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# Ethical Dilemmas Facing Today's Lawyer

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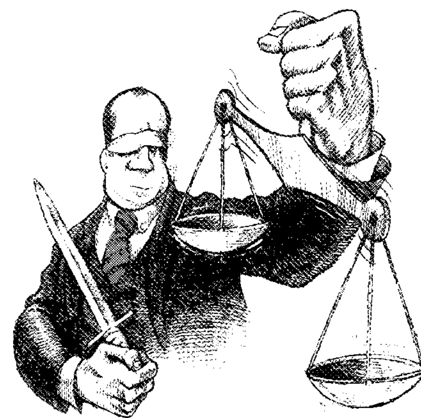
# Ethical Dilemmas Facing Today's Lawyer



By Roger C. Cramton

Does the public interest require an independent legal profession? My answer is yes and no, but mostly yes. We have considered threats to professional independence but the desirability of an independent legal profession was assumed rather than thoroughly examined.

An initial difficulty is created by the vagueness of the concept of "professional independence," which means different things to different people. American lawyers, for example, frequently argue that the lawyer's ability to choose his clients (and thus control his work) is an important aspect of independence. In England, the "cab rank rule"—requiring a barrister to take any brief offered, with limited exceptions—is viewed as a basic element of independence because it prevents the lawyer from being identified with the views or actions of particular clients.

**Zeal tempered by duty**

A crude but succinct statement of the heart of professional independence lurks in the pithy remark of Thurman Arnold. Arnold, a flamboyant figure of the last generation, occasionally addressed law students at some ceremonial function. He often concluded by growling these words of advice to future lawyers:

"There will come a time in your practice when, despite your very best efforts, someone has got to go to jail. When that time comes, make sure . . . its the client!"

Here in a nutshell is a basic paradox of professional independence. The lawyer is loyal to his client, providing a vigorous and fearless presentation for him. But that zeal is tempered by the lawyer's duties to the court, to adversaries and third persons, and to the public. He is not a mere alter ego, mouthpiece or "hired gun," but an independent professional who observes professional standards of integrity, devotion to truth and justice, and respect for broader social values. Thus when someone must go to jail, it must be the guilty client and not the lawyer; there must be no perjured testimony, no suppression of documents or other violation of professional and legal standards.

**The confidentiality provisions of the new Model Rules go so far toward the 'hired gun' model that they are a public embarrassment.**

This traditional view of the dual aspect of professional independence —duty to client balanced by duty to court and public—is directly contrary to the famous statement of Lord Brougham that a lawyer is responsible to his client alone. The excessive rhetoric he used in defense of Queen Caroline was rejected, not only by his own later statements, but by leaders of the bar in both England and America.

David Dudley Field stated the orthodox position in 1855: "[The lawyer's] first duty is undoubtedly to his own client, but that is not his only one; there is also duty to the court, that it shall be assisted by the advocate; a duty to the adversary, not to push an advantage beyond the bounds of equity; a duty to truth and right, whose allegiance no human heart can renounce; and a duty to the state, that it shall not be corrupted by the example of unscrupulous insincerity."

This mosiac of warm and evocative symbols—truth, justice, fairness—presupposes that a true lawyer is committed not just to a job but to a self-directed calling informed by a spirit of public service. The lawyer is a minister of justice as well as a champion, not out to "win at all costs." Is this ideal merely a memory of what might have been in some golden age? Is it a dream that we preserve because it evokes a warm glow even though it has little relation to present realities?

**Contradictory theories**

Social scientists have two contradictory theories explaining the central role of professions in modern life. Although they have technical names, I will refer to them as the public interest model and the market model.

The public interest model attributes the special status, power and reward of professionals to the expertise, skill, and judgment they bring to bear to the solution of important problems in individual or social life. Professionals are an aristocracy of talent, selected and qualified by arduous educational and apprenticeship experiences. Their specialized knowledge creates demand for their services; and their skill, collegial identification and autonomy are the source of power that need not be tainted by self-interest, but embraces altruistic motives and dedication to public service.

Because of their broader view—a detachment from narrow self-interest—they are in a position to mediate among contending interest groups

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and thus to bind society together. They are balance wheels, helping to stabilize society. Clearly this is a portrait that justifies and supports professional independence.

The market model provides a less noble explanation for the status, trappings and symbols of the professions. Its exponents, such as G.B. Shaw, view the professions as "conspiracies against the laity." Professionals attempt to create demand for their services, control the market for them, and persuade the public that their high status and earnings are in the public interest. In this view, professionals' behavior is oriented toward their private interests as individuals or as a professional group. Their control over access to the profession and its services, these critics argue, should be broken down by competitive market forces, perhaps assisted by outside regulation.

**How do lawyers behave?**

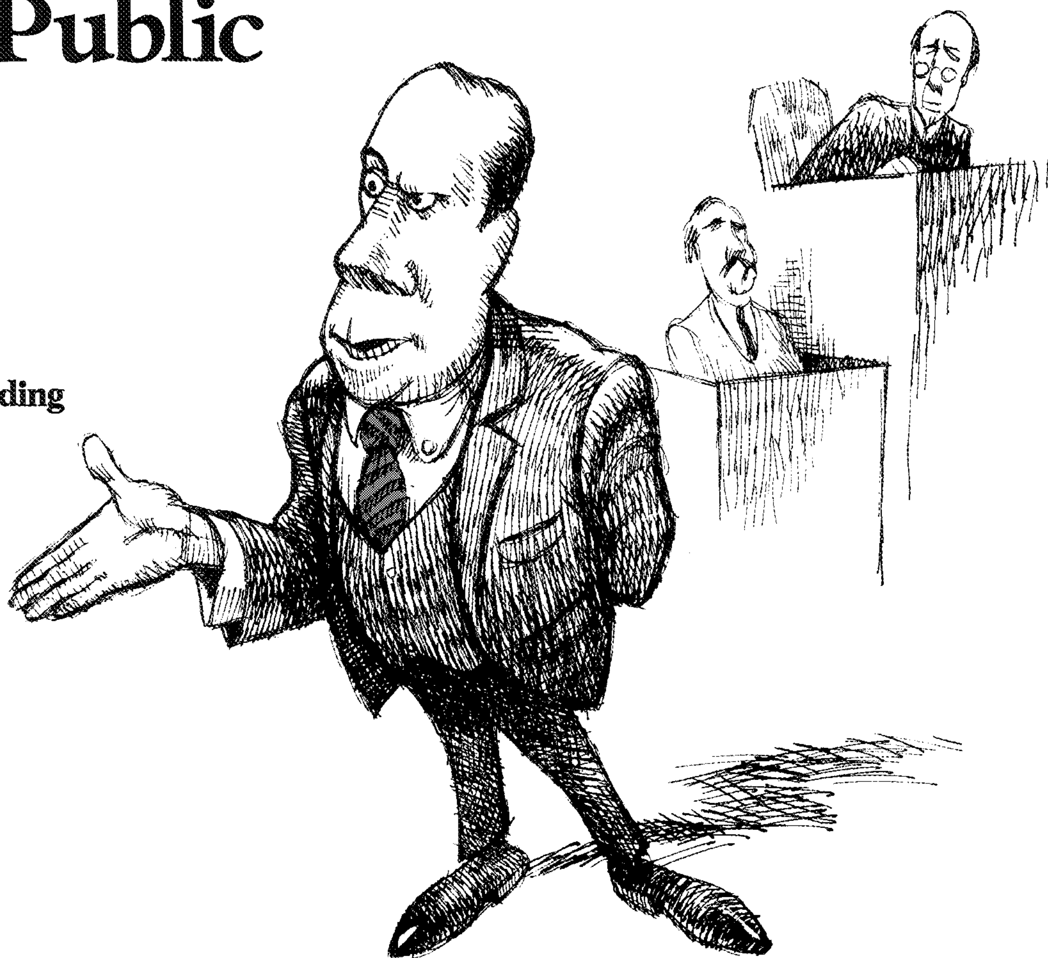
Which explanation is correct? Which portrait is closer to contemporary realities for lawyers? These are basically empirical questions that ask, How do lawyers behave? What factors shape their behavior? The analysis must deal both with lawyers as individuals and with the profession as a whole.

The public interest theory posits first that the lawyer is an independent operator who exercises control over his own work and has a large moral influence over clients. As Elihu Root said: "About half of the practice of a decent lawyer consists in telling. . . clients that they are being damned fools and should stop." On the other hand, J.P. Morgan, confronted by a nay-saying lawyer, said: "Your job is to help me do what I want to do."

Is today's lawyer a buffer between the illegitimate or immoral desires of clients and the public interest? Or is he the amoral facilitator of the client's selfish goals? No one knows which impulse is dominant, but my guess is that there is plenty of both. My fear is that over time there is less willingness to engage in moral dialogue with clients; the "hired gun" mentality is

# Obligation to the Client–to the Public

**Although lawyers give enormous amounts of time to public service in a general way, they are not generous in providing legal services to those unable to pay.**





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convenient and profitable and finds increasing support in the profession's own ideology.

It is unnecessary here to delineate all of the structural and economic circumstances that push toward the "hired gun" mentality. The increasing specialization of the bar has dissolved collegial ties and relates each lawyer, not to the profession at large, but to clients with a particular interest. The increasing competition for legal work, the growth in the size of organizations in which large practice is carried on, the assertion of control over legal work by corporate clients, and the tendency of lawyers to identify with the interests of their clients all tend to make lawyers dependent upon clients rather than a possible moral influence on them.

**'No place for democracy'**

The onslaught of competition and commercialism in the once genteel precincts of the corporate bar is vividly portrayed in contemporary press accounts. The message is that greed has come out of the closet; that the byword is now "produce or perish," that the "heavy hitters" will split off on their own if they are asked to subsidize the pro bono work of others. "You eat only what you kill" is the way one entrepreneurial lawyer put it.

When corporate lawyers get together today, the talk is not of the plight of legal services for the poor or law reform but of ways of hustling for clients: marketing plans, seminars for new clients, public relations brochures and blitzes. Instead of talking about the personal responsibility of a lawyer for a client, the talk is of top-down and outside control of legal work. "We're managing a tough business," one managing partner says, "and there's no place for democracy."

The new style of corporate general counsel selects outside lawyers and monitors their work in detail. "We're in the driver's seat when it comes to fees and services," one recently said. If these are contemporary realities within the elite sectors of the profession, the scramble for business and profit is hardly likely to be diminished in the less prestigious and more crowded sector of the profession that serves private individuals.

The public interest model also posits that lawyers are willing to devote time to public service goals and to temper their representation of clients on behalf of the same goals. The willingness of lawyers to defend the liberties of all by protecting the rights of some is a periodic and noble reality. This willingness functions best, a cynic might add, when the unpopular defendant is a wealthy rather than indigent scoundrel.

**Pro bono lip service**

Although lawyers give enormous amounts of time to public service in a general way, they are not generous in providing legal services to those unable to pay. The average pro bono contribution of the bar is only 6 percent of billable hours, and most of that is devoted to such client-producing activities as work for non-profit organizations or participation in CLE programs. Although these are good things, they do not provide legal services to needy people.

**Many of the major steps in ensuring that middle- and lower-class Americans obtain legal services at a reasonable price have been forced on a reluctant bar which sought to protect its own turf.**

I am a typical example. My pro bono work is speaking without fee to this and other professional groups; I cannot find the time and commitment to help some needy individuals with their routine legal problems.

Think of what the public image of the American bar would be if each of us—all 650,000—handled six routine matters each year for our less fortunate fellow citizens. If more than 3 million Americans each year experienced the generosity and skill of lawyers, would the public perceive us as selfish and heartless?

**Legal ethics battleground**

The current battleground in legal ethics is the tension between all-out loyalty to client and continuing respect for countervailing public goals. Professional rules continue to require lawyers to respect the integrity of the judicial process, but other aspects of the public responsibility side of the equation are diminishing. The evolution of the new Model Rules of Professional Conduct, adopted by the American Bar Association House of Delegates in 1983, is illustrative.

Consider the situation of the lawyer who is negotiating or litigating with an unrepresented party. The older ethic of the profession counsels fairness to the adversary. The modern ideology is that unrepresented or inexperienced parties are entitled to no favors—running over a patsy is accepted behavior. The early versions of the new model rules attempted to resuscitate the public responsibility ethic by enjoining lawyers in such situations from "unfairly exploiting ignorance of the law or the tribunal" and "procur[ing] an unconscionable result." In response to vehement bar opposition, these provisions were deleted. The patsy is a target of opportunity, not the source of ethical concern.

**Silence can kill independence**

The confidentiality provisions of the new model rules go so far toward the "hired gun" model that they are a public embarrassment. A lawyer who has discovered his client's intent to commit a massive fraud may not disclose but must remain silent. The justification for this extreme position is that any departure from client confidentiality will destroy the trust and candor that are essential to effective representation.

But lawyers and clients have lived with the indeterminancy of the attorney-client privilege for many decades. It is surely not self-evident that continuation of one modest exception will be any more destructive of the lawyer-client relationship than continuation of another—that lawyers may breach a confidence in suing for a fee. "What is clear," Deborah Rhode has said, "is that the profession today gives higher priority to its own pecuniary concerns than it does to the potenti-


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ally more significant claims of victims of client wrongdoing."

Ironically, this extreme position on non-disclosure can destroy professional independence. Lacking the discretion of leverage to disclose the client's continuing fraud, the lawyer is tied to the client's apron strings. He becomes an instrument of client wrongdoing, with silent withdrawal his only recourse. The grand rhetoric of public responsibility is displaced by the "mouthpiece" role.

**Amoral if not immoral**

The increasingly dominant ideology of professional behavior today is aptly described as the total commitment model—the lawyer should do everything for the client that the client would do for himself if he had the lawyer's skill and knowledge.

Professional rules contain some discretion to depart from total commitment to the client's cause, but the basic constraints are references to general law—the lawyer should not be a lawbreaker on behalf of a client. But much that is immoral or undesirable is not illegal, so the total commitment model pushes lawyers toward amoral if not immoral behavior in advancing the client's interest.

It also may push the lawyer to adversary excesses that burden, delay and distort the justice system—spurious claims and defenses, discovery abuses, tactical games, and the like. As Rhode says, "A lawyer will leave no stone unturned, especially when he is being paid by the stone." The obsessive pursuit of billable hours results in such legendary feats as that of the Wall Street associate who took advantage of time changes on a transcontinental flight to bill 27 hours in a single day.

**What of organized bar?**

At the collective level, there is much to be said in terms of the organized bar's devotion to law reform, improved access to justice, more competent lawyers, and other public objectives.

But there is a dark side to this moon as well. Many of the major steps in ensuring that middle- and lower-class Americans obtain legal services at a reasonable price have been forced on a reluctant bar which sought to protect its own turf. It was the Supreme Court, not the bar, that eliminated minimum fee schedules, opened up opportunities for group legal services and prepaid plans, and struck down restrictions on lawyer advertising. These changes, by preventing the organized bar from restricting competition among lawyers, have provided consumers of legal services with greater choice of price and quality. The gradual demise of many of the unauthorized practice restrictions also gives wider choice to consumers.

The major difficulty with the bar as a whole, however, is not its occasional pursuit of self-interest but its fragmentation. De facto specialization gives each lawyer little affinity with other lawyers and the profession generally. Bar associations become umbrella organizations so broad and diverse in character that they are unable to take a clear position on any significant issue of law reform or improvement of justice. They are largely reduced to striking symbolic poses—perhaps we speak in grand terms of the lawyer's professional independence because we cannot agree on such matters as abuses in the use of contingent fees or reform of products liability law.

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More than 50 years ago, Karl Llewellyn said: " 'The Bar' is . . . an almost meaningless conglomeration . . . inert beyond easy understanding." Developments since he spoke have furthered the diversity and fragmentation of the bar.

Nor are we impervious to the general trends in a materialistic and self-indulgent society. Lawyers, like other groups, emphasize their rights and interests, but rarely speak of concomitant responsibilities. When the ABA Section of Individual Rights was proposed, a wise amendment added two words: "and Responsibilities." Yet nearly the entire output of the section deals with the claims and entitlements of individuals or groups, not the obligations that each citizen owes to each other and to the body politic.

**A vision, despite the shortfall**

What do I conclude? The lawyer's professional independence *is* a memory founded on idealism and public service; it emphasizes a sense of community within the bar and the society generally; and it is nutured by most of the things that really matter—altruism, trust, compassion, sharing and caring. This ideal is and has been an occasional reality in the lives of the heros of the bar whose memories we celebrate. Finally, it is a vision and dream that can shape our goals and aspirations even though there is a large shortfall between their generous scope and the selfish narrowness of many of our actions.

Hypocrites we may sometimes be when we talk nobly of these unrealized aspirations. But cynicism, greed and despair, the sages tell us, are worse sins than hypocrisy. If our beliefs are important to us, even though not always observed, they will still influence our behavior.

And what is the alternative? The cynicism and greed of current tendencies to view law and justice solely in instrumental and market terms? The despair that follows our realization that the coercive power of the state cannot achieve our goals by external regulation?

The ideal—and occasional reality—of the lawyer's professional independence has the same justification as democracy: "A terrible system of government," Winston Churchill said, "until you consider the alternatives."

Ideals do have consequences. A vision of ourselves as professionals who temper zeal for the client with communal values is worth nurturing and cherishing. □



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