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Review Essay

Attorneys' Problems in Making Ethical Decisions

EDWIN H. GREENEBAUM*

In representing clients, attorneys exercise their authority and responsibility as members of the legal profession. As long as there has been an adversary system, there has been dispute regarding advocates' conflicting loyalties to their clients and to the public, a debate which has been pursued with renewed vigor in recent years. While partisans in this dialogue push their normative viewpoints, a significant proposition tends to be ignored: Attorneys' action decisions are the result of interaction processes between attorneys, clients and the groups to which they belong. Because the dynamics of these processes are little examined, the meaning of attorneys' behavior is poorly understood. Accordingly, those making the transition from layman to lawyer, students and young attorneys, find the legal ethics literature unsatisfying.¹

The adversary ethics literature explores the conflicting action implications of centrally important professional values which are not usually considered controversial. They include the obligations of legal professionals: to provide services to those who need them (especially criminal defendants); to become fully informed regarding legal matters in order to provide fully competent services; and to hold confidential clients' privileged communications. Other obligations, also uncontroversial, which are frequently seen as having conflicting implications are that lawyers should be candid and truthful, should support the search for truth, should not themselves be the cause or source for contentiousness, and should not be personally implicated in the perpetration of injustices. While the comments which follow focus on a document which advocates client-oriented ethics, the criticisms apply equally to the arguments of public interest partisans.


¹My understanding of these concerns arises from my work with law students and alumni in Civil Procedure, which revolves around the adversary system, and Roles and Relations in Legal Practice, a course which has as its purposes introducing law students to interpersonal phenomena as related to their future law practices and leading them to reflect on lawyers' roles and their personal relations to these roles. For a description of the course's content and methods, see Greenebaum & Parsloe, Roles and Relations in Legal Practice, 28 J. LEGAL EDUC. 228 (1976).
Examples of attorneys' action dilemmas are explored in Monroe Freedman's *Lawyers' Ethics in an Adversary System:*

As part of that training [provided by the Criminal Trial Institute of which Freedman was Co-Director in 1966], I gave an opening lecture on legal ethics, in which I discussed what my colleagues and I had found to be the three hardest questions faced by the criminal defense lawyer. Those questions were: (1) Should you put a witness on the stand when you know the witness is going to commit perjury? (2) Should you cross-examine a prosecution witness whom you know to be accurate and truthful, in order to make the witness appear to be mistaken or lying? (3) Should you give your client advice about the law when you know the advice may induce the client to commit perjury? I concluded, with admitted uncertainty, that the adversary system, with its corollary, the confidential relationship between lawyer and client, often requires an affirmative answer to those questions.

Many in the community find it troubling that lawyers defend clients they know to be guilty, test the credibility of evidence they know to be accurate and, especially, aggravate the injuries of those already victimized by using every available technicality on behalf of their clients. Any who doubt these to be acknowledged costs of attorneys' conduct should read "Cross-Examination: Destroying the Truthful Witness" (Chapter 4 in Freedman's book). "Destroy" is not too strong a word. The value of literature such as *Lawyers' Ethics in an Adversary System* is in making clear to laymen, including law students, the rationalizations for conduct of attorneys which seem to many incongruent with honesty and fair dealing. It is particularly helpful to face these issues in contexts with specific facts, where decisions may be seen to have pragmatic costs:

The system of professional responsibility that I have been advancing, on the other hand, is one that attempts to deal with ethical problems in context—that is, as part of a functional sociopolitical system concerned with the administration of justice in a free society—and giving due regard both to motive and to consequences.

The legal ethics literature tends to vote in favor of client-oriented resolutions of these issues or for the contrary positions argued to be required by the *Code of Professional Responsibility*, the *American Bar Association Minimum Standards for Criminal Justice* and other author-

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2M. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* (1975) [hereinafter cited as FREEDMAN]. Freedman is the dean of Hofstra University School of Law. This book, which is treated as an example in this paper, is in part a political event. Dean Freedman explains the book would probably not have been written had not Warren Burger, then a judge of the United States Court of Appeals for the District of Columbia, called for Dean Freedman's disbarment and dismissal from his then position as professor of law at George Washington University following a newspaper report of Dean Freedman's lecture. Preface to FREEDMAN, supra, at viii.

3Id. at viii.

4Id. at 46.
ities. (That the Code of Professional Responsibility et al. contain contradictory provisions is, of course, part of the argument.)

Casting one's vote is no doubt legitimate, especially if one has cogent commentary to contribute to the dialogue; but new contributions which would cause anyone to choose one side or the other are scarce. While the literature explores the contrary action implications of values validated by the profession's traditions and authoritative standards and states positions regarding the resulting conflicts, attorneys' decisionmaking problems in ethical matters are generally neglected. In addition, the value implications in these action dilemmas are more subtle than is usually acknowledged.

DECISIONMAKING PROBLEMS

As young lawyers begin to perceive the potential conflicts of interest between their clients, themselves, their law firms, the legal profession and society, conflicts which may center on emotionally charged matters, they discover that practicing law has distressing aspects. The ethics literature does not much help attorney initiates in their suffering the practice of law to the extent three aspects of decisionmaking problems are neglected: (1) the emotional aspects of ethical decisions, (2) the limitations on attorneys' freedom of choice and (3) the position of the individual attorney as a member of a group, the legal profession.

Emotional Aspects

There are a substantial variety of motivations prompting individuals to join the legal profession. But to most first-year law students, law is authority and has the mission of maintaining order. The profession draws to it persons who want this authority to do and be certain things; it must be clear, predictable and just and show the clear road to proper ethical choices. The disappointing fact is that the law is in many respects unclear and unpredictable and is sometimes the engine of injustice. Further, law is a helping profession in which practitioners are faced with subtle and


6It does not go too far to say that Dean Freedman finds the ABA Code of Professional Responsibility and other authorities hypocritical. See, e.g., Freedman, supra note 1, at 57, 63-64. For a demonstration of inconsistencies in statements by his arch nemesis, Warren Burger, see id. at 44-45.
difficult conflicts of interest between themselves, their clients and society, frequently involving distressing human circumstances. The ethical choices facing the legal practitioner are a challenge to anyone's maturity. The reality of the law, then, is unsatisfactory, and students and practitioners will be motivated to avoid seeing it.

The traditions of the profession do provide rationalizations for those who would abandon their own judgment to that of the group, although practitioners may have to choose between discrepancies in role behaviors acceptable to subgroups of the profession: the ABA or the local bar, firms representing substantial business interests, the personal injury bar or legal services groups and so forth. Whatever rationalizations lawyers accept, however, there will remain that portion of their personalities which holds to notions of goodness which were learned as children growing up in a family and in the general community.\(^7\) Coping with the resulting internal conflicts is a part of every attorney's personal agenda.

The alternative to abandoning one's judgment to that of the group is to learn to acknowledge one's conflicting personal motivations and to make judgments on explicit recognition and weighing of facts and values influencing decisions. If this is the path of greater responsibility, however, it is also potentially one of greater distress, requiring as it does living with insoluble dilemmas, with concern for the suffering of clients and others, and with never having certain knowledge that one's decisions are right or wrong. Attorneys can never be certain of the moral correctness of their decisions because of the uncertainty of values and because of uncertain knowledge of the likely consequences. Training in ethical behavior cannot responsibly content itself with extinguishing inappropriate defenses to practitioners' anxieties, but must help in learning new behaviors, which while consonant with professional values, will also make possible living with the stresses of professional work.\(^8\)

I believe that ethics commentators share with law students the wistful hope that reasoned discussion can result in the resolution of dilemmas and that a code of professional responsibility can and ought to provide clear and generally acceptable guidance to attorney conduct.\(^9\) The ethical problems facing attorneys, however, are true dilemmas, and action deci-

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\(^7\) The occasional comment by a few criminal defense attorneys that they cannot defend guilty child molesters or rapists is only the audible remnant of what I hear from law students in Roles and Relations in Legal Practice, see note 1 supra, who frequently express reservations regarding the defense of a guilty client, even where only a property offense is involved. Compare the reported reactions of senior partners in a prestigious Washington law firm who would allow firm members to be surveyed on professional ethics in criminal defense only orally and anonymously because they feared the reactions of local judges to publication of their "true views." FREEDMAN, supra note 1, at 39.

\(^8\) See Menzies, A Case-Study in the Functioning of Social Systems as a Defense Against Anxiety, in GROUP RELATIONS READER (A. Coleman & W. Bexton eds. 1975); note 12 infra.

\(^9\) Dean Freedman certainly is critical of ambiguities and failures to make distinctions in the ABA Code of Professional Responsibility. See FREEDMAN, supra note 1, at 60-61.
sions will not be generally acceptable. The extent to which decisions should be governed by authorities and the extent to which they should be left to the consciences of individual attorneys is itself a value question. An attorney with appropriate humility will frequently defer in his judgment to colleagues or to the mores of the legal community. The extent to which the profession pre-empts the individual attorney’s judgment by rules with enforceable sanctions is a decision made through political processes. The legal profession will not become more “ethical” until allocation of authority and acceptance of responsibility are more realistically faced.

Just as it is difficult for parents with children and for doctors with patients, it will always be difficult for lawyers to deny their dependent clients something they want or something an attorney feels a client needs. And it will always remain difficult for attorneys to know when they are being appropriately humble in giving deference to group norms and when they are merely avoiding responsibility or being personally prudential.

**Limitations on Freedom of Choice**

Practitioners, coming from a posture of not wanting responsibility, are plunged into contexts where their freedom of choice is very limited. Discussion in much of the literature seems to proceed from the premise that attorneys are free to make their own ethical decisions. Especially for attorneys just starting out, this is just not the case. The most extreme situation occurs when attorneys are instructed by their employers—senior partners in their firms, not their clients—to do something which the attorney considers improper. Recent graduates report being told to commence actions, make defences or file motions which the junior attorney believes to be groundless, where the senior’s instruction is predicated not on second guessing that judgment, but merely on the fact the client wants the action taken or will be benefited by it.\(^\text{10}\)

Even without such direct coercion, attorneys motivated to maintain, not to mention advance, their economic positions and social status are under intense pressures to conform to the approved conduct of the groups or individuals which maintain them, which include clients, employers and the local bar. Wherein do the canons of professional conduct weigh in the economic security of one’s spouse and children and one’s aspirations for position in the community? Being a lawyer will have different meaning for different people, but it will have important meaning both to individual attorneys and their families as well as to others important to them. Sacrificing status for the sake of ethical conduct is not easily done.

The emotional pressures to view oneself as honest and honorable cause practitioners to rationalize what they are compelled to do as ethical

\(^{10}\text{See note 1 supra for my contacts with young lawyers’ concerns.}\)
conduct, or they are likely to find a new context in which to earn a livelihood. It is no wonder that, however rationalized, the action ethic of the profession is most client-oriented in those areas of practice wherein clients are best situated to hire and fire their attorneys, and that client-oriented ethics are on shakier ground where attorneys' economic security depends on relations to institutions other than the client. Effective discussion of ethical conduct of the profession must go beyond the advancement of rationalizations to enhancing attorneys' effective choice.

Attorneys as Members of a Group

The above discussion views attorneys' membership in professional groups as both seductive and coercive, but even more is involved. Working in groups is notoriously difficult. Problems of authority, dependency, intimacy and security, among others, are acute for group members. Group myths and unstated assumptions may govern conduct, making more difficult the accomplishment of work. Lines of authority and legitimate leadership are strikingly unclear in the legal profession. What are the allocations of authority between the American Bar Association and state and local bars, between the legislature and the courts, between statewide appellate courts and local judges, between individual attorneys and employing firms? At least in regard to questions of ethical standards in regard to difficult matters, no one really knows. This diffuseness of authority is possibly a good thing in a pluralistic society in which the weight to be given opposing values is very controversial, but the lack of clarity is debilitating to those wishing to guide their actions in accordance with legitimately authorized standards.

And finally, the ultimate Catch-22 for those seeking ethical comfort, in a professional group which is largely self-governing, if governed at all, individual attorneys are responsible not only for their own actions, but for the actions of other attorneys as well. This is not merely a theoretical or imposed value, but something felt by attorneys. Attorneys are very aware that a choice to refrain from doing an ethically distasteful act on behalf of a client, a choice validated by the Code of Professional Responsibility, is

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12Those interested in pursuing this subject are advised to look into the work of the A.K. Rice Institute, including its group relations conferences which have as their focus the exercise of authority in groups. A useful collection of essays by Bion, Rice, Rioch, Menninger and others is contained in A.K. RICE INSTITUTE, GROUP RELATIONS READER (A. Coleman & W. Bexton eds. 1975). Inquiries regarding conferences or the Group Relations Reader may be addressed to A.K. Rice Institute, 1610 New Hampshire Avenue, N.W., Washington, D.C. 20009
facilitated by the knowledge that the client is likely to find another more congenial attorney and that the dirty work will be done.\footnote{14}{A lawyer should be able to refuse a client for any reason, including mere suspicion of dishonesty (except in the extreme and unlikely circumstances that the client would thereby be left with no attorney available at all). \textit{FREEDMAN}, \textit{supra} note 1, at 54. Irrational or not, however, in those jurisdictions in which the defense of unchastity is still the law, the attorney is bound to provide it on the guilty client's behalf. For the lawyer who finds the presentation of that defense, and perhaps others in rape cases, to go beyond what he or she can in good conscience do, there are two courses that should be followed. The first is to be active in efforts to reform the law in that regard; the second is to decline to accept the defense of rape cases, on the grounds of a conflict of interest (a strong personal view) that would interfere with providing the defendant with his constitutional right to effective assistance of counsel. \textit{Id.} at 48-49 (footnotes omitted). Note that "unchastity" is not in fact a "defense," but merely evidence with some relevance to a consent defense.}

\textbf{Implications of Client-Oriented Values}

The premises of client-oriented ethics seem to be the obligations of confidentiality, of vigorous advocacy and of provision of legal services.\footnote{15}{See generally \textit{id.} at 1-8.} These obligations exist because they are promised, because they are functional in the search for truth and justice according to law, and because they serve humanitarian goals. A relationship of trust between attorney and client in which clients feel they can be safely candid with their attorney is necessary to these goals.

The contractual promises of confidentiality and vigorous advocacy are not unqualified, however, nor is the obligation of the profession to provide services. (The implications of humanitarian service will be discussed later.) If an attorney is not obligated to kill an adverse witness for the benefit of a client, the question becomes where lines are to be drawn. The guiding principles would seem to be that attorneys are not themselves to be implicated in wrong doing, nor in their advocacy and advancing a client's interest are they to confuse or obstruct the search for truth and justice.

The literature, however, while recognizing that limitations exist,\footnote{16}{E.g., \textit{id.} at 71-72. Dean Freedman is not willing to justify the violation of ethical rules, such as one prohibiting actively falsifying evidence, by attorneys motivated to see justice done, despite some inconvenient fact .... Those lawyers who choose that role, even in the occasional case under the compulsion of a strong sense of the justness of their client's cause, must do so on their own moral responsibility and at their own risk, and without the sanction of generalized standards of professional responsibility. \textit{Id.} at 76. Without regard to motive and consequences? \textit{See} text accompanying note 4 \textit{supra}. The distinction which Dean Freedman finds between assisting a client to manufacture evidence and to present perjured testimony may not be seen by everyone. \textit{FREEDMAN}, \textit{supra} note 1, ch. 3, "Perjury: The Criminal Defense Lawyer's Trilemma."} tends to treat ethical obligations as absolute. For example, in Freedman's discussion of whether an attorney should participate in a client's presentation of perjured testimony,\footnote{17}{See generally \textit{id.} at 1-8.} he argues that warning a client that the
attorney cannot condone perjury will caution the client against candor with the attorney. Thus, the attorney will be less well informed. Clients may even withhold information which they do not have the legal sophistication to recognize as exculpating. As Dean Freedman observed: "[T]he lawyer will not be successful without convincing the client that full disclosure will never result in prejudice to the client by any word or action of the attorney."

The fault of the argument is that it does not recognize that a client's choice to be represented by counsel is a choice to be represented by counsel who has limitations. A client accused of a crime does not have the right to go free on the basis of perjured testimony. It is basically the client's decision: there are benefits to being candid with counsel; the price is legitimate. Of course, clients must be informed if they are to make choices. The attorney's obligation and skill includes explaining the benefits and limitations of his professional services to prospective clients.

The objection that informing prospective clients that the attorney will not assist clients in presenting perjured testimony will cause clients not to be completely candid with counsel does not account for the complexity of establishing trust. Absolute candor between attorney and client is not possible; they are insufficiently intimate for that, being strangers to each other. The realistic goal must be the greatest possible trust and candor. Every attorney has conflicting interests with every client. Clients know this, and attorneys pretending to unqualified loyalty are not promoting trust. Early candor regarding attorney limitations can help produce early and explicit agreement regarding the terms of service. This in turn should help produce greater security in an attorney-client relationship, which will help facilitate greater candor, and should help avoid embarrassing misunderstandings at later stages when attorney is representing client in negotiations or in litigation. (That attorneys would prefer to dictate, rather than reach agreement, regarding the terms of their service may be part of the problem.) This is not to say that unforeseen developments will not occur and difficult decisions may have to be made, perhaps instantaneously.

The remaining value supporting client-oriented ethics, not yet discussed, is that the provision of legal services serves humanitarian goals.

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18 Id. at 30.
19 It is likely that attorneys are not as explicit as they should be in discussing both benefits and limitations with prospective clients. The how and why of this is too large a topic for this essay. My experience with law students suggests that insecurity regarding the value of lawyers' services in one cause.
20 "[T]he inevitable result . . . would be to caution the client not to be completely candid with the attorney. That, of course, returns us to resolving the dilemma by maintaining confidentiality and candor [by the attorney?], but sacrificing complete knowledge . . . ." Id. at 98.
21 For a start, attorneys have an economic incentive to provide clients the least service for the greatest possible fee.
Evaluation of humanitarian service requires consideration of aspects of the attorney-client relationship not frequently examined. It would seem to require the consideration of attorney and client as whole persons.

A basic issue for philosophy and ethics is whether individuals are responsible for their actions. The premise of the law is that for any given act the answer is yes or no; there is no middle ground. The premise from reality is, of course, very different. Responsibility is relative; the actor causing injury is a victim as well as a perpetrator. The provision of the services of an attorney may in part recognize and compensate for this reality.

Whatever their responsibility, ethical or legal, individuals confronted with legal problems are in an unhappy position. They have difficulty speaking for themselves not only for lack of sophistication and expertise in legal matters, but also because their personal involvement, and possibly distressing circumstances, make them less effective than they might otherwise be. If the attorney who represents himself has a fool for a client, how helpless must the layman be. In light of these considerations, providing a champion to individuals upon whom legal institutions are bearing down is clearly humanitarian.

From a humanitarian viewpoint, however, a relationship with an attorney has implications for clients beyond winning or losing the case. People with legal problems frequently have troubles, in part, because they have difficulty in their relationships with others. Lawyering has therapeutic implications even though the lawyer is not a therapist. To adopt a phrase, the attorney is either a part of the solution or part of the problem. There is no way to stand apart. There are many variations on this theme. An important one is that troubled individuals frequently view their world as one where people exist principally to use each other and do not have constructive, mutual relationships. The attorney who acquiesces in being only a tool of such a client may be reinforcing those perceptions and behaviors which tend to involve the client in difficult situations. Thus, the provision of what Freedman and others see as dedicated legal service, without anyone being responsible for its effects, may result in an attorney colluding with a client in dehumanizing them both, to the detriment of the human dignity which client-oriented ethics profess to support.

In summary, interaction processes are complex, and human behavior, including that of attorneys, is not easily understood. In these respects much of the legal ethics literature tends to obscure rather than illuminate professional responsibility problems.

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23 There are, of course, possible exceptions to this generalization, e.g., the law encourages settlements and will not even examine jury verdicts too closely for indications of compromise.