

One Man's Perspective on Ethics And the Legal Profession

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INTRODUCTION

There are certain ethical problems in the legal profession which are more important than others and receive less attention than they should. First, the legal profession and the American society have failed to provide everyone with access to the services of a lawyer. Without such access our system of justice simply cannot function equitably. An inequitable system is an ethical problem for the profession which is particularly identified with that system. Second, the education of lawyers and the process of qualifying them for admission to the Bar makes no provision for their practical training in a clinical setting in law school. Law school experience is still, for most students, totally a classroom and library experience. Yet, with a diploma from a law school and successful completion of the written Bar examination one may hold himself out as competent to serve a client and to practice. Not helping the law student close the gap between theory and practice while he is receiving his legal education, unlike medical school, is an ethical failure on the part of legal education and the profession because the present educational and qualifying process conveys a false impression of

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practical competence and places unprepared lawyers in the administration of justice. Finally, there is no training in legal education for professional responsibility. Adaptation to ethical and moral behavior and the acquisition of a sense of responsibility to clients and to others are matters which require the continuous exercise of moral judgment through action and responsibility for the consequences of such action. Intellectual training alone, essential and well done by the law schools, cannot develop in a professional the instinctive right response to moral dilemmas. Proper instincts must be acquired through doing and taking responsibility—an opportunity which clinical education uniquely affords. The absence of clinical legal education in American legal education, therefore, has resulted in another ethical failure, that is, not providing education in ethical behavior and professional responsibility for the lawyer.

PUBLIC DISILLUSIONMENT WITH LAWYERS

The Watergate revelations unleashed an epidemic of concern with lawyers' conduct because so many of the actors in the Watergate scandals are lawyers. The trouble is that almost all of the concern with ethics evidenced lately by lawyers and others had little to do with what has interested most of the public about lawyers' ethics down through the years. Most of us want to know, first, if we can have a lawyer's services when we need such help; and second, whether lawyers can be depended on to be competent and behave ethically in the lawyer-client relationship.

While lawyers are important public officeholders the public's reservations about lawyers' actions stem from their perceptions concerning the lawyer's ability and willingness to serve a client on an ethical basis. Lawyers who misbehave in public office only serve to reinforce the negative image of lawyers which comes from what the ordinary person perceives his own relationship to lawyers to be. If Watergate, then, by some higher logic of irrelevancy we cannot understand, serves to rekindle our interest in the availability of legal services and in the lawyer-client relationship, it will be a positive force for the improvement of ethics in the legal profession.

That the lawyer-client service relationship is what people judge by is borne out by the results of the very recent survey made at the request of the American Bar Association Special Committee to Survey Legal Needs. According to the results of this survey the public believes, as over the years novelists, playwrights, essayists, and Daumier's cartoons have reiterated for us, that lawyers serve the rich; do not work as hard to help the poor; charge more for

their services than they are worth; are not prompt in getting things done; and that many matters handled by lawyers would be done as well and less expensively by others. Finally, by comparing responses from the same persons after an interval of one year, the survey established that Watergate only imperceptibly raised the percentage of respondents—already more than 1/3 a year ago—who believe that lawyers would help their clients with unethical acts. Obviously the public's attitudes toward lawyers come from long-standing perceptions of the legal profession and how it operates. They are not very much influenced by occasional scandals which only seem to raise slightly the percentage of the public holding a negative image of the lawyer.

Perhaps the principal reason for the public's continuing disillusionment with lawyers is that lawyers do not fulfill the public's expectation that the lawyer's services should be equally available to rich and poor alike. The failure to meet the public's expectations in this respect results in a shaky foundation for a claim of concern with ethical behavior on the part of the legal profession. Indeed, it is general knowledge that only a few pioneers and leaders in legal aid have struggled hard to get the society to provide a system of legal services for all. With this kind of history there is too much room for feelings and assertions that lawyers serve the rich to the neglect of the poor, and that any alleged concern with other problems of morality and ethics may be missing the mark. It may be that in the eyes of the public progress on all the other ethical problems will not be considered as significant as it might be until this difference between the rich and the not-so-rich in access to lawyers' services is eliminated. Fortunately, great strides are being made now in developing group and prepaid legal services plans for union members. But much more remains to be done for these citizens and even more for those not included in such plans.

THE ROLE OF CLINICAL EDUCATION

Apart from the absence of a system of legal services for all, the most substantial ethical weakness of the legal profession is the failure to provide a way to educate and qualify entering members of the profession for competence in actual practice. Developing such competence is, of course, a life-long enterprise, as are all matters of quality. But especially because these are life-long processes it

is a significant failure when there is nothing done to further the process during such crucial years as those which are devoted to what is now called professional education. At present a law student need see no client before obtaining a law degree. The law school's teaching methodology, confined to classroom and library, and sometimes including empirical research, gives the law student an education not different from the kind of education to which he has been exposed in high school and in college. He is not required in law school to act as a lawyer, only to "think as one". Nor does the law student have to demonstrate his ability to perform as a lawyer as a part of the Bar examination, which is again a written exercise very much like the law school written examinations.

The present system of educating and qualifying lawyers is questionable on ethical grounds because it holds out that it is preparing lawyers to serve clients when it does not do so. Limited to classroom and library in law school and to written exercises on Bar examinations, our educational and qualification process ignores the necessary transition from learning theory and doctrine to putting these into practice with a client. The present system leaves untouched the largest part of the professional development of the lawyer, satisfied as it is with achievement in intellectual analysis and unconcerned as it has been with professional competence.

These deficiencies in the education and qualification of lawyers persist because of the absence of a requirement for clinical education for each law student, in which the student under law school supervision will have his first experience in serving clients. While medicine combined basic science with clinical education in the early part of this century (with the help of \$100 million in philanthropic funds) legal education moved in the opposite direction. The length of academic or classroom and library education for the aspiring lawyer became longer; the law schools eschewed any but classroom and research experience; and the apprentice experience in individual lawyers' offices, which had been required, atrophied until it finally disappeared.

The organized Bar and the law schools share the responsibility for these developments. They led to strong academic and intellectual preparation of law students while there was total neglect of clinical teaching in the professional school, which could make possible the first transition from theory to practice under high standards of supervision, with an educational concern operating outside the employer-employee context of the abandoned apprentice system and its abuses.

Until about a half dozen years ago the position of the law schools, when the question of training for competence came up occasionally, was that practice would easily be learned after graduation in someone's law office. It is easy to see that this kind of outlook does not convey a strong sense of professional responsibility for delivering competent legal services to the public. This response also ignored the realities of how and what young lawyers learned in the first exposure to practice. Rather than recognizing that the role of a professional school is to begin the transition from theory to practice for its neophytes, many spokesmen for the law schools downgraded the difficulty or importance of this transition and shunned any responsibility in this respect by calling such a concern a "trade school" preoccupation. Legal educators tended more to judge their mission as teachers by what other teachers in the university were doing, rather than by the requirements of the profession of which they are members and for which they were educating young people. The law schools and the profession over the years learned to live rather easily with this situation, where no one really had the responsibility for assuring some minimum standards of technical competence in actual performance on the part of the newly-admitted lawyer.

It is pleasant to report some harbingers of change. As a result of the movement for clinical education, the law schools are no longer as unconcerned about these matters as they were until fairly recently. They have begun to change their outlook in spite of the fact that there are painful adjustments ahead for legal education, because the expansion of clinical faculties and offerings means a reallocation of some of the existing resources within the law school from the academic to the clinical side as well as adding new resources.

The last half dozen years have seen the beginning of some efforts devoted to correcting the deficiencies involved in the existing gap between learning and practice. Since about six years ago the Council on Legal Education for Professional Responsibility has been encouraging and financially assisting a basic change in the law school curriculum to include clinical as well as academic experience. In this brief period just about every American Bar Association-approved law school has incorporated clinical work into the curriculum, although it is not required for every student and in most cases only a fraction of the students are given a clinical experience.

The changes in the law school curriculum that are involved will require continuing attention and insistence on reform by leaders in the profession, such as we are seeing lately in the words and actions of Chief Justice Warren E. Burger and Chief Judge Irving R. Kaufman of the Court of Appeals for the Second Circuit. Both have spoken out recently and repeatedly about the need to have better preparation of trial advocates. Chief Judge Kaufman has gone beyond analyzing deficiencies, and has suggested a program of educational reforms for the legal profession to include clinical experience for a law student. He is showing his sense of professional concern and public responsibility by having a committee of distinguished lawyers, under the chairmanship of Robert L. Clare, Jr., Esq., develop rules for admission to practice in the federal courts in the Second United States Circuit which would require some evidence of competence to practice based on education and experience in performance. Another significant action is the position taken by the president of the American Bar Association, James D. Fellers, when he stated in his opening address at the August, 1974 annual meeting of the American Bar Association that he would be in favor of requiring a clinical experience for all law students. This interest and activity on behalf of clinical training is a healthy assertion that competence per se is one of the primary ethical considerations for a professional. It affirms that the legal profession—educators and practitioners together—can produce better lawyers if they address themselves to education for competence in performance.

More than in the past, as a result of these recent developments, the ethical stance of lawyers—educators and practitioners alike—will be judged in part from now on by how well and how soon they succeed in creating a new system of legal education and a new process for admission to the Bar which produce lawyers who can perform competently with clients and in the courts.

The absence of clinical instruction in the law schools also means that there is a failure in not continuing the development of ethical sense in law students. Without the opportunity to be part of the ethical problem through student practice there is no real learning of legal ethics by law students. Indeed, the absence of an effective method in the form of the clinic for teaching ethics and professional responsibility, and the minuscule place given to this area at present in the law school curriculum, may instead convey a cynical attitude about any real concern with the contents of the Code of Professional Responsibility.

Courses in ethics or professional responsibility do not rate high

in law school. The ease and the accompanying lack of meaning with which one may pontificate about abstract questions of ethics and morality is the reason. It is one thing to be part of an ethical problem; it is quite another to talk about what A, B, or C should have done. It is easy to have the right and even the righteous judgment on someone else's course of conduct; it is very difficult to have the right answer to a moral dilemma in which one is himself involved. This takes a lifetime of exposure and development, and the law school is delinquent in leaving a vacuum for its part of the process.

Disenchantment with solely intellectual discussions of ethical problems in law school is at least a testimonial to an innate feeling that they smack of hypocrisy and that they make the discussion leader feel foolish. But legal educators and practitioners alike should recognize that the academic method followed for teaching ethics is the root cause of the ineffectiveness in teaching and the low status of the subject matter area. Yet the subject of ethics and professional responsibility deserves the highest priority.

When it comes to ethics and professional responsibility, there is no substitute for personally living through the circumstances which create the ethical dilemma and for having personally to face the consequences of the action or inaction which is used as a response to the moral challenge. Ethics and the sense of professional responsibility are not amenable to academic teaching or to being reduced to intellectual puzzles. There is another part of our being involved here which is not what the academic method of lecture, reading, discussion, and writing is designed to teach. This more inner part of ourselves, which constitutes our moral sense and instinct for right, must be developed and kept alive through continued exposure to actual situations which tear at us emotionally, as well as challenging our intellectual capacities. The forces must pull us in different directions and pose a threat to our capacity to function as a person and as a professional. The action or inaction which is our response has to be resorted to under some degree of emotional tension. It is these minor and major forms of emotional torture which leave their mark and thereby teach us ethics and professional responsibility. These experiences, which can only be obtained in a clinical setting, develop the moral fibre and the quick instincts required to cope with ethical problems and to come up with the

“right answer.” The continuing development of these basic parts of the human personality, which are more emotional than intellectual, are only possible if the law student is part of the problem, if he or she is one of the actors in the situation which creates the ethical challenge.

For this purpose the clinic is indispensable. It is the only place where professional responsibility can be taught and learned in the true sense—where we take something lasting away with us. For here the law student is acting under responsibility, to a client, to a teacher, to lawyers, to others in the machinery of justice, and to the community in general. In the clinic the law student is part of the problem, not outside looking in.

A change to the clinical method for teaching ethics and professional responsibility also would involve the law school and its faculty in new ways and thrust new, important responsibilities on them. For in clinical teaching the teacher too becomes part of the problem situation and, therefore, exposes himself and his responses to the ethical challenge. The clinical teacher is at the law student's side in the clinic. He works with the student in a team effort. The teacher is not insulated by being removed from the student, as he is when he occupies the lecturer's position in the classroom, or as he is when he reviews and comments on written work which is sent back to the student in an impersonal manner.

Moreover, in clinical teaching the law school faculty assumes a new psychological burden. Inevitably in the clinic the faculty learns about the student's professional behavior as never before. This is unavoidable. The clinical faculty knows which student does not show up for a client interview, or comes late. The clinical faculty knows which law student neglects his obligations toward lawyers for the opposing side, or which students take shortcuts, or are prone to be dishonest. The clinical faculty will be in situations where a student's lateness in getting work done has much more immediate meaning than does a student's lateness in handing in a written assignment in an academic classroom. In short, a “no show” in the clinic is quite a different problem from a “no show” in the classroom, although even the latter deserves more attention in the professional school than law school faculties have been willing to give to such matters.

Thus the clinic puts the law faculty into moral dilemmas which it has to confront, just as it places the student into a new situation of fuller responsibility. What should law faculties do with such intimate knowledge of law students' behavior? How should such

knowledge be used in connection with the review of a Bar applicant's "character" by Bar examiners? Whether legal educators and the profession seize the opportunities and assume the obligations of the clinical method of law teaching, and how they respond to the just-posed questions will determine if the Bar of the future is much more concerned with ethics and professional responsibility.