacles to autonomous decisionmaking: limiting

[3]Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 456. For other example of procedural issues with substantive impact, see *id.* at 454–59.

[4]Dworkin, *Autonomy and Informed Consent*, in President's Commission for the Study of Ethical Problems in Medicine & Biomedical & Behavior Research, 3 MAKING HEALTH CARE DECISIONS: THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP 74 (1982) (quoted in Strauss, *supra* note 8, at 337). Thus, autonomy is justifiable as a good in itself. Dworkin, *supra*, at 73–74. Moreover, principles of utility justify informed consent: they assure that individual choice is maximized, resulting in client satisfaction; attorney and client are protected from the dangers of poor communication; the public may be less skeptical of the legal profession; and they encourage self-scrutiny.

information limits choices, and, almost inevitably, the client may be manipulated if an attorney withholds or misstates information. Thus, failure to share the material fact that secrets may be disclosed has an immediate and substantial impact on client autonomy.

In most cases, failure to disclose limits to confidentiality should be deemed an intentional act as a lawyer is bound to know the requirements of the code of ethics in her state. Intentional deception creates additional strains upon the attorney-client relationship, even if the client is unaware of the deception. First, the lawyer may feel compelled to make additional false statements to avoid discovery of the original deception. Moreover, the attorney may become less sensitive to the morality of her actions: "lies seem more necessary, less reprehensible; the ability to make moral distinctions can coarsen; the liar's perception of his chances of being caught may warp."[5] Finally, the lawyer who successfully deceives may view her client as being easily duped. Consequently, the attorney's respect for the client as an autonomous moral agent may be reduced. Perhaps she may develop a general unwillingness to respect the client's rights, or those of other clients. A lack of informed consent about limits on confidentiality also presents an interesting irony: the lawyer makes a misrepresentation regarding secrecy to clients to create an atmosphere encouraging candor. Such lawyers "would prefer, in other words, a 'free-rider' status, giving them the benefit of lying without the risks of being lied to."[6]

It is clear, then, that deception concerning confidentiality can immediately destroy the foundation of the attorney-client relationship and the client's right to autonomy. Of course, the right to autonomy is not absolute. Although increasing autonomy is good in the abstract, it may not be justified in cases where autonomous decision-making leads to immoral results. Thus, one must also consider the rights of the lawyer or third parties at stake if the lawyer informs the client of exceptions to confidentiality and the client chooses to refrain from confiding in the lawyer. However, autonomy is a "prima facie" right entitled to great deference, and the lawyer attempting to justify deception must overcome a strong presumption that the client is entitled to information.

Deception is most justified when it prevents imminent bodily harm to a third party. Such deception is justified for three reasons: there is a limited time available to evaluate alternatives; the right to bodily integrity is a strong coutervailing one; and deception typically occurs in such isolated instances that it probably will not encourage others to lie. Such a rationale might, for example, serve as a justification for failure to inform the parent of a child who is admitted to an emergency room with injuries clearly stemming from abuse that the incident must be reported. Otherwise, the parent may remove the child, who then would not receive care. In the attorney-client context, deception may be appropriate where the client has a history of violent behavior, making it more likely that third parties might be harmed.

The difficulty with this analysis is that it ensures that clients will not inform of their intention to commit a harmful act absent a promise of confidentiality, and lawyers will therefore be unable to prevent harm. In fact, clients may tell lawyers anyway, either because they feel compelled to confess or because they recognize they will receive representation if they talk to their lawyers.

There is, in addition, an analytical problem with using the paradigm of avoidance of bodily harm as a blanket justification for deception. Deception about possible disclosure occurs from the commencement of the relationship, when it is unclear whether anyone's interests are implicated, let alone an innocent third party's interest in bodily integrity. Thus, the lawyer cannot evaluate the alternatives, nor can she determine the likelihood or severity of an infringement of a third party's rights at the time of the deception. Thus, the lawyer cannot evaluate the strength of the justification for the deception at the time it occurs. Moreover, a policy of not disclosing limits on confidences, if intentional, goes beyond the isolated incident that will not encourage others to lie. Rather, it reflects an ongoing practice of deception.

[5] S. Bok, *Lying: Moral Choice in Public and Private Life* 15 (1978).

[6] *Id.*, note 17 at 23. The fact that the client trusted the lawyer will exacerbate the inevitable feelings of betrayal that will result if the client learns the lawyer has disclosed private information, regardless of whether the lawyer intended to mislead.

If the possibility of averting bodily injury does not serve to justify a policy of deception, it follows that deception is not justified by the possibility of perjury, or that a lawyer may avoid harm to herself if her competence is challenged or if she must collect a fee. In fact, if situations invoking those exceptions arise more often than threats of bodily harm, the greater likelihood of occurrence makes the information more material to the client.

Lawyers may fear that informing clients of the limits to confidentiality will chill attorney-client communications. Other than the possibility of harm to the lawyer or third parties, which is too speculative to serve as support for deception, the only danger of a chilling effect is that the client may not confide information the attorney finds necessary for competent representation. One can analogize this argument to the discredited and paternalistic notion that patients should not be told of risks because they might not submit to procedures that are "good" for them. So long as a client is made aware that the lawyer may be hampered in her representation if the client does not confide in her, the choice of whether to confide belongs to the client.

One exception to the notion that lawyers may not consider the chilling effect that informing the client might have is where the client appears extraordinarily nervous and mistrustful, and the lawyer feels immediate warnings will destroy the relationship before it is established. Commentators have recognized that short term paternalism may be necessary to enhance autonomy in the long run. However, as David Luban indicates, there are strict limits to when deception is justified, even for a brief period: the decisionmaker's capacity must be impaired; the constraint must be as limited and temporary as possible; and the threatened damage must be severe and irreversible. I would add that if the attorney believes that confidences potentially damaging to the client are imminent, deception even in the short term is unjustified as the impact on autonomy would be irreversible. Absent these special circumstances, however, a presumption arises that informing clients about limits to confidentiality is necessary.

One obvious question that arises is how much information the lawyer should share. Providing the client with an equivalent of a law school education by explaining all of the nuances of confidentiality rules seems unnecessary and, in fact, would be counterproductive, as studies have shown that providing too much information reduces the recipient's ability to understand. However, the attorney should give a general explanation of the duty of confidentiality and its major exceptions. In that way, the client will have enough information to enable him to ask intelligent questions as specific confidentiality issues arise. If it becomes clear to the attorney as the representation progresses that the client needs more specific information because an exception may apply, she should raise the issue again.

Of course, not all information is material to every client. Three variables might be considered in determining when to inform the client. First, the lawyer might evaluate the relative sophistication of her client. A lawyer dealing with in-house corporate counsel may assume the client is aware of confidentiality sections. Although some cases have shown corporate officials are unaware of the nuances of legal representation, one may assume they are generally more sophisticated than some other clients. Arguably, knowledgeable clients do not require warnings to make informed decisions.

Next, the lawyer could evaluate the likelihood that information might be confided. For example, Model Rule 2.2 requires that a lawyer serving as intermediary between clients inform them that no attorney-client privilege exists regarding communications between any of them and the lawyer. Similarly, Model Rule 1.13 requires that a lawyer inform a corporate officer that she is not his attorney. Both rules are based on the notion that it is foreseeable that problems could arise. For example, this factor would support a rule that lawyers should warn criminal clients about the potential for disclosure of future crimes or of fraud on a tribunal. If fee disputes are common, that exception should be disclosed.

Finally, the nature of the confidences to be shared is relevant. A client will be more concerned about disclosures involving highly private or harmful information than about more innocuous information. Perhaps, then, exceptions concerning crimes or frauds should be raised, but the fee exception need not be as only general information is disclosed. The client might also be interested in learning that a lawyer may exculpate herself by inculpating the client.

While use of these factors would be better than giving no consideration to client concerns, there are two grave problems with relying on them. First, selective information may be more misleading than no information at all. Recitation of some exceptions may lead the client to believe there are no others.

Second, use of the factors tends to treat clients as groups rather than as individuals, which is contrary to the central notion of the informed consent requirement. Rather than enhancing autonomy of the individual client in an individual case, the lawyer relying on the factors above runs the risk of creating "a standardized person to whom he attributes standardized ends,"[7] and "acting for the hypothetical client rather than the one before him."[8] This approach depersonalizes the client and treats him as an object. To ensure true autonomy, the lawyer must not decide what she thinks the client wants or needs, but must explore the client's actual goals with him.

As a result, while the above factors might be useful, they cannot be dispositive. The lawyer must engage the client in an ongoing, personal discussion to enable her to determine what matters to the client. Perhaps that discussion could begin with a statement such as the following one, which is drafted to apply to a criminal client:

> You should know that I work for you and that I consider it very important to keep your confidences. The attorney-client privilege essentially means that I cannot be forced to disclose information about discussions we have. For example, judges sometimes can order lawyers to disclose information, but they can't make me tell them about whether you committed the crime. You should know about some limits to the privilege, however. I am an officer of the court, and I cannot help you commit any frauds upon the court. Therefore, if I learn that you will lie or have lied on the witness stand, I must report that. I am also allowed to report if you tell me you are going to commit a crime. I may also report limited information to defend against claims made against me or to collect my fee, but I am allowed to report only that information necessary to meet those goals. For example, if we fight about my fee, I might be able to show my billing records, but I couldn't just reveal all the things I know about you. Although there are times I may feel it is necessary to report information, I want to remind you that I take the privilege very seriously and would never lightly decide to share information.

Those reading this suggested statement might believe all of this sounds terrible and the client would view the lawyer as greedy and self-protective. This response is like shooting the messenger rather than wishing the message were different. The ethics rules provide for these exceptions, and if they sound as if ethical priorities are misplaced, the rules should be changed. So long as they exist, however, the client should be aware of them. Of course, absent modification of the rules, one alternative to revealing the more self-serving of those exceptions is that an individual attorney may decide as a matter of personal ethics not to warn regarding those exceptions, because she intends never to invoke them. In this way, no deception occurs.

Assuming no explanation of exceptions occurs, and the client confides evidence he would not have absent a belief it would remain confidential, the client has lost the right to make autonomous decisions with adequate information. The lawyer should be held responsible for that loss.

Although informing clients of limitations on confidentiality might inhibit the rights of the lawyer or third parties, those rights are varied and speculative. Conversely, deception regarding limitations has an immediate impact of reducing autonomy and impairing the attorney-client relationship. Thus, an attorney is morally required, and should be legally required, to be forthright with a client and to allow the client to choose whether the risks of disclosure outweigh its benefits.

[7] Lehman, *Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1087 (1977).
[8] *Id.*, *supra* note 7, at 1087.

Discussion Questions

1. Pizzimenti introduces the substance/procedure distinction. What is this distinction and what role does it play in the discussion of client confidentiality?

2. According to Pizzimenti, why is client confidentiality important? What moral theories might be relevant to her reasoning?
3. There appear to be various exceptions to the duty to maintain client confidentiality. What exceptions does Pizzimenti point out? To what extent do you agree with her about these?
4. How much information about the confidentiality of the attorney-client relationship should be shared with the client? What is the basis for your answer?

Pure Legal Advocates and Moral Agents: Two Concepts of a Lawyer in an Adversary System

ELLIOT D. COHEN

IT IS SOMETIMES ASKED whether a good lawyer in an adversary system can also be a good person. We must first notice that there are two different senses of the term *good* employed in this question. In its first occurrence, *good* may be taken in its instrumental sense to mean, roughly, *effective*. In its second occurrence, *good* may be taken in its moral sense to mean *morally good*. Thus the question is whether an effective lawyer can also be a morally good person. And the latter question, it is clear, can be answered only if we have some idea of what we mean by a morally good person, and by an effective lawyer.

Accordingly, in this paper I shall first outline what we take to be salient marks of a morally good person. Second, I shall examine one sense of a lawyer, what we call the *pure legal advocate concept*, in which a good lawyer does *not* satisfy our criteria of a morally good person. Third, I shall examine a further concept of a lawyer, what might be called the *moral agent concept*, according to which a good lawyer is, *ipso facto*, a morally good person.

Morally Good Persons

Following one tradition, let us say that a morally good person is a person who, through exercise and training, has cultivated certain morally desirable traits of character; the latter traits being constituted by dispositions to act, think, and feel in certain ways, under certain conditions, which are *themselves* morally desirable.[1] What traits of character in particular are morally desirable and to what extent and in what combinations they must be cultivated in order for a person to be morally good are admittedly no settled matters. Still, there are some traits which at least most of us would countenance as being important, if not essential, ingredients of the morally good personality. It is such traits of character with which I shall be concerned, particularly those among them which seem to be the most relevant to legal practice.

What then are some such characteristic marks of a morally good person?

1. We would not ordinarily countenance a person as being morally good if we believed that he was not a *just* person, that is, if we thought that he was not disposed toward treating others justly. There are, however, two senses of *just* and *unjust* in which a person may be said to treat others justly or unjustly.

[1]See Aristotle, *Nicomachean Ethics*, Book II.

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First, a person may be said to treat others justly when, in distributing some good or service among them, she observes the principle of treating relevantly similar cases in a similar fashion; and she may be said to treat others *unjustly*, in this sense, when she violates this principle. For example, a physician who consistently distributes medical service among the ill on the basis of medical need would, *ceteris paribus*, be acting justly in this sense; whereas one who distributes such service without regard to medical needs, but instead with regard to race or religion, would, in this sense, be acting unjustly. This is so because we typically regard medical need as the controlling factor in distributing health care; whereas race and religion appear to be quite irrelevant in such a context.

We may, however, be said to treat others justly when we are respectful of their legal and moral rights, or when we give to them what they rightfully deserve; and we may be said to treat others unjustly when we intrude upon their legal or moral rights, or when we treat them in ways in which they do not deserve to be treated. For example, one acts justly, in this sense, when he keeps an agreement with an individual who has the right to insist upon its being kept; or a judge acts justly, in this sense, when he hands down a well-deserved punishment to a legal offender; whereas a person perpetrates an injustice upon another, in this sense, when he fails to uphold a binding agreement or when he inflicts injury upon an innocent party.

Let us say, then, that the just person is one who is disposed toward treating others justly in *both* of the above senses. That is, she tends to be consistent in her treatment of others—she does not normally make biased or arbitrary exceptions. But she is also the sort of person who respects individual rights and can usually be counted upon to make good on her obligations to others.

2. Being morally good would also appear to require being *truthful*. By truthful person is meant one who is in the habit of asserting things only if he *believes* them to be true. Thus he is in the habit of asserting things with the intention of *informing* his hearers, and not deceiving them, about the truth. An *untruthful* person, on the other hand, is in the habit of asserting things which she *disbelieves*; and this she does with the intention of deceiving her hearers about the truth. Moreover, the untruthful person may deceive not merely through her spoken word, but also by other means. She may, for example, leave false clues or simply remain silent where such measures are calculated to mislead as to the truth. This is not to suggest that such tactics are never justified; it is rather to say that, when they constitute the rule instead of the exception, the person in question has fallen below that level of truthfulness which we should normally require of a morally good person.

3. Being a morally good person would also seem to demand at least *some* measure of *moral courage*. Indeed, it would appear that a person could not be just or truthful if he did not have any such measure; for it often takes courage to be honest or to do what is just. By a *morally* courageous person we mean a person who is disposed toward doing what he thinks is morally right even when he believes that his doing so means, or is likely to mean, his suffering some substantial hardship. As Aristotle suggests, it is "the mark of a brave man to face things that are, and seem, terrible for a man, because it is noble to do so and disgraceful not to do so."[2]

And, therefore, we can say, along with Aristotle, that a person who endures hardship just for the sake of some reward—such as fame or fortune—or for the sake of avoiding some punishment—such as public disfavor or legal sanctions—is not truly acting courageously in this sense, for he acts not because it is morally right to do so, but to gain a reward or avoid a punishment.

4. The moral quality of a person is no doubt often revealed through her monetary habits. Indeed, for some individuals, the making of money constitutes an end in itself for which they willfully transgress the bounds of morally permissible conduct—for example, the pimp, the drug dealer, the thief, and the hit man. And some—those whom we characterize as being stingy, miserly, tight—cling to their money with such tenacity that they would sooner allow great iniquities to occur than surrender a dollar.

The morally good person, on the other hand, would appear to be one who has developed *morally respectable* monetary habits. Such a person

[2]Ibid., 1117a16.

Aristotle calls a *liberal* person, one who, he states, "will both give and spend the right amounts and on the right objects, alike in small things and in great, and that with pleasure; he will also take the right amounts and from the right sources."[3] Following Aristotle, let us say then that a morally good person must also be, to some degree, a *liberal* person.

5. We should also expect a morally good person to be *benevolent*. By this we mean that she is disposed to do good for others when she is reasonably situated, and to do no harm. And the concern she has for the well-being of others does not arise out of some ulterior motive but rather *for its own sake*. Furthermore, she is disposed toward *feeling* certain ways under certain conditions—for example, feeling sorrow over another's misfortune or taking pleasure in another's good fortune or in helping another.

It is not supposed, however, that in order to be a morally good person one must be disposed toward benefiting others at great sacrifice to oneself; nor is it supposed that such a person must go very far to benefit or feel sympathetic toward those who do not stand in any concrete personal relation such as friendship or kinship. Still, a person who does not go an inch to benefit anyone—unless justice demands it—and who sympathizes with no one is perhaps at most a minimally good person. But one who intentionally harms others, as a matter of course, with pleasure or without regret, cannot normally be regarded as being benevolent. Indeed, such is a mark of a malevolent or morally base person.

6. So, too, would we expect to find *trustworthiness* in a morally good person. That is, we should expect such a person to be in a habit of keeping the confidences and agreements which he freely accepts or enters upon. Indeed, the person who breaks faith for no good reason is not just being dishonest; he is also being a "traitor" or a "double-crosser."

This, however, is not to suppose that an individual must *never* breach a trust if he is to be a morally good person. There are, undoubtedly, some extenuating circumstances in which breaking a trust would be the morally right thing to do—as when keeping it involves working some greater injustice upon someone than that involved in breaking it. Nor is it to be supposed that trustworthiness is a *sufficient* condition of being morally good. There may be loyalty among thieves, for instance, but we should not, for that reason alone, take their lot to be morally good.

7. A morally good person, I would suggest, is one who is regularly disposed to do her *own* moral thinking—that is, to come to her own decisions about moral issues on the basis of her own moral principles; and then, in turn, to *act* upon her considered judgment. Kant expressed this fact by saying that the will of a morally good person (that is, a morally good will) is one which is determined "autonomously." Following his usage, let us say then that a morally good person is a person who possesses *moral autonomy*.

Being such a person is undoubtedly no easy matter, for moral decisions are frequently difficult ones to make. For instance, in cases of conflict between one's moral principles, one must weigh one principle against another and then "strike a moral balance"—as, for instance, in a case where keeping a promise involves inflicting harm upon another; or when, in determining the value of the consequences of an act, one must balance the good consequences against the bad ones. And such determinations are clearly no mere matter of logical deduction. All that one can reasonably be expected to do in such cases is to try one's level best. But it is a mark of a morally autonomous person, and thus of a morally good person, that he actually makes such an earnest effort.

Keeping the foregoing criteria of a morally good person in mind, let us now turn to an analysis of lawyers.

The Pure Legal Advocate Concept

Following one traditional usage, we can say that the concept of a lawyer is a *functional* concept—that is, it may be defined in terms of the function or role which a lawyer *qua* lawyer is supposed to perform, in an analogous manner in which a watchdog may be defined in terms of its function of guarding property, or in which a carpenter's hammer may be defined in terms of its function of driving in nails. Hence, just as a good (effective)

[3] Ibid., 1120b29–31.

watchdog may be defined as a dog which performs well the function of guarding property, so too may a good (effective) lawyer be defined as a person who performs well the function or role of a lawyer. What, then, we may ask, *is* the function or role of a lawyer?

One sense of *lawyer* is that in which the role of a lawyer is restricted to that of the client's legal advocate, and in which a good lawyer is thus conceived as being *simply* an effective legal advocate. This sense, which we shall hereafter call the *pure legal advocate concept,* is exemplified in the classic statement made by Lord Brougham when he was defending Queen Caroline against George IV in their divorce case before the House of Lords. He states:

> An advocate, in discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty.[4]

The pure legal advocate concept is also more recently suggested by Canon 15 of the ABA *Canons of Professional Ethics,* which states that

> 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.

Given the pure legal advocate concept, it is easy for one to conclude that the necessary and sufficient mark of a good lawyer is her tendency to win cases by all legal means. For, as was said, this concept supposes that a good lawyer is simply an effective legal advocate; and it is easy to suppose that the necessary and sufficient mark of an effective legal advocate is her tendency to legally win cases. A good lawyer hence emerges as a legal technician skillful in manipulating legal rules for the advancement of her clients' legal interests; in this sense, the good lawyer is no different than a skillful chess player able to manipulate the rules of chess to win *his* game.

[4]M. H. Freedman, *Lawyers' Ethics in an Adversary System* (Indianapolis: Bobbs-Merrill, 1975), 9.

Furthermore, given this concept, a lawyer may, and indeed is required, to do certain kinds of things on behalf of his client which would ordinarily be regarded as being morally objectionable. In such instances all that matters, so far as lawyering is concerned, is that such acts are legal means of advancing the client's legal interests. For instance, a defense attorney in a rape case may cross-examine the prosecutrix, whom he knows to be telling the truth, about her chastity for purposes of casting doubt upon her truthful testimony. Or, he may permit his client to take the stand knowing full well that the client will perjure himself. Or, a lawyer in a civil case may invoke a legal technicality (for example, the statute of limitations) on behalf of his client in order to defeat a just cause against him. Or, a corporate lawyer on a continuing retainer may represent a client who seeks to keep a factory in operation which creates a public health hazard by emitting harmful pollutants into the air.

However, some who countenance the pure legal advocate concept—namely, those sometimes referred to as rule utilitarians—hold that such immoralities as the above-mentioned ones are the necessary evils of maintaining an adversary system which itself does the greatest good. The working assumption here is that the adversarial form of legal administration, wherein two zealous advocates are pitted against each other before an impartial judge, constitutes the best-known way of maximizing truth and justice; and that, furthermore, this system works best when lawyers disregard their personal moral convictions and thereby restrict their professional activities to the zealous legal representation of their clients.

If the rule utilitarian is correct, then lawyering, so conceived, can be said to be a morally justified function, notwithstanding that, on that view, a lawyer may be required to engage in conduct which, by common standards, is morally objectionable. Thus, when seen in this light, the lawyer emerges as a promoter of the highly prized ends of justice and truth, and as an individual who, because of her service to society, is worthy of praise and admiration. Indeed, she begins to seem like a morally good person.

Nevertheless, I want to suggest that the appearance is deceiving, that, on the contrary, the lawyer, so conceived, will inevitably fall short of our marks

of a morally good person. Moreover, I want to suggest that, as a result of such shortcomings, there is substantial disutility in the pure legal advocate concept of lawyering which its utilitarian exponents rarely take into account in their utilitarian justification of it.

Let me emphasize that I am supposing, along with Aristotle, that it takes exercise and training to cultivate the character traits of a morally good person: one is not simply born with them. My claim is, accordingly, that the legal function as construed under the pure legal advocate concept, with its emphasis on suppression of the individual lawyer's personal moral convictions, does not allow for the cultivation of these traits and is, in fact, quite conducive to their corresponding vices.

Furthermore, I am supposing that a lawyer cannot easily detach his professional life from his private life and thereby cannot easily be one sort of person with one set of values in the one life, and a quite different sort with quite different values in the other life.

The latter supposition is justified by the substantial amount of empirical evidence that now exists correlating the personality traits of individuals with their specific vocations. One ambiguity, however, is whether individual vocations influence personality traits, or personality traits influence choice of vocation, or some combination of both; for any one of these hypotheses would explain the correlation.

Some studies have supported the hypothesis that personality traits influence choice of profession—that is, that people with certain personalities are attracted to certain professions in order to satisfy their individual needs. But even *if* this hypothesis is true, and the other above-mentioned hypotheses are false, it is clear that the kind of person found in a profession will remain a function of the way the profession itself is conceived. Specifically, on the hypothesis in question: We would expect the personalities of those choosing careers in law to depend upon their conception of a lawyer. But, if I am correct, then legal practice as construed on the pure legal advocate model could seem attractive only to those individuals contemplating a career in law who would feel comfortable in a professional climate which discourages, rather than promotes, the personality traits of a morally good person as here understood.

Moral Shortcomings of the Pure Legal Advocate

1. It appears that a lawyer, on the pure legal advocate concept, will inevitably fall short of being a *just* person. For although she does not violate the principle of treating relevantly similar cases similarly when she gives special preference to her client—inasmuch as being a client would appear to be a relevant dissimilarity for the purposes of an adversary system—she does, indeed, work injustices through the violation of the moral *rights* of individuals. For on this concept the lawyer's fundamental professional obligation is to do whatever she can, within legal limits, to advance the legal interests of her clients. But from this basic obligation there derives a more specific one which, contra Kant, may be expressed thus: "Whenever legally possible treat others not as ends but as means toward winning your case."

For example, the criminal defense lawyer is thereby authorized to knowingly destroy the testimony of an innocent rape victim in order to get an acquittal for his client; and a civil lawyer is authorized to knowingly deprive another of what he rightfully deserves by invoking the statute of limitations for the purpose of furthering his client's interests. But we shall concur with Kant in maintaining that lawyers, like anyone else, have a duty to treat others with the respect which they, as persons, have a right to insist upon.

2. Nor will the pure legal advocate meet the cardinal mark of *truthfulness*. For, from her obligation there derives the secondary obligation of being *un*truthful where doing so can legally contribute toward winning the case. An example of a lawyer who complies with this obligation is one who remains silent when she knows that her client has, under oath, lied to the court. The lawyer, by wittingly saying nothing, engages in deceptive behavior—she contributes to the court's being deceived as to the truth—and is on that count *herself* guilty of being untruthful. Indeed, scrupulous adherence to *this* obligation could hardly support anything but an untruthful habit.

3. Nor does the concept in question support *moral courage*. For, according to it, the personal moral convictions of a lawyer are irrelevant to his function and should not serve as reasons

zealous representation of clients, or for any sacrifices—of time, money, reputation, and the like—which he may make on their behalf. Indeed, if he is to do his job well, then he must get into the habit of *not* being influenced by his moral outlook. Rather, any sacrifice he may make should be for the sake of obtaining a legal victory, be it a moral one or not. It is plausible to suppose, however, that where morality takes a back seat, ulterior motives, such as the self-aggrandizement obtained through winning, will serve as the primary motivation.

4. Nor does the pure legal advocate concept support *liberality;* for the pure legal advocate, through her unconcern with the moral character of her clients and the purposes for which they hire her, gets into the habit of taking money from dishonorable individuals for unsavory purposes. She thus emerges as a professional who can be hired, for a good sum, to do the dirty work of a villain or a scoundrel. Indeed, she then begins to sound more like a hired assassin than like the liberal person whom Aristotle had in view. The high-priced corporate lawyer who wittingly helps her corporate client to market a dangerous product provides us with one example of such a lawyer; and the high-priced criminal lawyer who specializes in defending mass murderers is another.

5. Furthermore, the pure legal advocate concept does not appear to satisfy the minimum condition of *benevolence*—that is, the nonmalevolence expected of a morally good person. For, from his primary obligation, there derives the secondary obligation to employ even such means to forward a client's interests as are injurious to others, so long, of course, as they are legal. But this also means that a lawyer must learn to put off sympathetic feelings which a benevolent person would normally have. In particular, he must get used to working injury upon others without having any strong feelings of guilt, sorrow, or regret. For, to be sure, such feelings could only serve to interfere with the execution of his basic obligation to his client. The result is thus a callous attitude in his dealings with others.

6. Prima facie, it appears that the morally desirable character trait of *trustworthiness* receives strong support from the pure legal advocate concept. For, indeed, it appears that a lawyer cannot put on the most effective representation of her client's interests unless she is also prepared to hold in confidence the secrets entrusted to her by her client. A problem with this view, however, arises in the case in which there is a conflict between a lawyer's obligation to keep her client's confidence and some other moral obligation—for instance, that of not harming innocent persons. In such a case, the restricted lawyer is required to keep her client's confidence so long as it is legally possible and in her client's best interest to do so. Her considered judgment as to what is, under the circumstances, morally best is then quite irrelevant. But it is a mark of a morally good person to choose what she thinks is, all things considered, the morally right thing to do in such a situation. Hence, whereas a morally good person sees his obligation to keep confidences as one among several moral principles which may at times override one another, the pure legal advocate sees her professional obligation to keep her clients' confidences as binding upon her quite independently of the moral propriety of doing so in any particular case.

In any event, even *if* it is admitted that the pure legal advocate concept reinforces trustworthiness which, *in itself,* is a morally good trait, this still does not show that the good lawyer, on this conception, can be a morally good person. For, as we have seen, there are further requisites of a morally good life.

7. I have suggested that an important quality of a morally good person is that he has *moral autonomy.* However, the pure legal advocate concept offers no stimulus to the cultivation of this trait. For, as we have seen, the pure legal advocate inhabits a world in which his moral judgment is quite beside the point. If morality is relevant, it is so at the level of the judge or the legislator, but it is quite outside the purview of the lawyer's function. The lawyer must know the law and must know that he owes his undivided allegiance to his client. Given the latter he can easily accommodate himself to the requirements of the law. His decisions are, in effect, made *for him* by the system he serves. He is more like a cog in a machine and less like a person. But the moral world is inhabited by *persons*—that is, individuals who autonomously confront their moral responsibilities; so that, for a lawyer who has grown comfortable with passing the buck of moral responsibility, there is little hope of his aspiring to the morally good life.

The Moral Agent Concept

If I am correct, then it appears that the pure legal advocate who scrupulously adheres to her restricted role, far from being a morally good person, will be given ample opportunity for becoming—if she is not already—quite the opposite. For she will thereby be placed in a professional climate conducive to her being unjust instead of just; untruthful instead of truthful; unmotivated by a moral outlook instead of morally courageous; illiberal instead of liberal; callous instead of benevolent; morally irresponsible instead of morally autonomous. In short, she will fall well below the minimum standards of a morally good person.

But if all this is right, then there will, it seems, be a good deal of *disutility* in the pure legal advocate concept which, indeed, any utilitarian exponent of it ought to consider in computing its overall balance of utility. For it appears that such personality traits as those mentioned above, when associated with our concept of a lawyer, can serve only to bring disrespect upon the legal profession and, by association, upon the legal system as a whole. And this low regard may well lead to a commonplace view of the adversary system as a haven for the guilty and the wicked and as something of which the innocent and the morally good ought to steer clear. It can very well serve to discourage persons of strong moral character from entering the legal profession. It is also quite plausible that pure legal advocates who, by virtue of their knowledge of, and relation to, the law, are uniquely situated to contribute to needed changes in unjust laws, will not concern themselves with such moral reformation. Moreover, add to these the disutility involved in the unsavory acts performed by pure legal advocates on behalf of their clients in the normal course of discharging their professional obligations—the injuries thereby done to individual litigants as well as to others—and there is at least a strong prima facie case for abandoning the adversary system entirely in favor of a different model (an inquisitorial model for instance) or for adopting a concept of a lawyer in an adversary system which avoids these disutilities.

Fortunately, there *is* a further concept of a lawyer which, while *not* abandoning the adversarial approach, serves to avoid much of the disutility mentioned above.

This further sense, hereafter called the *moral agent concept*, is exemplified, for example, in the remarks on advocacy made by Lord Chief Justice Cockburn, in the presence of Lord Brougham, at a dinner given in honor of M. Berryer on November 8, 1864. He stated:

> My noble and learned friend, Lord Brougham, whose words are the words of wisdom, said that an advocate should be fearless in carrying out the interests of his client: but I couple that with this qualification and this restriction—that the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interest of his clients per fas, but not per nefas; it is his duty, to the utmost of his power, to seek to reconcile the interests he is bound to maintain, and the duty it is incumbent upon him to discharge, with the eternal and immutable interests of truth and justice.[5]

The moral agent concept was also expressed, more recently, by John Noonan when he remarked that

> a lawyer should not impose his conscience on his client; neither can he accept his client's decision and remain entirely free from all moral responsibility, subject only to the restraints of the criminal law. The framework of the adversary system provides only the first set of guidelines for a lawyer's conduct. He is also a human being and cannot submerge his humanity by playing a technician's role.[6]

And this concept is suggested elsewhere by Richard Wasserstrom, Jeremy Bentham, and *The Report of the Joint Conference on Professional Responsibility.*[7]

[5]Costigan, *The Full Remarks on Advocacy of Lord Brougham and Lord Chief Justice Cockburn at the Dinner to M. Berryer on November 8, 1864,* 19 CALIFORNIA LAW REVIEW 523 (1931).

[6]Noonan, *The Purposes of Advocacy and the Limits of Confidentiality,* 64 MICHIGAN LAW REVIEW 1492 (1966).

[7]See, respectively, Wasserstrom, *Lawyers as Professionals: Some Moral Issues,* 5 HUMAN RIGHTS 8 (1975); Bentham, "Rationale of Judicial Evidence," book 9, chapter 5, in *The Works of Jeremy Bentham* (J. Bowring, ed.), 1843; American Bar Association and the Association of American Law Schools, *Professional Responsibility: Report of the Joint Conference,* 44 AMERICAN BAR ASSOCIATION JOURNAL 1161 (1958).

Given the moral agent concept, we may no longer say that the good lawyer is simply the effective legal advocate; he is, rather, one who is effective in morally as well as legally advocating his client's cause. Hence, one cannot infer from this concept that the good lawyer is one who tends to win his cases. For, on this concept, he is not merely a good legal technician; he is also one who conducts himself in the manner of a morally good person—that is, as a person with morally desirable character traits.

It is evident, however, that a lawyer cannot so conduct herself unless she also subscribes to the moral principles to which a morally good person would subscribe were she to participate in an adversarial process. If our analysis of a morally good person is supposed, then such principles would need to be ones supportive of the personality traits set forth in that analysis. To wit, from these character traits we may derive a corresponding set of moral principles which are adjusted to an adversarial context. I suggest the following formulations, although other similar formulations are possible:

- Treat others as ends in themselves and not as mere means to winning cases. (Principle of Individual Justice)
- Treat clients and other professional relations who are relevantly similar in a similar fashion. (Principle of Distributive Justice)
- Do not deliberately engage in behavior apt to deceive the court as to the truth. (Principle of Truthfulness)
- Be willing, if necessary, to make reasonable personal sacrifices—of time, money, popularity, and so on—for what you justifiably believe to be a morally good cause. (Principle of Moral Courage)
- Do not give money to, or accept money from, clients for wrongful purposes or in wrongful amounts. (Principle of Liberality)
- Avoid harming others in the process of representing your client. (Principle of Nonmalevolence)
- Be loyal to your client, and do not betray his confidences. (Principle of Trustworthiness)
- Make your *own* moral decisions to the best of your ability and act consistently upon them. (Principle of Moral Autonomy)

We can say that the above principles, or ones like them, at least in part *constitute or define* the moral agent concept of a lawyer; for they are principles to which a lawyer's conduct must to some extent conform if he is to function not simply as a legal advocate but also as a morally good person.

I am *not* suggesting that these principles are unconditional ones. Indeed, to say so would be unrealistic since they will inevitably come into conflict with each other when applied to specific contexts, thereby making it impossible for the lawyer to satisfy all principles at once. (That is, in order to be truthful, a lawyer may need to betray a client's trust, and conversely.) Rather, what I am suggesting is that such principles impose upon a lawyer *conditional*—or prima facie—obligations which, in cases of conflict, must be weighed, one against the other, by the lawyer in question in the context in question.

Let me offer an example which will illustrate the difference between applying, in conflict situations, the above multi-principle model and the pure legal advocate model. In *Lawyers' Ethics in an Adversary System,* Monroe Freedman cites the following:

> In a recent case in Lake Pleasant, New York, a defendant in a murder case told his lawyers about two other people he had killed and where their bodies had been hidden. The lawyers went there, observed the bodies, and took photographs of them. They did not, however, inform the authorities about the bodies until several months later, when their client had confessed to those crimes. In addition to withholding the information from police and prosecutors, one of the attorneys denied information to one of the victims' parents, who came to him in the course of seeking his missing daughter.[8]

According to Freedman, the lawyers in the above cited case were simply discharging their *unconditional* professional obligation to represent their clients' legal interests. However, if the moral agent concept is supposed, then it is clear that the above lawyers could have revealed where the bodies were buried. Admittedly, according to the Principle of Trustworthiness, a lawyer has a (prima facie) obli-

[8]M. Freedman, *supra* note 4 at 1.

gation to keep his client's confidences. But he also has further (prima facie) obligations such as those of Truthfulness, Individual Justice, and Non-malevolence. I think that a plausible case can be made that the latter principles were sacrificed to some extent by the lawyers in the Lake Pleasant case at least insofar as their treatment of the relatives of the deceased was concerned. And it is plausible, I believe, to argue that the moral weight of the latter principles, taken collectively, outweighed that of the Principle of Trustworthiness taken by itself in the situation in question. This need *not* have been what the lawyers in the cited case should have finally decided to be the correct balancing of principles. The point I want to make is rather that the lawyers *did have* in the first place, on the conception in question, the *moral autonomy* (as legitimized by our Principle of Moral Autonomy) to make such a judgment on the matter. It is just such moral autonomy—with its weighing of competing moral principles, one against the other—that the pure legal advocate concept disallows.

Of course, if lawyers are allowed such autonomy, there arises the difficulty of providing *criteria* for arbitrating between conflicting principles. This difficulty, we have seen, does not arise on the pure legal advocate model since the pure legal advocate is, in effect, insulated from making moral trade-offs by her unconditional allegiance to her client's legal interests.

One normative view regarding how a lawyer, in accordance with the moral agent concept, might go about solving moral dilemmas takes the form of a "pure" utilitarianism. According to such an ethic, all eight of our principles are to be understood as receiving their ultimate justification from the principle of utility. Hence, in case of conflict the final court of appeal will be the principle of utility itself.

I do not think, however, that such a basis for solving lawyers' moral dilemmas would be adequate. My objection is that which has traditionally been made against utilitarian ethics which are not tempered by justice considerations. Suppose, for example, a criminal lawyer is defending an influential politician accused of rape. Suppose also that the politician admits his guilt to his attorney but nevertheless informs her of his intention to testify under oath (to that which is false) that the defendant first made sexual advances toward him. Now suppose that the politician in question is in the process of bringing about a change in taxation which would mean substantial tax reductions for millions of Americans, and that, furthermore, these efforts would most likely be defeated if the politician in question were convicted of rape. On the pure utilitarian criterion, it would appear that the attorney in question would be committed to allowing the politician to perjure himself notwithstanding the defeat of the true rape claim; for the greatest good would (*ex hypothesi*) be served by allowing the politician to escape the charge of rape through his perjured testimony. But in such a case it would seem unjust (by the Principle of Individual Justice) to sacrifice the well-being of the truthful rape victim for the tax reduction. Indeed, in doing so, the lawyer would arguably be committing a grossly immoral act. But, if so, the principle of utility untempered by some principle(s) of justice—such as the Principle of Individual Justice or the Principle of Distributive Justice—would be an inadequate criterion for settling lawyers' moral dilemmas.

How then is a lawyer, on the moral agent conception, to resolve antinomies arising between these principles? Although I do not see any formula for doing so, this is not to suggest that one resolution is just as respectable as any other. For one thing, there is a difference between the ethical judgment of a lawyer that is *factually enlightened* and one that is not. For example, the judgment of a lawyer who allows trustworthiness to override harm in a particular case without adequate knowledge of the nature and extent of the harm is less respectable than the judgment of a lawyer who takes account of such facts.

Still, once the facts are known a decision must be made in their light; and I think it would be intellectually dishonest to suggest that there is some principle(s) from which we may logically deduce our decision. Principles take us just so far, leaving the final verdict in our hands.

It is the lack of clear noncontroversial criteria for resolving moral dilemmas, and the ensuing feeling that ethics is, in the end, a matter of "fiat" or "personal preference," that may make some feel uncomfortable about giving lawyers moral autonomy. However, it should be kept in mind by those who worry about the "gray" areas of ethics that

the making of ethical decisions is already an accepted and unavoidable part of the role of *some* officials in our legal system. For example, given the "open-textured" quality of legal rules and precedents themselves, judges often need to rely upon their own *moral* evaluations in deciding whether a given set of facts falls under a given legal rule or precedent. But if judges can handle their moral problems—and I believe that, in general, they *do* handle them—then there appears to be less reason to fear that lawyers cannot or will not handle their moral problems.

Discussion Questions

1. According to Cohen, what are the salient marks of a morally good person?
2. Cohen argues that a pure legal advocate cannot be a morally good person. What does he mean? How does he use utilitarianism to show this point? Do you agree with Cohen?
3. What is Cohen's moral agent concept and how is it different from the pure legal advocate concept?
4. Do you see any conceptual relationships between Cohen's discussion of the attorney-client relationship and the four models of the physician-patient relationship discussed by Ezekiel J. Emanuel and Linda L. Emanuel in Chapter 7? What about the discussion of autonomy provided by James Taylor in Chapter 4?

Can Virtue Be Taught to Lawyers?

AMY GUTMANN

"CAN VIRTUE BE TAUGHT?" Plato rightly thought this a most challenging question. But our question—Can virtue be taught to lawyers?—presents a still greater challenge. We can begin to meet the challenge, as Socrates might suggest, by addressing the prior question: What is virtue for lawyers? For without figuring out what legal virtue is, we can only pretend to know whether lawyers can be taught virtue, or learn it.

What virtues are fitting for lawyers in their most common activities as advocates and counselors in a constitutional democracy? My aim in this essay is not to offer anything close to a comprehensive answer, but to contribute to a more adequate understanding of legal virtue by briefly assessing three answers commonly offered by contemporary legal theorists. Each reflects an important conception of legal virtue: the "standard conception" recommends zealous advocacy of clients' interests; the "justice conception" that lawyers be above all dedicated to the pursuit of social justice; and the "character conception" that they live a good life in the law, a life characterized by the exercise of practical judgment.

I argue that despite their different relative merits, these conceptions are similarly incomplete. Each neglects a virtue that is increasingly relevant to lawyering because we live in a society where legally-relevant decision making is increasingly complex. The missing virtue is the disposition and capacity of lawyers to deliberate with nonlawyers (call us ordinary people) about the practical implications of legal action and its alternatives. By deliberation I mean a mutual interchange of infor-

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mation and understanding oriented toward decision making about both ends and means. I suggest some reasons why the obligation of lawyers to deliberate with their clients about legal means and ends is endemic to legal ethics in a constitutional democracy. And I suggest why each conception of legal ethics should explicitly defend the deliberative obligations of lawyers. I conclude that the question, What is legal virtue?, true to its Socratic inspiration, points to a more deliberative conception of lawyering and legal education. Lawyers should deliberate with clients, and legal education should prepare them to do so.

Consider the view of legal virtue offered by the standard conception of lawyering. "When acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail."[1] To maximize the likelihood that your client prevails, you must be not just an advocate of your client's preferences or interest, but a zealous advocate.

The obligation of zealous advocacy has been amply criticized by David Luban, among others, for losing sight of the larger aim of the law in furthering social justice.[2] The standard conception makes most sense in the context of the adversary process of criminal law, which does not of course comprehend most of what lawyers do. Even zealous advocates of their clients' preferences or interests may be held responsible—legally, professionally, and morally—for their actions. Authorization by clients does not immunize lawyers from responsibility for doing wrong any more than authorization by military officers exonerates soldiers from wrongdoing. What constitutes legal wrongdoing is often a tricky question, but the principle of responsibility does not stand or fall on hard cases.

A partial truth of the standard conception remains, and I want to pursue its implications here. Far worse than being a zealous lawyer is being a lazy or incompetent one, unwilling or unable to take on someone else's cause as your own. Lawyers who represent their clients simply for the sake of making a living, and therefore do not represent them well as long as they can get away with it, use their clients merely as means to their own self-interested ends. In criticizing the standard conception, we should not lose sight of the virtue of ardent (and perhaps at times zealous) advocacy. This is a virtue entailed in the legal obligation to argue other people's causes, not one's own. The advocacy virtues are necessary to safeguarding the basic interests of citizens in the face of threats to their civil and political rights.

But they are not sufficient, and for a reason that even proponents of the standard conception should acknowledge. The standard critique of zealous advocacy focuses on the need for lawyers to temper their defense of clients' causes with an appreciation of the larger purpose of their legal actions: social justice. Before we consider tempering advocacy for the sake of social justice, we should look carefully at the requirements of advocacy itself. What constitutes adequate representation? Ardent legal advocates, like good doctors, need to know not just the preferences of their clients, but their informed preferences. Like good friends, good lawyers do not take every and any preference of their clients as dispositive of what they should do in their their clients' defense.[3] Unlike good friends, good lawyers know, or should know, a lot more than their clients about the probable consequences for their clients' lives of various legal strategies. Proponents of the standard conception and critics alike can grant that ardent advocacy is sometimes a great virtue of lawyers. But we also should recognize that lawyers are not in a position to know what their obligation of ardent advocacy entails unless they understand their clients' informed preferences. Such an understanding cannot be taken for granted, or assumed to be apparent from simply asking clients about their preferences for legal services.

An internal critique of the standard conception follows from its central premise. The case of an ardent advocate should reflect her clients' informed preferences. In general, if lawyers do not make special efforts to understand the informed preferences of their clients, then the

[1]Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 673 (1978).

[2]David Luban, LAWYERS AND JUSTICE: AN ETHICAL STUDY 3–147, 393–403 (1988).

[3]See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L. J. 1060, 1060–69 (1975).

standard conception becomes indistinguishable from the indefensible claim that lawyers cannot be held accountable for anything to which their clients consent, whether or not they are well informed.

Clients are typically not experts in the law, or at least not in the part of the law for which they seek legal counsel. We need to rely upon legal counsel to develop informed preferences regarding legal services. Whether we know it or not, we are dependent on lawyers for becoming informed about the nature of legal processes and outcomes, and their likely impact on our lives. But the process of legal understanding is not one-way. Lawyers also depend, or should depend, upon their clients for understanding whether and what legal strategies would best serve their clients' interests. And clients depend on lawyers for advising us on whether and how to proceed with our cases. The decision in the end is ours, not theirs. But lawyers have a responsibility for helping us make an informed decision by engaging with us in a deliberative process which entails the give-and-take of information, understanding, and even argument about our alternatives. Whenever ardent advocacy is a legal virtue, so is the willingness and ability of lawyers to deliberate with clients, explaining the aims and likely consequences of alternate strategies, listening to the clients' concerns, reacting to them, and arriving at an understanding of their clients' informed preferences after mutual evaluation of the possibilities. The deliberative virtues include the disposition to discuss various legal strategies with clients, and to understand clients' goals and their informed reaction to relevant legal strategies to the extent feasible. These deliberative virtues are a precondition of good advocacy.

A mundane example illustrates this internal criticism of the standard conception. Suppose a group of divorce lawyers are excellent at arguing court cases for their clients but spend little or no time trying to understand their clients' informed preferences with regard to marriage and divorce. The vast majority of their clients do not start out with anything close to an expert knowledge of legal possibilities, let alone of the probable consequences and experiences attached to arguing their cases in court or settling them out of court. The lawyers take their clients' preferences at face value. When a client comes into their office saying that he does not want to pay his spouse a penny if he can get away with it, they tell him they will do whatever they can within the limits of the law to help him. They can threaten his spouse with litigation over custody and scare her into settling for a minimum amount of child support.[4] And the lawyers often succeed in this strategy or in others that are also well-designed to satisfy their clients' expressed preferences. Their clients, on the other hand, typically fail miserably. They are never encouraged to consider the bad consequences of their desire to punish their spouses, and by extension, their children, who may never forgive them for the excessive misery wrought on their family for the sake of selfishness or revenge.

This group of successful divorce lawyers could practice their profession differently and still be successful as zealous advocates, far more successful in one important sense. They could help their clients examine the broader implications of their initial preferences, and explore with them the pros and cons of alternative strategies. The initial preferences of clients are sometimes, perhaps often, contrary to what their informed preferences would be. It is not reasonable to expect clients to inform themselves, even to know the questions they need to ask, independently of the guidance of legal counsel. These divorce lawyers, therefore, may seem like ardent advocates but in one critical sense they fail to fulfill the responsibilities of ardent advocates. They have not tried to understand, and to help their clients understand, their informed preferences. These lawyers bear some responsibility (not necessarily "full" responsibility) for their clients' uninformed preferences, because clients typically have no reasonable alternative but to depend on lawyers for informing them about the pitfalls and possibilities of the legal strategies available to them. (These lawyers do not bear full responsibility because clients also have some responsibility for informing themselves, and public officials are also responsible for instituting legal reforms that make it easier for ordinary people to inform themselves about the law.) On its own terms, the standard conception is incomplete if it does not ally the virtues of deliberation with clients with those of ardent advocacy.

[4] I am grateful to Andrew Koppelman for this example.

But this defense of deliberative virtues is incomplete, and we can expose its incompleteness by considering a more compelling conception of law: the justice conception. Ardent advocacy may be a necessary virtue for lawyers in their roles as advocates, but lawyers cannot know if and when they should be advocates without thinking about the larger social purposes of law, in particular about the central place of law in serving social justice in a constitutional democracy. (Of course, this is not to say that legal practices as we know them consistently serve the cause of social justice, but rather that the social justification of some legal services rests critically on their doing so.) The core of the justice conception is captured by the Model Rule's characterization of a lawyer as a "public citizen having special responsibility for the quality of justice."[5]

The justice conception, as one might infer from its label, shifts the primary virtue of lawyering from advocacy to justice. Advocacy, even zealous advocacy, may still be an important virtue for (some) lawyers, but only insofar as justice demands. It would be surprising, moreover, especially in a society where some people are economically disadvantaged and socially stigmatized, to find that justice always, or even generally, demands zealous advocacy of lawyers, regardless of the nature of their clients' cause. The justice conception does not demand that lawyers aim directly at what they deem just, even if that means arguing against their clients' cause. Where the adversary system is justified, so are lawyers justified in ardently arguing their clients' cases. But the adversary system is not justified in all legal contexts, and even where it is, it may not justify zealous advocacy, meaning maximizing the likelihood that one's client cause will prevail (which is what the standard conception requires). The virtue of justice, to follow David Luban's "fourfold root of sufficient reasoning," requires that lawyers be able to justify (1) the legal institution within which they act (e.g., the adversary system of criminal justice), (2) their legal role (e.g., advocate for clients) as necessary to that institution, (3) their role obligation (e.g., zealousness in advocacy) as necessary to the role, and (4) their role acts (e.g., cross-examining an alleged victim of rape about her irrelevant sexual history) as necessary to the role obligation.[6] If the justification fails at any stage, as it does in stages three and four of the parenthetical example, then lawyers are not justified in acting as zealous advocates.

Whereas the standard conception defends zealous advocacy as the primary legal virtue, the justice conception views as virtuous only those dispositions and acts required by the legal pursuit of social justice. The justice conception highlights an important legal virtue that the standard conception neglects, or even denies: the willingness and capacity of lawyers to act according to the demands of justice, rather than the preferences (even the informed preferences) of their clients when the two conflict. Partisan advocacy is not justified for all legal roles. Even when advocacy is justified, zealous advocacy may not be. And zealous advocacy does not justify certain tactics on behalf of one's clients (such as discrediting a plaintiff by raising irrelevant facts about her sexual history).

Louis Brandeis is sometimes cited as the paradigm of a virtuous lawyer on the justice conception—someone who put justice first in the practice of law. When he was acting as legal counsel to William McElwain, the owner of a large shoe factory embroiled in a labor dispute, Brandeis told McElwain in front of John Tobin, who was representing the striking workers, that Tobin was "absolutely right."[7] Brandeis proceeded to convince McElwain to end the seasonality of employment that was troubling his labor force. McElwain's company flourished. What should we make of the Brandeis example? I think that it demonstrates that the demands of justice on lawyers are both greater and less than what proponents of the justice conception commonly convey.

What more could the justice conception demand than that lawyers follow Luban's fourfold root of sufficient legal reasoning? We need not question whether the fourfold root is sufficient to reasoning to wonder whether legal reasoning of this sort is sufficient to acting justly as a lawyer. In

[5] MODEL RULES OF PROFESSIONAL CONDUCT, Preamble (1989).

[6] For a detailed description and defense of this conception of legal ethics, see Luban, *supra* note 2.

[7] Philippa Strum, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 96–97 (1984).

focusing on the steps of legal reasoning that must be satisfied by justified legal action, proponents of the justice conception take something critical for granted concerning the lawyer-client relation that some questioning of the Brandeis example may reveal. Suppose Brandeis told McElwain in front of Tobin that Tobin was "absolutely right" and left it at that. Brandeis still would have represented the right position to his client, but McElwain would have been far less likely to abide by it. He might well have fired Brandeis and gotten himself a lawyer more sympathetic to his cause. Or he might have gone along with Brandeis out of deference to Brandeis's legal expertise even though Brandeis's moral position on this matter was largely, if not entirely, independent of his legal expertise. Or suppose Brandeis had deceived McElwain into doing the right thing, thereby pursuing the cause of justice with morally suspect means. For lawyers to work effectively in bringing both the means and ends of law into conformity with social justice, they must be disposed not to deceive their clients into doing the right thing, but rather aid their clients in deliberating about the demands of social justice.

Proponents of the justice conception conflate the idea that lawyers have a greater responsibility to pursue justice (by virtue of their role and/or their having more power to do so) with the idea that they are more likely to subscribe to the correct conception of justice (by virtue of their practical judgment). The practical judgment of lawyers, their capacity for "logical thinking, a nose for facts, good judgment of people, toleration"[8] does not translate into a comparative advantage over other thoughtful people in discerning what constitutes just social policy or the most justifiable of competing principles of social justice. Deception of clients in the service of social justice is therefore suspect for both deontological and consequentialist reasons. Justice is not well-served by authorizing lawyers to pursue just ends independently of their clients' authorization, because the unauthorized means are morally suspect, and the ends lawyers choose to pursue may be worse than those that would be chosen by well-informed clients.

Had Brandeis deceived McElwain or simply quit as his legal counsel because he deemed McElwain's cause unjust, the story would illustrate a weakness of the justice conception as commonly articulated, rather than its potential strength. The commitment of lawyers to pursuing (what they believe are) just causes is only half the conception, the most commonly articulated half. The neglected half is a disposition to deliberate with their clients with the aim of arriving at a mutual understanding of what justice in a constitutional democracy permits or demands. By its very nature, deliberation is subverted by deceptive means.

If their cause is just, why be so concerned with the means that lawyers use to pursue justice? Why recommend deliberation between lawyers and clients, a sharing of information and understanding on relevant matters, rather than that lawyers use their legal expertise and authority simply to convince clients to do what they, the expert lawyers, believe is just? Luban uses the Brandeis model to illustrate the noblesse oblige tradition of law, where lawyers use their authority and expertise to pursue that understanding of social justice they think best.[9] This is not the deliberative model even if it eschews deception. Deliberation demands far more. It requires an active engagement with clients that aims at a better understanding of the value of legal action and its alternatives than either party to the deliberation probably had at the outset. The value of the best legal action on behalf of a client may often be its contribution to the pursuit of social justice, but social justice cannot routinely be pursued by a legal counsel independently of the client's informed consent.

The demand for deliberative virtues has two distinct sources internal to the justice conception of law, and one external to it (to which I will return in discussing the character conception of legal virtue). The first internal source has to do with the distribution of the virtue of justice, the second with its content. Regarding the distribution of justice as a virtue, it is not in practice reasonable to rely upon lawyers as a group for a firmer commitment to social justice (beyond the rule of law) or just social policies than their clients. Lawyers are more expert in navigating the law

[8] David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 725 (1988).

[9] *Id.* at 720–27.

than their clients, but they are also, by virtue of their expertise and professional autonomy, politically more powerful and therefore potentially more likely to subvert social justice in pursuit of their own professional or personal interests. Legal expertise does not make lawyers more committed to the cause of social justice than their clients, and it is hard to see why it would. The justice conception therefore cannot credibly claim that the disposition to pursue just ends is a virtue more distinctive to lawyers than their clients. Nor can it authorize lawyers to act upon their substantive conception of justice independently of deliberating with their clients about its content. Were the justice conception to recommend such independent action beyond upholding the rule of law, it would be justifying a form of tyranny.

It does not follow that lawyers must defer to their clients' preferences as required by the standard conception, but rather that deliberation with clients places an important internal constraint on (and opportunity for) the legal pursuit of justice. This constraint is important both because it respects the principle of informed consent, and because it increases the chances that justice will actually be pursued and the virtue of justice will be as widely distributed among citizens as constitutional democracies require. An analogous (although relevantly different) set of internal constraints applies to judges, where judicial deliberation issues in one or more opinions that are informed by, and addressed to, competing legal and moral perspectives on the case.

The recommendation that lawyers deliberate with their clients follows also from an understanding of the content of social justice in a constitutional democracy. Constitutional democracies are created to cope with reasonable disagreements, including disagreements over the content of social justice and just social policy. At the same time, constitutional democracies must be constituted by, and authorize public officials to act upon, a public conception of social justice which itself is not universally accepted. Ongoing deliberation over its contents is one requirement of a conception of social justice suitable to constitutional democracy. Saying that lawyers should deliberate with their clients about justice is another way of saying that they should act justly, where the conception of justice now includes consideration of the social process of reasoning, not just its content. Reasoning by lawyers themselves is not enough, however logical, cognizant of the facts, tolerant and understanding of human nature legal reasoning is. Neither is deliberation a sufficient condition of legal justice, although it is both necessary and neglected.

I have outlined two reasons internal to the justice conception for lawyers to deliberate with their clients. There is a third reason that becomes apparent only after considering the limited scope of the justice conception in motivating what many lawyers do for a living. The justice conception would of course claim too much were it to require lawyers always to manifest the virtue of justice in their actions. In some situations of adversary justice, we rely upon legal institutions rather than lawyers for pursuing justice. This is the insight the standard conception carries too far. But there is yet another limit of the justice conception that rests on the distinction between furthering social justice and helping people live good lives according to their best lights, where social justice does not demand such help but simply permits it. Social justice need not be the primary aim of legal counsel and action on behalf of clients. Helping people live good lives is an aim of legal counsel consistent with social justice, but not dictated by it or directly aimed at it. Some legal services simply help people live good lives according to their best lights.

Whereas the standard conception needs to be revised at the level of justification, the justice conception needs modification at the level of motivation. The commitment to deliberating about the law from the perspective of social justice seems to be inadequately motivated by a great deal of legitimate legal practice, which is aimed not at social justice but at helping people live good lives consistent with, but not dictated by, social justice. Many people need lawyers on occasion to help them deliberate not about social justice, but about their own well-being. Helping people deliberate about their own well-being is surely a reasonable, indeed admirable use of the law, as long as the means and ends of such legal aid are not unjust. It also adds another motivating reason for good people to enter the legal profession. The legal profession is, or at least can be, a "helping profession" in this regard.

We often need help in thinking about our own well-being, and lawyers can help us in situations where legal services are a potential means of furthering individual well-being. Many nonadversarial legal services are only indirectly relevant to social justice, but directly relevant to a client's well-being. Lawyers who further the well-being of their clients without injuring others do good in the world, even if they do not contribute to the cause of justice. The differential ability of citizens to afford legal counsel is of course a matter of social justice, but income maldistribution does not obliterate the good of this common form of legal counsel. Wherever legal services have the potential for enhancing human well-being, they also have the potential for harm, which is yet another reason why the disposition of lawyers to deliberate with their clients is a legal virtue. Deliberation is a necessary condition for informed consent, and informed consent is a safeguard against the potential tyranny of legal counsel.

What can motivate good people to enter a profession where advocacy is more often better rewarded than the pursuit of social justice and where the pursuit of social justice is often not a realistic aim of legal counsel? Law can be an attractive career not only because people make good money in it or pursue social justice by its means, but also because lawyers can live a good life in the law by helping other people live good lives. The character conception of legal virtue builds upon this understanding of legal purposes, which is potentially more inclusive than advocacy in an adversary process or the pursuit of social justice.

The character conception, as articulated by Anthony Kronman, runs roughly as follows. Law is a habit-forming profession. The good habit that it can cultivate is practical judgment, *phronesis*. Living a good life in the law means living a life characterized primarily by practical judgment, not by client advocacy or the pursuit of social justice by means of the law. Both client advocacy and the pursuit of social justice are too instrumental to serve as adequate motivations for good people to become lawyers. Kronman worries that "the lawyer who chooses his career for public-spirited reasons alone, may see himself merely as the instrument by which some communal good is to be achieved. He may even hate his work, find it dull and unrewarding in itself, but still consider it the most economical route to whatever political arrangements he values for their own sake."[10]

This particular worry is not warranted for two reasons. One relates to Kronman's overly restrictive understanding of the public-spirited reasons for becoming a lawyer, and the other relates to a narrow notion of the nature of practical judgment in law. The insight of the character conception is that law at its best requires the virtue of practical judgment. But the conception, as Kronman proposes it, unnecessarily separates public-spirited reasons for becoming a lawyer from the exercise of practical judgment. Suppose you have public-spirited reasons for becoming a lawyer. You want to contribute in some small way to defending people's legal rights and obligations. Another element of your public-spiritedness is that you believe that the equal defense of every citizen's legal rights and obligations constitutes an essential element of the public good in a constitutional democracy. You correctly believe that by the very process of competently defending people's rights and obligations, you are contributing to social justice. In being motivated by social justice, you therefore need not have anything resembling a purely instrumental relation to your work.

Even if your attitude toward legal work is not purely instrumental, could it be, as Kronman also suggests, that the legal practice of defending citizens' rights and obligations is dull and unrewarding, especially by contrast to the practice of practical judgment? Even this more qualified claim rests on a misunderstanding of how lawyers can best defend citizens' rights and obligations. Lawyers should not simply enlist what they consider the best legal means to pursue what they consider the most justified ends for their clients. In the service of social justice, law at its best enlists the practical judgment of lawyers, and (as we have seen) the exercise of practical judgment by lawyers requires deliberation with clients, the mutual interchange of relevant information, and understanding. If a life dedicated to the exercise of practical judgment is rewarding in itself, as the character conception rightly suggests it can be, then legal practice in defense of social justice may

[10]Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 843–44 (1987).

also be rewarding in itself, because it too enlists the virtue of practical judgment.

Kronman describes a person of practical judgment as combining "a compassionate survey of alternatives viewed simultaneously from a distance,"[11] and as someone who "knows more than others do because he feels what they do not."[12] Practical judgment is "marked as much by affective dispositions as by intellectual powers."[13] There is much to be said for this understanding of practical judgment insofar as it includes the disposition of lawyers to sympathize with, and thereby better understand, the situation of their clients. But practical judgment in legal practice cannot simply be assimilated to practical judgment more generally. According to Kronman, practical judgment requires more than knowledge of the law and cleverness; it requires

> the same combination of sympathy and detachment that a person must possess in order to deliberate wisely about his own ends. The wise counselor is one who is able to see his client's situation from within and yet, at the same time, from a distance, and thus give advice that is at once compassionate and objective.[14]

What is missing from this description of practical judgment in the law? The lawyer of practical judgment gives advice, but he never (according to Kronman's many descriptions) needs to consider the judgments of clients, their understanding of what is good or just. By now, it will come as no surprise that the element that I think is missing from this understanding of practical judgment is the disposition of lawyers to deliberate, to engage with their clients in the mututal interchange of information and understanding, rather than the one-way flow that Kronman's description recommends, his Aristotelian sympathies notwithstanding. The addition of deliberation to our understanding of practical judgment in the law would only strengthen the character conception's claim that people can live a good life in the law, a life that, unlike the nondeliberative exercise of practical judgment by lawyers, would be free of problematic paternalism. The exercise of practical judgment in the law can be all the more rewarding when it issues in deliberation by both lawyers and clients.

Practical judgment is a generally valuable virtue. The character conception is therefore correct in recommending practical judgment as a constitutive part of a good life. But the demands of practical judgment differ importantly from one realm of life to another. In private life, practical judgment often does not require the disposition and skills of deliberation. In many matters of private life, we need not engage in the mutual exchange of reasons, empirical and moral understandings with other people in order to divide neatly between private and public realms. In some matters of law, for example, clients may know precisely what they want, and know enough about the law to be confident that their preferences are informed and therefore in need of nothing but technical input from legal counsel. This is that attractively unsanctimonious view of lawyers that Anthony Trollope attributes to John Bold, the political reformer:

> Bold was not very fond of his attorney but, as he said, merely wanted a man who knew the forms of law, and who would do what he was told for his money. He had no idea of putting himself in the hands of a lawyer. He wanted law from a lawyer as he did a coat from a tailor, because he could not make it so well himself.[15]

Because our options for legally pursuing even mundane matters these days are so complex in their implications for our own and other people's lives, this view of lawyers as hired hands is unrealistic at best and dangerous at worst.

Complex professional decisions typically require deliberation between professional and client, if only (but not only) to figure out what a client wants, and how a professional can best help the client without making things worse (by using means, for example, that are incompatible with some other valued end that only deliberation brings to light). Deliberation is a constitutive part

[11] *Id.* at 853.
[12] *Id.* at 858.
[13] *Id.*
[14] *Id.* at 866.
[15] Anthony Trollope, THE WARDEN 25 (David Skilton ed., Oxford University Press, 1980) (1855).

of practical judgment with regard to complex professional decisions that affect the interests of other people, and practical judgment is, as the character conception correctly suggests, an indispensable virtue of good lawyering. If lawyers do not deliberate with their clients, if they pursue their own independently-arrived-at conception of their clients' interests or social justice, then they act paternalistically, treating their clients as children, and even unjustly, using them as mere means rather than ends in themselves, as constitutional democracy demands. If lawyers deliberate with their clients not only, or even primarily, about social justice, but about the ways in which the law can contribute to their well-being, then many kinds of legal practices can be motivated for public-spirited reasons and because they are conducive to living a good life as a lawyer. Living a good life in the law is dependent upon doing good with the law, but lawyers can do good even when they are not self-consciously serving the cause of social justice. This is an important insight of the character conception of law. Another public-spirited reason for being a lawyer is to help people by deliberating with them about how the law can (and cannot) help them live a good life. Helping people in this way requires lawyers to have the virtue of practical judgment, and a necessary element of practical judgment in the legal realm is the disposition to deliberate with clients.

To summarize: The standard conception of law, the justice conception, and the character conception, as commonly articulated, neglect the virtue of deliberation in legal practice. Yet consistently pursued, all three point to the moral importance for lawyers of the disposition to deliberate. Whether the law aims at ardent advocacy of clients' informed preferences, the pursuit of social justice, or the ability of lawyers to live a good life in the law, deliberation becomes a necessary (but not sufficient) virtue for lawyers. Each of these three conceptions of the law is incomplete. The law actually and ideally aims at elements of all three conceptions which have yet to be synthesized into a more comprehensive view.

We need not choose among the three conceptions, or arrive at a more comprehensive conception to acknowledge the importance of legal deliberation. Can lawyers be taught the disposition to deliberate with clients, and the skills of deliberation? Yes, if legal education is self-consciously aimed at teaching the deliberative virtues, and if legal practices are better designed to encourage lawyers to deliberate. These are of course two big "ifs," which I now must leave largely in the hypothetical.

In conclusion, I can only mention, briefly and tentatively, two ways of moving legal education further in the direction of teaching the deliberative virtues. The first is a change in law school education that would parallel what has been happening in many medical schools and for related reasons: the expansion of clinical practice for the purpose of teaching future lawyers how better to communicate with their clients. Clinical practice is perhaps more often viewed as a means of encouraging law students to pursue public interest law, but clinical work need not be motivated only or even primarily by this purpose. Clinical practice can also be designed and directed to cultivate the skills and dispositions of deliberation, which should characterize good lawyers, whether they enter the world of corporate, private, prosecutorial, or public defense law.

A second way of moving legal education further in the direction of teaching deliberation is for regular law school courses to teach more of the knowledge and understanding that is necessary to make informed judgments about alternative legal strategies. This entails teaching students to think in philosophically and empirically rigorous ways about the value and consequences of pursuing alternate legal strategies and defending different legal doctrines. Learning to think like a lawyer would mean learning to think rigorously not only about legal doctrine but also about the consequences and moral values of alternate legal (and nonlegal) decisions. And also to understand the different evaluations people may place on various legal alternatives in light of their own distinctive conceptions of the good life. The Socratic method employed for the sake of deliberation would have students engaging in the give-and-take of argument about the value of various legal strategies in light of considerations of social justice and conceptions of the good life in a constitutional democracy.

There is obviously a lot more to be said about whether and how the deliberative virtues can be taught to lawyers. I have offered some reasons why

the disposition to deliberate and the skills of deliberation should be considered an important part of legal virtue, whether one subscribes to the standard conception, the justice conception, the character conception, or a more (yet to be articulated) comprehensive conception of law. Deliberation, I have argued elsewhere, is also a disposition that public education should try to teach all democratic citizens.[16] It is not the unique responsibility of law schools or legal institutions to teach deliberation. But deliberation is not easy to teach, and a constitutional democracy can use all the help it can get, not only but especially from lawyers and professors of law.

[16]Amy Gutmann, DEMOCRACTIC EDUCATION 50–52 (1987).

Discussion Questions

1. Gutmann argues that there are three traditional ways to understand legal virtue. What are they and why does Gutmann believe each one is incomplete?
2. According to Gutmann, what is the deliberative virtue of lawyering?
3. What suggestions does Gutmann put forward to solve the problem of lack of deliberation with clients? Do you think her suggestions will work?
4. Cohen described two competing conceptions of lawyering, the pure legal advocate and the moral agent. What connections do you see between those concepts and the ideas discussed by Gutmann?

Cases

Case 9-1

Anthony sat staring at his attorney, Mr. Tucker. After awhile he spoke: "He insulted me several times. I lost my temper. I picked up a metal bar lying on the ground and I hit him. I hit him over and over until he stopped moving. After that I ran. I didn't know if he was dead or not. I didn't care. I just wanted to get away. Later, I found out that he was dead. I feel bad for what I did, but I don't want to go to jail. What should I do, Mr. Tucker?"

Jim Tucker has heard such confessions and pleas for help many times. "Where's the metal bar, Tony?"

"I threw it in the middle of the river. No one will find it there."

"Fine, I'll tell you what you're going to do, Tony. You're going to take that stand and you're going to plead not guilty."

1. According to Taylor, what guidance do the ABA Canons give Mr. Tucker in this kind of case?
2. How would Monroe Freedman respond to Mr. Tucker's decision to have his client plead not guilty?
3. According to Taylor, what direction does case law give in this kind of case?
4. How might one use moral theory to determine the limits of an attorney's obligation to be an advocate for his client? Would moral theory support Mr. Tucker's recommendation to plead not guilty?

Case 9-2

Terry has always been a meticulous and careful person. Her attention to detail has repeatedly impressed her family and friends. Such an orientation toward life has made Terry a very effective corporate lawyer. Unfortunately, for the first time in her life, she

finds herself between a rock and a hard place. Terry received an anonymous phone call stating that one of her clients, a man she has been friends with for a long time and who owns a failing factory, plans to burn down his factory in order to gain the insurance money. In the past, he has joked with her that he wished "the damned thing would burn down and solve all his problems." As an officer of the court, she knows that she must confront her client in order to stop him, but she doesn't know how. On one hand, she knows that if she expresses to her client the limits of her confidentiality, the client will not be honest with her. On the other hand, if she does not express the limits on her confidentiality, the client may confess and she will be required to break confidence with him and turn him in. Neither prospect seems ethically acceptable to her.

1. According to Pizzimenti, does Terry have any justification for withholding the limits of her confidentiality?
2. From Pizzimenti's perspective, suppose Terry decides to advise her client of the limits on her obligation to maintain confidentiality. Will such a revelation support or hamper her client's autonomy?
3. In light of all the articles thus far discussed, can you think of any other way that Terry might handle this situation?
4. Above and beyond the limits of her professional obligations, does Terry have any moral obligations to confront and, if necessary, expose her client's intentions?

Case 9-3

Joseph Benson takes legal cases when no one else will. He argues that a lawyer should not decline representation just because the client or the cause is unpopular. He bases this on what he calls the Principle of Individual Justice. This means that each person, regardless of what he has done, deserves to have his moral and legal rights protected, including the right to a fair trial. In his zeal to represent his clients, Benson has deliberately deceived the court by withholding evidence and encouraging his clients to lie in court. In his mind Benson believes he is only doing what a good legal advocate would do, which is to protect his client from being ***harmed*** at all costs. Benson has also said that this is exactly what a morally good person would do.

1. Benson seems like a good legal advocate and (perhaps) a morally good person. What's your opinion? What would Cohen argue?
2. While Benson exhibits a commitment to individual justice, moral courage, and nonmalevolence, his commitments seem to ignore the principle of truthfulness. Explain why this is so. Do you think he is ethically justified?
3. Using Cohen and the moral theories in Chapter 1, describe how someone might criticize Benson's claim that his view is the *only* morally right view.

Case 9-4

Jim Pullman's marriage is about to fail. He has been married to Mary for six years and they have two children, but the level of commitment between them has eroded. He has spoken about this to only one of his friends who suggested he talk to a friend of his who is a divorce attorney. Following his advice Jim schedules an appointment. The attorney states that he would be glad to represent him; however, the attorney makes clear that before Jim decides to do this he should think of some of the important consequences of his action. He explains to Jim that divorces often end up tearing apart more than the marriage; they also tear apart the loyalty of other related family members

and close friends. More importantly divorce puts the children, who are caught in the middle of the fight, at odds with each other and with the parents. The attorney adds that the court system, more often than not, awards custody of the children to the mother and awards both child and spousal support. Jim's attorney also points out that it is not uncommon for marriages to change around the six or seventh year. One or both of the partners feel like marriage is unsatisfying. Normally, however, this lasts only a brief period of time and with counseling good marriages can be saved. Finally, the attorney ends his advice with a discussion of the importance of the married unit for the psychological stability of the children and the overall stability of society in general.

1. Does Jim's attorney's approach to lawyering fit the standard conception of law, the justice conception, or the character conception? Do you think that one of these conceptions fits Jim's problem better than the other two? If so, why?
2. Do you think that the advice the attorney gave Jim satisfies the deliberative obligation attorneys have toward their clients? How do we really know if Jim's attorney has satisfied this obligation? Are the attorney's last two bits of advice consistent or inconsistent with this obligation? (Could the attorney even be overstepping ethical boundaries by imposing certain ideas on Jim?)
3. Suppose that you are Jim's attorney. In light of Gutmann's article, how would you approach Jim's problem? Would you advise anything different? What, if anything, would the article by Cohen contribute to your approach and advice? What about the article by Faber (in Chapter 4)?