A PERSPECTIVE ON THE MORAL RESPONSIBILITY OF LAWYERS*

*by Judge Thomas M. Reavley***

The pollsters tell us that the general public has a low respect for the morality of lawyers. According to a recent Texas A&M poll, only thirty-nine percent of Texans give a high rating to lawyers on honesty and ethical standards, compared to high ratings by seventy-eight percent of the public for doctors, seventy-four percent for police officers, and forty-one percent for politicians.[1] The profession's defenders respond by arguing that the ethical duty of the lawyer is to serve the cause of the client rather than to judge or to ensure the morality of that cause, and that the polls actually testify to the faithfulness of lawyers in performing their ethical duty rather than to their low personal morality.[2]

Without a doubt, it is what we do on behalf of our clients that ruins our standing in the polls. The perception is based, not only upon our representation of unsavory clients, but also upon the familiar displays of deception and sophistry to win whatever the client wants. It seems to me that our low public rating has some justification because, in our proud obsession with the duty to the client, we have become much too casual about the larger moral obligations to society. Neither professional duty to the client nor our role in the adversary system can justify fraudulent conduct.

Legal ethics and the rules of professional responsibility inform us on the particular obligations of our profession. But we may as well claim that we have separated breath from life as pretend that the lawyer's professional conduct is somehow set apart from her

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** Circuit Judge, Fifth Circuit; B.A., University of Texas, 1942; J.D., Harvard University, 1948; LL.M., University of Virginia, 1983; Lecturer, Baylor University Law School; Adjunct Professor, University of Texas Law School.

1. Texas Poll, Fall 1987 (conducted by Public Policy Resource Laboratory, Texas A&M University for Harte-Hanks Communications Co.).

2. For an overview of the lawyer as a mere advocate serving the cause of a client, see Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

personal morality. Everything we do, whether in the courtroom or on the street, affecting a client or the deliveryman, must and will reflect our personal moral standards. Moral philosophy does matter, and we should say more about it in the law schools. Those people who contend that a lawyer should argue to the jury what the lawyer knows to be false are applying ethics in mid-air. They are distorting the rules for want of the moral foundation required for the implementation of all rules of ethics.

Let me put to you three cases. First, suppose that your client brings to you a document, apparently signed by all of the parties, which tends to establish the client's claim. Because of your understanding of the case and what your client has told you at earlier times, you believe the document to be forged. Do you discuss your doubts with the client? Do you submit the document to a questioned documents expert in advance of filing it with the discovery papers? If an expert examines the document and says that she is inclined to think that it is forged in some significant part but that she cannot be positive, and if you are still convinced that it is in fact a forgery, what do you do?

In the second case, your client insists upon a legal right or judgment which you think will achieve a morally objectionable result. For example, the case could involve barring payment of a just debt by interposing the statute of limitations, or insisting upon custody of a child for whom the client cannot possibly give adequate care. But I put to you the one involving Client Gotlots and Widow Onespot. Your client Gotlots is acquiring land for a large development and one corner lot is important to the development. Jenkins owns the clear record title to that lot, but on the lot stands the home and garden of Widow Onespot. Jenkins tells you that Widow Onespot is his sister and has been living there for many years with the consent of their father, now deceased. Jenkins explains that the title is his, devised to him by his father; he is evasive about his moral obligation to his sister and is prepared to sell the land to Gotlots.

You interview the Widow Onespot and she insists that her father promised her that she could stay on that land as long as she lives, and this is exactly what she plans to do; she does not display trust or sisterly love for her brother. Your investigation proves that she has not paid the taxes on the land until the last two years, that she has not made substantial improvements to the place, and, therefore she has neither limitation title nor an enforceable equitable interest in the land. When you explain the state of the legal title to Gotlots,

he instructs you to make a deal with Jenkins and get Widow Onespot off the land. Do you comply without question, advise him further, or just tell him to find another lawyer?

Your third case is a guilty defendant who has acted as a middleman in a heroin distribution in order to obtain two packets for himself to sustain his own addiction. The government's case depends upon the defendant's confession, which you are in a position to suppress because the defendant was never given the *Miranda* warning. Is there any question about what you do?

How do we go about resolving these questions? Suppose you were to give your answers and then someone asked you: "Why?" What do you say? Perhaps it would not be too philosophical to answer that we choose the conduct that will produce the best effects for the values we respect. Our decisions are attained by applying our values to our perception of the consequences to those values as between alternative choices. Hard decisions are complicated by our inability to control or to foresee the full effects or consequences, and by the necessity that we weigh those effects according to the priority of the value affected. As lawyers, our responsibility may be no more than to explain the consequences to the client rather than to bear full responsibility for the client's decision. Yet, we cannot be content when the client's course and decision have immoral consequence.

We are guided in our representation of clients by the rules of professional conduct, but these rules speak of moral character and moral standards and moral conduct without explanation. Canon 8 of the State Bar Rules tells us that deception or illegal conduct before a tribunal should never be condoned.[3] Rule 7-106 says that a lawyer may not "state or allude to any matter that . . . will not be supported by admissible evidence."[4] The lawyer must be careful not to reveal the confidence of a client, but that prohibition does not include the intention of her client to commit a crime.[5] Ethical consideration 7-

3. SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. XII, § 8 (Code of Professional Responsibility) Canon 8 (1973) [hereinafter TEXAS CODE OF PROFESSIONAL RESPONSIBILITY].

4. *Id.* at DR 7-106(C)(1); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(e) (1987) [hereinafter MODEL RULES] (stating that a lawyer in trial should not "allude to any matter the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence").

5. TEXAS CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 3, DR 4-101(C)(3) ("A

26 prohibits the use of "fraudulent, false, or perjured testimony or evidence." The lawyer may not present evidence that she "knows, or from facts within . . . [her] knowledge should know" is false.[6]

These rules set the stage very well, but they do not and could not decide the moral questions that arise. Some lawyers even find no guidance there for the situation where the client during his testimony comes out with a statement that the lawyer knows to be false. There is considerable difference of opinion among lawyers and teachers on that question: whether to withdraw, whether to disclose the perjury to the judge, or whether counsel may argue to the jury as if the perjured testimony were true. I read the Texas Rules, and the ABA Code and Model Rules, to forbid any reference to the false testimony. But the American Lawyers' Code of Conduct forbids the lawyer to reveal her client's perjury and requires her to advance the perjury in argument as any other favorable testimony.[7]

Dean Monroe Freedman of Hofstra Law School, who was the principal draftsman of the latter code of conduct, says: "[T]he criminal defense attorney, however unwillingly in terms of personal morality, has a professional responsibility as an advocate in an adversary system to examine the perjurious client in the ordinary way and to argue to the jury, as evidence in the case, the testimony presented by the defendant."[8]

In *Nix v. Whiteside*,[9] the Supreme Court held that the lawyer's refusal to assist a client's plan to commit perjury neither deprived the defendant of his sixth amendment right to effective assistance of counsel nor of his right to testify in his own defense.[10] But Professor Gershman of Pace University is troubled by that opinion and writes:

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lawyer may reveal the intention of his client to commit a crime . . ."); *see also* MODEL RULES, *supra* note 4, Rule 1.6(b)(1) (holding that a lawyer may reveal information to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm).

6. TEXAS CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 3, EC 7-26.

7. *See* THE AMERICAN LAWYER'S CODE OF CONDUCT (Roscoe Pound - American Lawyer's Foundation, revised draft, May 1982) [hereinafter AMERICAN LAWYER'S CODE]. The pertinent code section on client perjury is Rule 3.7 which states that a lawyer should not knowingly present materially false evidence or make materially false representations. *Id.* at Rule 3.7. For a survey of the AMERICAN LAWYER'S CODE, see Comment, *Lying Clients and Legal Ethics: The Attorney's Unsolved Dilemma*, 16 CREIGHTON L. REV. 487, 500-04 (1983).

8. Freedman, *Perjury: The Lawyer's Trilemma*, 1 LITIGATION 26, 30 (1975).

9. Nix v. Whiteside, 475 U.S. 157 (1986).

10. *Id.* at 175-76.

"[T]o the extent that *Nix* authorizes defense counsel to engage in conduct which effectively drives his client off the witness stand, it constitutes an insensitive and unwarranted intrusion into a defendant's right to testify in his own behalf. Crucial to notions of civilized justice are concerns for a defendant's individual freedom and dignity. Such concerns ought to be respected, even at the risk of false testimony."[11]

I am as sympathetic with the claim that a lawyer is obligated to protect and advance the right of her client to commit perjury as I am with the claim that we should protect and advance the right of a man to beat his wife and children.

We have come to accept this distortion of our moral responsibility in the context of the criminal case, where the notions of trial by battle are strongest. We accept Horace Rumpole's sly coaching of his client prior to standing trial at the Old Bailey, even though it suggests a lie. But moral corruption is never confined to the left hand. What lawyers will countenance in the criminal case they will countenance in the civil case.

This is ethics up-ended for the want of a supporting foundation. It is typical of modern ethics in mid-air, contrived to achieve peaceful relationships or standoffs. Modern exercises in ethics are too often mere pretense for people who do not care for each other. If we are guided only by rules that put outside limits on our greed and our everlasting drive to get ahead and to be better than others, we might as well try to hitch bears to a wagon. It will not work.

Morality is reflected by conduct toward people: self and all others. Our conduct, and our morality, are ultimately determined, not by a set of rules, but by the value we ascribe to self and to other human beings.

In *Gorgias*,[12] Plato addresses the values of the rhetorician (the lawyer or politician), whose skill is persuasion, whatever the truth or the justice of the proposition.[13] Socrates compares that profession

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11. Gershman, *Attorney Loyalty and Client Perjury—A Postscript to* Nix v. Whiteside, 14 AM. J. CRIM. L. 97, 104 (1987).

12. PLATO, GORGIAS (W. Hamilton trans. 1960). Gorgias was a professor of oratory. The dialogue revolves around a discussion on the nature of oratory between Gorgias and Socrates.

13. *Id.* at 32. In the course of their discussion, the following discourse took place:

> Socrates. Now which kind of conviction about right and wrong is created by oratory in courts of law and elsewhere, the kind which engenders knowledge or the kind which engenders belief without knowledge?

to cookery, cooking only for taste, only to sell, whatever the true value of the food.[14] At the outset of the dialogue Socrates puts his first question, and it is this: "Ask him who he is."[15]

You can debate origins, and epistemology, and the meaning of existence so long as you have breath, but you dare not wait that long to decide who and what you are. Will your very being stand behind your words and conduct, or will this being—this you—be no more constant than the clouds on a windy day and your mission be to throw seasoning in the cooker? Will your decisions be honest because you are honest, or will your standards all vary with the price? Will you stand by your commitments or be subject to the temptations and fashions of the moment?

To say that each of us must decide for herself or himself does not mean that each of us will decide correctly. The freedom to choose does not mean that each will choose the right. Just as the sea floor is littered with the carcasses of ships captained by men who believed honestly and sincerely that they were on the right course, so the

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Gorgias. The kind which engenders belief, obviously.
Socrates. So it appears that the conviction which oratory produces about right and wrong is of the kind which is followed by belief, not the kind which arises from teaching?
Gorgias. Yes.
Socrates. And the orator does not teach juries and other bodies about right and wrong—he merely persuades them; he could hardly teach so large a number of people matters of such importance in a short time.
Gorgias. Of course he couldn't.

Id.

14. *Id.* at 43. When asked by one of Gorgias disciples about his opinion on the art of oratory, Socrates responded:

Socrates. I should call it a sort of knack gained by experience.
Polus. You think oratory is a sort of knack?
Socrates. Subject to your correction, I do.
Polus. A knack of doing what?
Socrates. Producing a kind of gratification and pleasure.

In comparing oratory with cooking, Socrates had these opinions:

Polus. Very well; what sort of art is cookery?
Socrates. It isn't an art at all, Polus.
Polus. What is it then? Explain.
Socrates. A kind of knack gained by experience, I should say.
Polus. A knack of doing what, pray?
Socrates. Producing gratification and pleasure, Polus.
Polus. Then are oratory and cookery the same thing?
Socrates. Certainly not, but they are branches of the same occupation.

Id.

15. *Id.* at 20.

wreckage of human lives, destroyed by their own hands, lies all around us.

If you are without any transcendental belief, you are left with self-knowledge. Maybe you can accept, in an optimistic spirit, an ultimate void rather than a mystery of creation wherein there is meaning and hope. But choose you must: who you are, your meanings and values, culminating in either integrity or accommodation, attending virtue or vice.

Because we do not live alone and because our decisions involve others, we must also decide that value to ascribe to our neighbor and the client, as well as those other parties to the lawsuit. The answer determines how we will treat the other person, and this answer is the genesis of our moral philososphy.

A society of individuals who accord no value to the other is a society which the Leviathan cannot save. What we desperately need in this world is community, with some togetherness and a measure of commonality transcending all of our differences. If we do not turn back the poison of alienation and self-service which divides our society, jamming every prison and jail and paralyzing every governmental entity, all that we treasure will be lost. The survival of our species depends upon the supply of individuals who have good will toward the world, who put their own narrow self-interest lower down the scale than their wish to light the way, to beat back the decay, to bridge the chasm, to correct the malfunction, to heal and stabilize and inspire.

We may do what we can with canons of ethics and moral teachings, but they will never give us a just community if we do not value highly the object of these rules: the human creature. The sure foundation of moral conduct is personal faith in the sacredness of all human beings. Absent that faith, the next best foundation is to hold to a firm conviction that all human life is precious, to be valued and protected, to be respected and accorded dignity.

If you value yourself and others so highly, you will inevitably deal honestly with others. Integrity is the product of one's assessment of himself. Integrity produces, in turn, trust among people—so essential to the fabric of society.

A lawyer who holds those values will neither deceive nor represent deception. You may not advocate the truth of any evidence you know to be false. You may take no cause to court unless you can believe in both the means and the end. You may make no argument to judge or jury unless you are yourself first persuaded.

And if someone cries that some other lawyer will take the case, you are unmoved. Neither the client nor the other lawyer is given the say-so about who and what you are. You set your own values; you decide who you are.

The tough part of decision making, where experience and industry and judgment are demanded, is in foreseeing consequences. Here is where we customarily fail, either ignoring consequences or mistaking them. We do not intend to come to disaster; we simply do not look ahead. We make decisions on complicated social problems guided only by feelings or conscience or the prejudices of our peers. For all the debates in the abstract about the justice of civil disobedience or political programs or arms control treaties, very little can be gained without a thorough analysis of the consequences of a particular course of action in a specific context. Foreseeing consequences is demanding work. Full information must be assembled; and the reaction of people must be anticipated, to the extent that is ever possible.

It is said that civilizations decay from human failure to hold to values that elevate rather than degrade. I suggest that another contribution to that decay is the failure by those who do hold high values to understand and do what is necessary to preserve them in their world. Failing to look or misreading predictable results, they strive for peace and justice and produce the exact opposite. Those who value social order may serve order faithfully, at the price of the loss of community and ultimately of disorder. Those who value community may serve community faithfully, at the price of disorder and the denial of community. Hence, said Bonhoeffer, "folly is a more dangerous enemy to the good than malice."

The lawyer is morally responsible for all that she speaks: to the client, to the court, and to the antagonist. Between the three, of course, the lawyer is obliged to speak in very different roles. For the client, she owes the obligations of confidentiality and zealous representation.[16] She advises the client of the available legal alternatives and the likely consequences of each. She should be attentive to the moral choices and considerations of those alternatives, although she may or may not be allowed to speak and to affect the client's

16. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canons 4 & 7 (1981) (stating, respectively, "A lawyer should preserve the confidences and secrets of a client" and that "A lawyer should represent a client zealously within the bounds of the law").

decisions on moral grounds. Some legal actions she will take at the direction of her client that she would reject if the decision were entirely hers. The lawyer never shuts her eyes to moral considerations, but she may be unable and is not required to fine tune the client's morality by her own.

We have to be practical as well as honest. We will remain true to our commitments and values, but we encounter clients of very different thinking, who may or may not care to know what the lawyer thinks. Many times we are required to act ungenerously for the client. That may be contrary to our nature, but it is not our choice. Where we can, we address moral considerations with the client. Where the client's direction is morally reprehensible, we refuse and withdraw. Where we draw the line has to be a judgment call, based on the lawyer's values and the foreseen consequences to all parties affected.

Our problems here can be eased by three means. First, if the lawyer's demeanor and reputation exhibit integrity and moral character, and if the lawyer demonstrates that character by casual statements as needed during the early stages of representation, the client should anticipate advice based upon high moral standards. Second, it helps when the lawyer, appreciative of the problems of the client, does not assume her own moral superiority or rush to judgment upon the client. Finally, the way in which we treat the client, and the manner of our presentation of moral considerations, will often determine the response of the client to that presentation.

We dare not get tangled up in our halos. We have no monopoly on morality and the truth. We can so easily be wrong about the historical facts and misunderstand the context of prior conduct as well as the moral aspects of the decisions to be made. Where historical facts are vague and ambiguous, there is usually no moral difficulty in being loyal to your client and giving him the benefit of the doubt. And when you see a potential rift between you and the client on a moral issue, remember that you retain the duty to help your client and that you can best do this by dealing with him discreetly and respectfully.

For example, consider the client with the document you suspect to be a forgery. To begin with, you do not decide lightly that it is a forgery. If you do finally decide that to be the fact, you do not castigate the client. You present the problem to him as if he is, basically, a person of integrity. Your approach is that you and he

both want to avoid illegality and dishonesty and that the cause will surely be lost if the jury should decide that you have presented a forged document. The two of you cannot take a chance on that happening. You must be assured of the legitimacy of the document in order to be satisfied that you can convince the jury of its legitimacy. If there should be a serious doubt about this, you cannot introduce the document. Despite your best efforts, the presentation may not work. The client may demand that you do something that you cannot do, and then all that is left to you is to refuse. I must say that I have encountered very similar problems, but I always obtained the client's consent for what I proposed.

Mr. Gotlots' cause is more challenging, and on the case stated we cannot decide exactly what to do because we lack enough information. The challenge here is in finding the prudent method of dealing with all of these parties, rather than in deciding what we will and will not do. When we tell Gotlots that Jenkins has the record title, we also tell him that the sister is in possession and claims the right to remain there. She may insist on litigating her legal claim, which could take years to conclude. You certainly have the duty to advise your client on all of the legal prospects. Since your values place a premium upon fair treatment for all of the parties, you will endeavor to do more. You will attempt to advise your client, if he will allow it, upon the potential consequences of the situation, driven by your values and expressed in terms of the client's values. Serious risks are presented: economic, moral, and perhaps legal. A difficult and prolonged confrontation is possible. A strong adverse public reaction could be foreseen. Diplomatic handling of Jenkins and the widow are required, and all the alternatives must be weighed, among them: litigation, eviction, sale by Jenkins to a third party, construction of the project without ownership of this lot, and the provision of a suitable replacement home for Widow Onespot for the remainder of her life. The moral factor in your thinking, that of justice for Widow Onespot, should enable you to better inform Gotlots on the larger vision of his best interests. You may be able to render successful professional services to your client while bearing concern for Widow Onespot and interposing solutions for her need during the negotiations.

The greatest challenge is the case of the guilty criminal—difficult because the conventional wisdom and professional rules are problem-

atic.[17] Custom dictates that we ignore many of the consequences for the client and society while we concentrate solely upon the immediate legal "rights" of the defendant. But it may be that your client has two primary needs: to beat his drug addiction and to learn to accept the laws of society. Standing in the courtroom to say that he is guilty and regrets what he has done, accepting treatment for his drug dependence, may be his only chance of meeting those needs. Why is it that we refuse to acknowledge the lawyer's obligation to tell him so? If your client refuses to follow this advice, of course, you have no other alternative under current sixth amendment law but to object to the unwarned confession and see your client acquitted.

Colin Turnbull, the social anthropologist, conducted a study in which he interviewed nearly 200 prison inmates. Turnbull reported that he could not find a single prisoner who "associate[d] a court or court procedure with either honor or justice."[18] I suggest a principal cause for this sad state is very likely that their own lawyers did not portray the system in that light. If the only objective is to defeat authority and beat the "rap", if the defendant exits the system without any bond to society or the authority that governs it, if there remains no regret for having abused the rights of others, if the system increases the alienation of almost every defendant that enters, should not lawyers question the wisdom and morality of our obsession with defendants' "rights"?

I hold the deepest respect for our profession and our justice system. We and our forebearers have wrought well, but there is much to be questioned and much to be improved. The lawyer should be dedicated and faithful to the client and more: trustworthy trustee of the common good, the moral agent to improve our profession and the administration of justice.

In the practice of law or the work of judging there is a lot of detail and drudgery. We should not forget that our effort serves the fabric and justice of society by the contribution to social order and

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17. For an overview on the debate behind the *Nix* decision, see Comment, Nix v. Whiteside: *Is the Client's Intended Perjury a Real Dilemma?*, 22 TULSA L. REV. 399, 399-400, 402-16 (1987) (dividing the views of the parties into two camps—(1) those advocating a truth seeking system and (2) those advocating an adversarial system—and acknowledging the competition between the two underlying social interests of the legal system).

18. Turnbull, *The Individual, Community and Society: Rights and Responsibilities from an Anthropological Perspective*, 41 WASH. & LEE L. REV. 77, 81 (1984).

community. I leave with you a wish that Justice Oliver Wendell Holmes wrote to Charles Wyzanski when Wyzanski graduated from college:

> I hope that when your work seems to present only mean details you may realize that every detail has the mystery of the universe behind it and may keep up your heart with an undying faith.[19]

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19. Levi, *In Memoriam: Charles E. Wyzanski, Jr.*, 100 HARV. L. REV. 705, 717 (1987).