

**THE EVOLUTION OF  
PROFESSIONALISM AND ETHICS:  
TO WHOM DOES THE LAWYER OWE HIS DUTY?**

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The first legal ethics treatises suggested that the lawyer had a duty to the court and to himself, as well as to his client. In the late 1800's, lawyers began to see the duty to the client as predominating.

Traditionally, trial lawyers adopted the more modern view because they believed it protected the client, while corporate-side lawyers preferred the more traditional model. Today, however, the alliances are shifting. Corporate-side lawyers are embracing the modern view, while trial lawyers are contending that corporate-side lawyers are using the rules to justify supporting anything their corporate clients want to do.

While the pendulum has swung back to a minor degree, today Georgia's rules, and the ABA Model Rules on which they are based, tend heavily in favor of the modern model. Even the recent "professionalism" movement thus far has focused on

monitoring the outward behaviour of lawyers, and not on addressing the fundamental, philosophical question of how lawyers should make choices. In light of the use being made of the rules, lawyers need to carefully consider their own views as to what a lawyer's duties should be.

I. THE MID-1800'S: THE LAWYER HAS AN EQUAL DUTY TO HIMSELF, THE COURT, AND HIS CLIENT.

In the early 1800's, lawyers were seen as owing duties to their clients, but also to the court and themselves. This "classic model" has been described thusly:

[I]n the courtroom, one lawyer is not trying to defeat another lawyer. Rather, one litigant is trying to best another, and each requires the services of a lawyer to adequately present his legal and factual position. It is therefore erroneous under the classic model to portray a lawyer as winning a case. A lawyer does not win a case; a client does.

A. Herron, Collegiality, Justice, and the Public Image: Why One Lawyer's Pleasure is Another's Poison, 44 U. Miami L. Rev. 807, 812 (1990).

A. Hoffman's Treatise.

In 1836 David Hoffman prepared the first thorough treatment of the lawyer's conduct, published in a treatise for law students called A Course of Legal Study. He espoused the classic notion of a lawyer having duties to several entities:

My client's conscience, and my own, are distinct entities: and though my vocation may sometimes justify my maintaining as

facts or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privileges of solely judging to what extent to go. In civil cases, if I am satisfied from the evidence that the fact is against my client, he must excuse me if I do not see as he does, and do not press it; and should the principles also be wholly at variance with sound law, it would be dishonorable folly in me to endeavor to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that might bring death to my cause of the succeeding day.

D. Hoffman, supra, Resolution XIV, at 755 (quoted in L. Patterson, Legal Ethics and The Lawyer's Duty of Loyalty, 29 Emory L.J. 909, 921 (1980)). Resolution X of Hoffman's treatise stated:

Should my client be disposed to insist on captious requisitions, or frivolous and vexatious defenses, they shall be neither enforced nor countenanced by me. And if still adhered to by him . . . he shall have the option to select other counsel.

Hoffman went so far as to state that a lawyer should not plead the statute of limitations merely on the basis of time passed, or the bar of Infancy when the claim against the infant was just. Resolutions XII, XIII, at 754-55 (cited in Patterson, Legal Ethics, 29 Emory L.J. at 922).

B. Rush v. Cavanaugh.

Hoffman's views were widely held during the mid-1800's, as is illustrated by the case of Rush v. Cavanaugh, 2 Pa. 187, 189 (1845). See Patterson, Legal Ethics, 29 Emory L.J. at 928. The case arose after a client hired an attorney to act as special prosecutor, and during the course of the prosecution,

the attorney agreed to drop the charges. The client called the attorney a thief, a robber and a cheat, and the attorney sued his former client for defamation.

The Supreme Court of Pennsylvania rallied to the lawyer's defense, upholding a judgment for the lawyer and stating:

[The lawyer] is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man. . . . The high and honourable office of a counsel would be degraded to that of a mercenary, were he compelled to do the biddings of his client against the dictates of his conscience.

Rush, 2 Pa. at 189 (1845).

C. Sharswood's Essay on Ethics.

Hoffman's views were carried into the very influential Essay on Professional Ethics, by George Sharswood, originally delivered as a speech to a law school class at the University of Pennsylvania. Sharswood's remarks were first published in 1854, and became an extremely influential force in legal ethics. See Patterson, Legal Ethics, 29 Emory L.J. at 913 n.15.

Sharswood shared Hoffman's view that the duty to the client was only one of several duties the lawyer had:

Let [the lawyer] be liberal to the slips and oversights of his opponent wherever he can do so, and in plain cases not shelter himself behind the instructions of his

client. The client has no right to require him to be illiberal -- and he should throw up his brief sooner than do what revolts against his own sense of what is demanded by honor and propriety.

G. Sharswood, Preface to An Essay on Professional Ethics at 74-75 (5th ed. 1907). Sharswood also quoted from the Rush v. Cavenaugh case. See Patterson, Legal Ethics, 29 Emory L.J. at 933. Sharswood emphasized that a lawyer had a duty to his brethren at the bar, in equal measure to his duty to the court and the client: "a very great part of a man's comfort, as well as of his success at the Bar, depends upon his relations with his professional brethren." G. Sharswood, An Essay on Professional Ethics 75 (5th ed. 1896) (quoted in Herron, Collegiality, Justice, and the Public Image, 44 U. Miami L. Rev. at 811-12).

## II. THE LATE 1800'S: THE LAWYER'S DUTY TO CLIENT BEGINS TO PREDOMINATE.

After the Civil War, however, American lawyers began to change their thinking about to whom a lawyer owed a duty. Lawyers focussed less on the simultaneous duty to client, court and self, and focussed more on the duty to client, even to the exclusion of the other duties. Lawyers holding to the newer view quoted Lord Brougham, who in 1820, while defending Queen Caroline against King George IV's bill for divorce, stated:

An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client at all expedient means -- to protect

that client at all hazards and costs to all others, and among others to himself -- is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other.

Rogers, The Ethics of Advocacy, 15 L.Q. Rev. 259, 269 (1899) (quoting Lord Brougham) (quoted in Patterson, Legal Ethics, 29 Emory L.J. at 909).

Ironically, Lord Brougham professed to be "astonished" that this interpretation was put on his words. Rogers, supra, (quoting Brougham, Life and Times of Lord Brougham at 405-07) (quoted in Patterson, Legal Ethics, 29 Emory L.J. at 910). The words had been intended as a threat that Brougham would reveal that King George secretly had married a Roman Catholic while he was heir-apparent. Such an act was deemed a forfeit of the crown, and if the deed were exposed, George might be deposed. Lord Brougham's threat was effective: the divorce did not go through.

Nonetheless, Lord Brougham's words have been enormously influential. Using the "modern model," lawyers do not accept personal responsibility for whether the system achieves justice. Rather, they assume:

[T]hat whatever the system provides is justice, [so] the lawyer is allowed -- or perhaps obligated -- to play the role of a hired gun, carrying out his client's will within legal limits to the possible detriment of the truth or accuracy of the proceedings. Furthermore, because the procedures themselves are assuring that justice is done, a lawyer is more inclined

to take advantage of every procedural edge that may be gained.

Herron, Collegiality, Justice, and the Public Image, U. Miami L. Rev. at 816. The result is that lawyers are afraid "to back away from zealous advocacy, [as] they would have to prejudge each case, and essentially usurp the judicial function," and as they "might fear a malpractice suit for doing so." Id. at 817.

Commentators suggest lawyers' thinking shifted in response to broader social changes, either caused by the industrial age or by a general belief in relativism, as opposed to absolutes. Regardless of the reasons for the change, the newer thoughts made their way into the first ethical codes and into the case law.

A. Explanation One: Lawyer as Tool of the Corporation.

Ray Patterson, a law professor at Emory, theorizes that the industrial age affected the law profession as it did the rest of society. See Patterson, Legal Ethics, 29 Emory L.J. at 953. He suggests that, with the advent of big corporations, lawyers were called on to act in the business context, rather than only in the litigation context. Id. Rather than being merely advocates after the fact, lawyers now shared responsibility for the actions of their clients that led to the litigation. According to Patterson, "[t]he response of the legal profession . . . was to decline the opportunity to share the client's responsibility." Id. For example, Elihu Root, an industrial age contemporary, reportedly said: "The client never wants to be told he can't do what he wants to do; he wants to be

told how to do it, and it is the lawyer's business to tell him how."

Patterson contends that a famous 1868 case illustrates the shift that was taking place in lawyers' thinking about what their role was. In a fight for control of the Erie Railroad, Commodore Vanderbilt sued Daniel Drew and two others. Drew and his faction hired attorney David Dudley Field, who in turn hired forty lawyers to assist him. Id. at 950.

Field and his team spread out through the New York courts, seeking contrary injunctions. Id. "In the span of one month there were seven injunctions from five different justices." Id. At long last, two injunctions completely contradicted one another, and Drew picked the one that suited him and ignored the one contrary to his interests. Id. Drew "complied" with the injunction he had selected by issuing huge amounts of Erie Railroad stock and then dumping it on the market. Id. The result was that the value of the stock of the company was destroyed, along with Commodore Vanderbilt's chances for control of the railroad. The forty lawyers received \$334,416 for their work; Field's four-man firm alone received \$48,289. Id.

Field was widely criticized for what he had done, but he defended himself by saying: "[T]he lawyer is responsible, not for his clients, not for their causes, but for the manner in which he conducts their causes." Id. at 951 (quoting Schudson, Public, Private, and Professional Lives: The Correspondence of

David Dudley Field and Samuel Bowles, 21 Am J. Legal Hist. 191, 198 (1977) (quoting David Dudley Field)).

B. Explanation Two: The Society Lost Its Shared Conception of the Good.

Professor Jack Sammons of Mercer University offers a different explanation for the change in the profession, although he does not date the change so specifically as Professor Patterson. Sammons maintains that our present-day society lacks any shared notion of what he calls "the good of a life well-lived." Jack L. Sammons, The Professionalism Movement: The Problems Defined, 7 Notre Dame J.L. Ethics & Pub. Pol'y 277, 283 (1993).

Sammons describes our society as slipping into a constant relativism, in which no one person's opinion is deemed any more valuable than anyone else's. Without shared notions, Sammons says, lawyers "do not know what practical wisdom or good judgment might be," and as a result lawyers do not see themselves as having any authority, merely "a different personal perspective." *Id.* at 283. Unsure that anything they say or do has any moral authority, lawyers have avoided responsibility for moral decisions. Sammons believes lawyers have done so by specializing, hoping to substitute "objective technical expertise" in a narrow field, for wisdom and moral authority. *Id.* at 285-87.

C. The Result: Dualism in the 1887 Alabama Code of Legal Ethics, the ABA Canons of 1908, and the Model Code of 1969.

Whether Professor Patterson or Professor Sammons better describes the reason for the shift, the result of the shift was a set of ethics codes that embodied the dual and dueling ideas about a lawyer's responsibilities. The Alabama state bar passed the first-ever code of legal ethics in 1887 (Alabama State Bar Association, Code of Ethics (1887)), and both competing strains of thought -- the idea that the lawyer is responsible to court, client, the bar, and himself, and the idea that the lawyer is mostly responsible to the client -- made their way into the Code.

For example, one section of the Code stated:

An attorney "owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability," to the end, that nothing may be taken or withheld from him, save by the rules of law, legally applied. No sacrifice or peril, even to loss of life itself, can absolve from fearless discharge of this duty. Nevertheless, it is steadfastly to be borne in mind that the great trust is to be performed within and not without the bounds of the law which creates it. The attorney's office does not destroy the man's accountability to the Creator, or loose the duty of obedience to law, and the obligation to his neighbor; and it does not permit, much less demand, violation of law, or any manner of fraud or chicanery, for the client's sake.

Alabama Code of Ethics, Rule 10.

The competing concepts of a lawyer's duty then passed from the Alabama Code into the American Bar Association's Canons of Professional Ethics of 1908, which was based on the Alabama Code. The Canons then formed the basis for the 1969 ABA Model Code of Professional Responsibility and Code of Judicial Conduct. See Patterson, Legal Ethics, 29 Emory L.J. at 913,

With the debate over to whom the lawyer owed his duty came a debate over whether a lawyer could reveal the confidences of a client. Sharswood and Hoffman had not included confidentiality as an ethical duty of a lawyer, but the Alabama Code stated:

Communications and confidence between client and attorney are the property and secrets of the client, and can not be divulged, except at his instance; even the death of the client does not absolve the attorney from his obligation of secrecy.

1887 Alabama Code of Ethics, Rule 21 (quoted in Patterson, Legal Ethics, 29 Emory L. J. at 941).

D. Courts have reflected the general confusion created by the dueling models.

Ethics decisions in the twentieth century have, at times, sent confusing messages, as courts have relied on one or the other of the models. For example, a 1974 case vacated a default judgment where one counsel had not given notice of the pending default motion to the other side, stating "it is patently obvious that attempts to utilize every niggling procedural point for maximum advantage demean the legal

profession, reducing its procedures to a vulgar scramble." Silverman v. Polis, 230 Pa. Super. 366, 326 A.2d 452 (1974).

A California court held, by contrast, that: "While as a matter of professional courtesy counsel should have given notice of the impending default, and we decry this lack of professional courtesy . . . , counsel was under no legal obligation to do so." Bellm v. Bellia, 150 Cal. App. 3d 1036, 198 Cal. Rptr. 389 (1984) (citations omitted). Falling even more obviously on the side of the modern model, in a similar case before the Illinois Supreme Court, a concurring opinion maintained that: "to require an attorney to inform his adversary of a default stands athwart the attorney's duty to zealously represent his client." Sprung v. Negwer Materials, Inc., 727 S.W.2d 883 (Mo. 1987) (en banc) (Rendlen, J., concurring).

### III. WHO SUPPORTS THE THEORY THAT LAWYERS ARE MERE AGENTS OF THE CLIENT? A CHANGING OF THE GUARD.

In the 1970's, the Association of Trial Lawyers of America ("ATLA") took a strong stance in favor of the idea that lawyers must be subordinate to their clients' wishes. The mainstream bar, with a more corporate influence, took the opposite view. Because the modern model is advantageous to it, however, the corporate bar has switched its allegiance. ATLA has not taken a specific stance, but members are increasingly arguing for the traditional model.

A. ATLA'S Early Position: Defending the Role of  
Lawyer as Agent.

ATLA was founded in 1946. It was a growing entity when, in 1977, the American Bar Association ("ABA") appointed the Kutak Commission to reexamine the ethics code in the wake of the Watergate scandal and of fears that the ABA's power over ethics codes might be eroding. T. Schneyer, Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct, 14 Law & Soc. Inquiry 677, 677-78 (1989).

The ABA's Kutak Commission started with a strong sense of the lawyer as having duties beyond those he owed to his client. An early draft of the new code proposed "that a lawyer presenting a case to a tribunal must disclose facts adverse to her client's case if 'disclosure . . . would probably have a substantial effect on the determination of a material issue of fact.'" Id. at 700.

Many lawyers were hostile to these early drafts of the code. Specifically, ATLA disapproved of the ABA draft codes because they made "lawyers servants of the system, rather than the bulwark between organized power and the individual." Koskoff, President's Page, Trial, Jan. 1980, at 4, 6 (quoted in Schneyer, Professionalism as Bar Politics, 14 Law & Soc. Inquiry at 712. ATLA determined it would write its own code, the American Lawyer's Code of Conduct.

ATLA President Theodore Koskoff said that during the meetings of the committee drafting ATLA's code, nonlawyers serving on the committee "were shocked by the concept that a

lawyer would reveal a client's secrets except in the most extreme circumstances. They reminded us . . . that what we were writing was not just a Code of Conduct for lawyers, but a Bill of Rights for clients." Theodore J. Koskoff, Introduction to the American Lawyer's Code of Conduct, Trial, Aug. 1980, at 46, 47 (quoted in Schneyer, Professionalism as Bar Politics, 14 Law & Soc. Inquiry at 711. In accordance with these principles, ATLA came down strongly on the side of confidentiality, one draft even "abandon[ing] the traditional rule allowing lawyers to use client confidences to recover a fee." Schneyer, Professionalism as Bar Politics, 14 Law & Soc. Inquiry at 711.

B. The Corporate Lawyer: Secrecy as Protection for Lawyer and Client.

Toward the end of the debate over the proposed ABA code, in February 1983, corporate attorneys began to recognize the advantages and protections to them if requirements of confidentiality were imposed and if the responsibility for decision-making were shifted to the client.

The American College of Trial Lawyers, an organization that is said to "often represent insurers and other companies and lock horns with ATLA lawyers" (id. at 718), opposed canons that "allowed lawyers to disclose otherwise protected information to prevent a client from committing a crime or fraud likely to cause substantial bodily harm or substantial injury to financial interests or property." Id. at 719. The group also opposed a rule that "permitted a lawyer in unusual circumstances

to reveal confidential information to outsiders, even over the objection of the organization's highest authority, in order to protect the organization," because the group "considered it presumptuous for lawyers to ever 'play God' by disclosing information the highest authority in the corporation was determined to keep confidential." Id. at 720. In other words, the group contended that the client's ethics ought to be a ceiling on the lawyer's ethics. The American College of Trial Lawyers was able to make substantial changes to the proposed ABA code before it was passed.

Today, the concept of attorney as agent bound to execute the will of the corporation has gained widespread acceptance among corporate trial attorneys. With that concept has come the notion that attorneys are guarantors and guardians of corporate secrets. Witness the comments in the Tort & Insurance Law Journal by two attorneys from the large firm of Jenner & Block in Chicago. The two set out a procedure by which a corporation could conduct an internal investigation and make sure that it can keep everything found during the investigation under wraps:

Management should notify the board of directors promptly of any improprieties so that counsel can be engaged from the outset of the investigation: preliminary investigation conducted solely by management may not be accorded privilege or work product protection.

T. Mulroy and W. Thesing, Confidentiality Concerns in Internal Corporate Investigations, 25 Tort & Ins. L.J. 48, 63 (1989). The two went so far as to advise counsel that:

Counsel should strive to include mental impressions, legal theories or potential strategies in all notes or memoranda of interviews with others in order to afford those documents the extensive protection for opinion work product.

Id. at 64.

C. The New Consumer-Driven Position: Confidentiality and Secrecy Can Be Used to Hurt Consumers and Their Cases.

In disputes between businesses, usually each of the two companies has access to most of the relevant information before suit begins. In a consumer's suit against a corporation, however, generally the corporation has all of the relevant documents locked within its corporate chambers. The consumer cannot get the information without the help of the court or its officers. Without the information, the client has no case.

Because information is essential to the consumer, both for decision-making and in any lawsuit, the consumer needs assurances that the system -- including the corporation's attorneys -- is not being used to prevent him from getting the information he needs.

If the lawyers' ethics are capped by the client's ethics, however, and the client is a corporation, then the lawyer is doomed to amorality or immorality. "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?" Edward, First Baron Thurlow 1731-1806 (quoted in M. King, Public Policy and the Corporation I (1977) (quoted in Coffee, "No Soul to Damn: No

Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386 (Jan. 1981)).

Consumers will best be protected, then, when lawyers are forced to accept responsibility for their actions, rather than allowed to foist all moral decision-making - and blame - onto a corporation.

#### IV. IS THE PENDULUM SWINGING BACK?

In recent years, the bar has emphasized professionalism, and the ABA and many states have rewritten the Model Rules of Professional Conduct.

##### A. The "Professionalism" Movement.

Today bar associations are paying increasing attention to what is seen as a widespread decrease in professionalism in the bar. In 1984, Chief Justice Burger delivered a speech to the American Bar Association in Las Vegas. Warren E. Burger, The State of Justice, A.B.A. J., April 1984, at 62. The chief justice's speech is widely credited with being the impetus for a recent surge in codes espousing ethics and professionalism.

See, e.g., Jack L. Sammons, The Professionalism Movement: The Problems Defined, 7 Notre Dame J.L. Ethics & Pub. Pol'y 277 (1993). The ABA set up a Commission on Professionalism, and many states have adopted codes or "creeds" of professionalism. Georgia now requires attorneys to take one CLE hour on "professionalism" each year.

Is this emphasis on professionalism a sign that lawyers are returning to the idea that lawyers have a duty to

the courts and to themselves, as well as to their clients? Perhaps, but the terms in which the professionalism movement is described make it unlikely that the movement is grounded in such a fundamental change.

For example, the Tennessee Bar Journal introduced the state's new Lawyer's Creed of Professionalism with these words:

But really it's nothing more than how your mother probably taught you to act. Be nice. And in all circumstances, just do the right thing.

Tenn. Bar J., July/August 1991, at 12. This "be nice" description does not suggest that the professionalism movement is based on the idea that a lawyer has duties other than to his client.

B. Georgia's Ethics Rules.

Georgia's ethics rules (formerly known as disciplinary standards, ethical considerations, and directory rules) traditionally have tilted heavily in the direction of the modern model, suggesting the lawyer's duty to the client is paramount. In the late 1990's, the Georgia Bar completely rewrote Georgia's ethics rules, and the new version was adopted by the Supreme Court in 2000. The new rules are based heavily on the ABA Model Rules of Professional Conduct, originally promulgated in 1983. Georgia's rules, like the ABA Model Rules, express the dualistic idea that the lawyer has duties to court, self, and client, but favor the idea that the duty to client trumps all other duties.

## CONCLUSION

Lawyers' ideas about who they are have changed dramatically in the last 150 years. The newer notions allow lawyers to shift the moral responsibility for decisions onto their clients, which may favor corporations over individuals.

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