

LAWYERS' ETHICS AND COLLABORATIVE LAW

THE WISDOM OF SKEPTICISM

With our education and training in the adversarial approach to dispute resolution, it is small wonder that attorneys are wary of the collaborative law process. Withdraw if someone goes to court? It sounds unconventional to the point of bizarre with a training that is founded on appellate case law. *Hadley v. Baxendale*, *International Shoe v. Washington*, *Palsgraf v. Long Island Railroad* - these are the basic formulae of our professional knowledge - and self identity. These are all litigated cases.

The notion that a lawyer representing a client in a dispute should take into consideration the concerns and needs of third parties - even (*gasp!*) the other party - feels to many like such a violation of our basic responsibility (to our own client) that the reaction is often sharp and visceral. Yet, the debate between those who hold that a lawyer has but one duty (and that is to client) and those who contend that the lawyer has an ethical (or at least a moral) duty to non-clients, has been strongly engaged for many years. Actually, the discussion between collaborative lawyers and those who hesitate at it's use is an extension of this larger debate which has occupied legal ethicists for at least 200 years.

The purpose of this chapter is to trace this debate, highlighting its most articulate proponents and to provide a brief compendium of quotations which both champion the position of the "zealous advocates" and those who exemplify, mostly, the positions of many current ethics scholars who warn about the damage inflicted by over-concern with the interests of only one party in a dispute. As we review this history, and read various statements, we should keep in mind the natural pendular movement of policy development. The straight line from Watergate, through the Lincoln Savings scandal from the 80's to Enron and Worldcom in the 90's underscores the collection of passionate essays outlining an attorney's obligations to third parties. Names which are generally unknown to practitioners - David Luban, Deborah Rhode, William Simon, Robert Gordon, Carrie Menkel-Meadow - have provided an intellectual basis for resisting the so-called "dominant approach" to American Legal Ethics: The notion that the rights of one's client are the only valid concern of the attorney. Where did this notion come from?

LORD HENRY BROUGHAM AND DANIEL HOFFMAN

It was 1820 and the British Queen Caroline was in trouble. King George IV wanted to remove her from the throne, accusing her of adultery. In fact she and George had been estranged for some time and she had been living in Italy (and had likely taken up with a lover there). However, removal under these circumstances would involve great forfeit on Caroline's part and she sought to fight these charges. Coming to her aid was Lord Henry Brougham, one of the pre-eminent barristers of the time. Brougham later went on to write extensively about the law and was always held in the highest esteem on both sides of the Atlantic. It was whispered that George had wed a Catholic widow previously and Brougham made it clear that he intended to establish the proof of these rumors, which would force George to surrender the crown. Brougham was warned against such a rash move. In reply he uttered the pronouncement that for the last 190

years has formed the call to arms for all attorney's charged with the protection of their client's interests.

(A)n advocate in the discharge of his duty, knows but one person in all the world, and that person is his client. To save the client by all means and expedients, and at all hazards and costs to other persons...is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may ring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion."

Lord Brougham's summation crystalizes the essences of what Professor William Simon calls the "dominant view" of the attorney's basic ethical responsibility. It is most aggressively and effectively promoted by Monroe Freedman, for many years one of deans of the American professional responsibility community. Lawyers are well familiar with this approach - If both sides in a legal dispute are represented by counsel who zealously promote the interests of their clients within the bounds of the law and all applicable ethical standards, justice will be reached.

While it has been noted that Brougham's words found a receptive audience in Antebellum America, contemporary legal thinkers of the time were not universally bowled over. Justice John Gibson of the Pennsylvania Supreme Court gave voice to these doubts in *Rush v. Cavanaugh*, 2 Pa. 187 (1845), when he stated,

"(I)t is a popular, but gross mistake, to suppose that a lawyer owes no fidelity to any one except his client; and that the latter is the keeper of his professional conscience."

Coincidentally, at this time, the first American legal ethicist, Daniel Hoffman, began to write. Hoffman, a Boston lawyer published the first attempt to comprehensively treat legal ethics in this country, in 1836, his *Resolutions in Regard to Professional Deportment*. M.H. Hoeflich in his *Legal Ethics in the Nineteenth Century: The "Other Tradition"* quotes Resolutions declaiming that the attorney's conscience must remain a "distinct entity" from his client's and that "(I)f I am satisfied from the evidence that the fact is against my client, he must excuse me if I do not see as he does, and do not press it..." Hoeflich observes,

"In all of these Resolutions there is implicit the notion that the lawyer must, in fact, exercise his own personal moral judgment in determining the extent to which he will go in representing a client. In so doing, the lawyer becomes a sort of judge in each client's case, a notion from which Hoffman does not shrink as many modern ethicists would."

However this "other tradition" could just as well have been labeled the "minority view" in American legal ethics, as "zealous representation within the bounds of the law" became a fundamental principle, ingrafted into the first ABA Canons of Ethics in 1908.

ZEALOUS REPRESENTATION AND FAMILY LAW

For all its unique qualities (dealing with extremely intimate personal issues and highly emotional clients for a start), family law has had no shortage of its own practitioners of Lord Brougham's advocacy. Perhaps the clearest statement of this single-minded support of a divorce client's position can be found in *Divorce*, the 1972 memoir of Raoul Felder. Felder, a highly successful New York matrimonial expert has over the years become nearly as big a celebrity as the stars and tycoons (or their spouses) who he represents. Here is how Raoul Felder views his ethical role as a divorce attorney:

"I am tough because I assume the lawyer who opposes me will also be tough. I will do anything within the law and the ethics of my profession to deserve the confidence placed in me. That approach is obviously reflected in this book.

It is not my intention to stand in judgment. I am not a moralist or a minister, a priest, or a rabbi. As a lawyer, I am a technician, a how-to man. Once someone decides he wants a divorce, I can help him avoid the pitfalls that await the unwary and guide him through the ordeal into which, if badly advised, he might sink. But the decision to divorce is not mine; it can only be my client's.

When I take a case, I am not concerned with whether my client is right or wrong. As far as I am concerned, a client is always right. I may refuse to represent him for other reasons (which will be explained later) but not because I think he's in the wrong. To stand in judgment is too great a luxury. It is the function of judges and juries to determine guilt or innocence, not mine. Under our system, even a murderer is entitled to a lawyer. That does not imply that the lawyer approves of murder. If a woman wants to divorce a husband who betrays her, I am not going to reject her simply because she betrays him, too. Some of my women clients have admitted they were going to bed with men for money. That's their problem, not mine. Mine is to win the case and to do so with speed and honesty. That is the way a lawyer who is a lawyer functions. The lawyer who is a crusader might view the problem differently. I am not one; and if someone needs assistance, I think I, and other practicing lawyers, can provide it far more effectively than the crusaders. When the chips are down, a man or a woman needs someone to tell him how things are, and not the way they ought to be.

Let me give you an example—clearly an extreme and unique one. I successfully represented a woman in a divorce case. After our victory the court went into the question of custody. The husband was seeking custody, claiming that the wife was often drunk, and so was not properly attending to the children.

While the court was in recess for several days, the mother, who lived on Long Island, sent her young son into New York to see his father. A couple days later, the state police found the boy wandering around the railroad station. The mother had neglected to pick him up after the visit and the boy had remained at the railroad station for about four hours. The police took him to the local child welfare center and as a routine procedure in these cases, X-rays were taken. They revealed healed fractures of the radius and ulna bones of the right arm. After an interview with the child, it was felt that there was a real possibility the mother had abused him.

In order to prevent the county from bringing charges against the mother, I met with the welfare authorities and advised them that there would shortly be a custody hearing. They agreed to hold off, but said that a meeting should be arranged immediately with the judge to apprise him of the facts of the situation.

We set up such a meeting the next day. The judge said that he felt that "guilt or innocence" was the primary consideration in such cases. We were dealing primarily with a psychiatric problem if the evidence were borne out, and he would like to send the son and both parents to a competent psychiatrist and then meet with him to see what he thought. The father agreed on behalf of himself and the child. My client did not want to be seen by the doctor. In my discussions with her now, I learned that she had been undergoing analysis for some time. With her permission, including a release, I had a meeting with her doctor. Much to my surprise he welcomed my visit and the opportunity to talk. For over seven months he had been trying to convince this woman that she should be institutionalized. He told me that on at least two occasions in the last year she had attempted suicide. He suggested that the judge's approach was a constructive one for the woman's own benefit because, he said, "As soon as she sees the psychiatrist chosen by the court, there is no question that he will see she is an extremely sick individual and very likely he will suggest commitment also."

Maybe there are some people who think I should have gone along with the doctor. Well I didn't. I told him, "At this point I will most certainly not allow my client to see the expert because my function is to win her case and not to get her committed. If she loses the case, then there will be plenty of time to send her to a doctor and decide what's going to be done with her."

I don't think I was wrong. As a matter of fact, I am sure I was not. It is not up to me to say what the real interests of a client are. Who am I to decide that point? What authority have I got? It is simply not my function to proclaim that a person is good or bad, saintly or evil, right or wrong, pure or impure. Any lawyer who does this is a hypocrite. In this case it was the task of the husband's lawyer to try to send my client to an institution. The judge sits on the bench to hear both sides of the case, not mine only."

To the extent the practice of family law is the practice of *law*, Raoul Felder is in tune with the dominant view of the attorney's role in the adversarial process. The leading scholar who has championed the lawyer's "role morality" is Professor Monroe Freedman. Paramount in Freedman's concerns (as with Felder) is the client's autonomy. He has stated, for example, that once a lawyer "chooses to represent a client,...it would be immoral as well as unprofessional for the lawyer, either by concealment or coercion, to deprive the client of lawful rights the client elects to pursue." He has further intoned:

"The adversary system thereby gives both form and substance to the humanitarian ideal of the dignity of the individual. The central concern of a system of professional ethics, therefore, should be to strengthen the role of the lawyer in enhancing individual human dignity within the adversary system of justice."

Yet, as has often been noted, such reliance on what David Luban has called “the adversarial excuse” requires certain preconditions. Chief among these is the assumption that each party has the resources to be represented by competent counsel. Yet, even if both sides have unlimited resources, an increasing number of writers have expressed essential misgivings about the societal and personal costs of the adversarial approach to the resolution of legal disputes.

PUSHING BACK AGAINST THE ADVERSARIAL APPROACH

Deborah Rhode of Stanford University has written with great insight and (yes) passion about lawyers’ ethical duties. Excerpts from her voluminous work follows:

“Lawyers also have responsibilities to prevent unnecessary harm to third parties, to promote a just and effective legal system and to respect core values such as honesty, fairness, and good faith on which this (adversarial) system depends...A growing constituency both within and outside the profession is demanding that lawyers assume greater responsibility for the welfare of parties other than clients.”

“(The contextual framework I suggest) would require lawyers to accept personal moral responsibility for the consequences of their professional actions. Attorneys should make decisions as advocates in the same way morally reflective individuals make any ethical decision...Unlike the bar’s prevailing approach, this alternative framework would require lawyers to assess their obligations in light of all the societal interests at issue in particular practice contexts...Lawyers also have responsibilities to prevent unnecessary harm to third parties, to promote a just and effective legal system, and to respect core values such as honesty, fairness, and good faith on which that system depends.”

“As moral philosophers, including David Luban have noted, individual autonomy does not have intrinsic value; its importance derives from the values it fosters, such as personal creativity, initiative, and responsibility. If a particular client objective does not, in fact, promote those values, or does so only at much greater cost to third parties, then deference to that objective is not ethically justifiable.”

“As Geoffrey Hazard (a well regarded ethics scholar) notes, the adversary system in practice is less a search for truth than an exercise in theater, in which lawyers present clients in their “forensic best” and victory, not veracity, is the ultimate goal.

Similar problems arise with the bar’s traditional rights-based justifications for zealous advocacy. Such justifications implicitly assume that any legal interest deserves protection. This assumption confuses legal and moral rights. Some conduct which is socially indefensible is technically legal, either because it is too costly or difficult to prohibit, or because decision-making bodies are uninformed or compromised by special interests...

To justify zealous advocacy in such contexts requires selective suspension of the moral principle at issue. If protecting individual rights is the preeminent value, why should the rights of clients trump everyone else's? Yet under bar ethical codes and prevailing practices, the interest of third parties barely figure."

Professor Carrie Menkel-Meadow of Georgetown University is an eloquent voice calling to question the harms inflicted by the adversarial system. Her essay, *Is Altruism Possible in Lawyering?*, commences with the John Donne stanza beginning "No person is an island, Intire of itself.." She comments,

"The very structure of law, as it is crated, practiced, and enforced, assumes a duality, an otherness - the defendant, the opposing side, the client, those inside the law, and those outside...Altruism is a strange concept to associate with lawyering and legal ethics. After all, our legal system is based principally on an adversary model that asks us to see the other side as "other" - as an opponent to be beaten or at least to gotten the better of as we zealously represent our side....From the moment we start law school, we learn to argue against someone and to explore all sides of the question with the purpose of arguing why we are right and they, the other, are wrong...To say that lawyers should consider, let alone care, for the other side of a legal problem is probably close to blasphemous in our lawyering practices..."

(T)hose of us who are interested in exploring whether other values can inform our lawyering ethics and practices as well as asking whether different conceptions of the lawyer's role and legal ethics can inform even the most conventional adversarial practice, focus on ways of encouraging cooperation, collaboration, negotiation, and mediation - processes somewhat different from our usually disputatious adversarial mode..."

(The adversarial system) which constitutes the bulwark of the legal profession's sense of fairness permits, indeed, encourages, activities such as the failure to disclose adverse witnesses, the refusal to give assistance or advice to the "other side" (except the advice to find an attorney), and of course, the most important exhortation of all, zealous advocacy, requiring both complete loyalty to the client and opposition to the other side."

In another forum Menkel-Meadow, in discussing *The Limits of Adversarial Ethics*, sets out a list of the ten most important things to add to existing ethical codes. This includes the injunction that "Lawyers should not agree to a resolution of a problem or participate in a transaction that they have reason to know will cause substantial injustice to the opposing party. In essence, a lawyer should do no harm." She concludes her chapter with the following:

"(F)or many of us, it is time to question some of the well-worn aspects of our profession. We became lawyers in order to leave the world in a better state than we found it, to right individual, as well as systematic, wrongs and to "assist in improving the legal system." To that end, we need to junk the adversary system."

Let that system do its work when we need a contest to find facts, declare legal rights and responsibilities, and clarify values. But to the extent that the adversary system and the ethics it inspires has caused us to lose the confidence of our own clients and the better parts of ourselves, we must open up our profession to a greater diversity of approaches. We need better ways of doing justice in the many different forms in which justice is experienced by participants in legal processes. We need an ethics of practice that would seek to solve problems, rather than to “beat the other side” by tenaciously advocating one single “truth.”...What would matter is whether more people would be better off with the intervention of a “solution-seeking” lawyer than with a partisan gladiator, or with no intervention at all.”

Much of the writing about attorneys’ ethical obligations has come amidst the general hand wringing over the violations in the savings and loan debacle in the 80's and the corporate depravity practiced by Enron, Tycor, WorldCom and their ilk in the 90's. As the course of legal developments follows the inevitable swing of the pendulum, lawyers’ silence (not to mention complicity) in the face of client fraud led to the enactment of amendments to the ABA Ethical Code and Washington RPC’s which erode the wall of attorney-client confidentiality. The new rules have arisen within an environment that is continually reminding us that attorneys have obligations to society as well as their client. In 1988, William Simon published one of his many seminal articles on the topic *Ethical Discretion in Lawyering* . Simons holds that the proper guide for the attorney is: *The lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice.*” In his first foray into this debate, a decade earlier and right on the heels of Watergate, Simon criticized the “Ideology of Advocacy” by claiming that its purpose, *“is to rationalize the most salient aspect of the lawyer’s peculiar ethical orientation: his explicit refusal to be bound by personal and social norms which he considers binding on others.”*

COLLABORATIVE LAW AS AN EXTENSION OF THE ARGUMENT

For at least the past 30 years, there has been a growing debate within the legal community - with parallel tracks representing the conventional adversarial ethic and those who question its harmful impact on non-clients. A new section on “humanizing legal education” has formed in the American Association of Law Schools. Susan Daicoff, a leading figure in this movement, has identified a “comprehensive law” movement, composed of a number of “vectors” including therapeutic jurisprudence, restorative justice and collaborative law. (Her website is definitely worth a visit.) Mindfulness in the practice of law is a topic of growing interest - University of Connecticut Law School even offers a course on this. As mentioned, the amendment to Model Rule 1.6 constitutes an institutional acknowledgment of the “other track.”

Collaborative law is a reflection of this track in the area of family law. It is a recognition that a conventional adversarial approach to domestic disputes can be deeply wounding. It can create further rupture in the relationship of two parents which may have repercussions for generations. Legal divorce is almost universally experienced as a traumatizing event in the life of one, or both, individuals. The habit of thought and language of the litigator who is “protecting my client” and “obtaining that to which they are entitled,” sets up a binary thought process with

winners and losers, good guys and bad guys, self and other. However, lawyers who are fine people, with a high level of personal morality, believe it is their duty to protect their client. They may be the only person, in their view, standing between their client and devastation. Yet this view, held in good faith, only serves to reinforce the institutional habit of lawyer-thought: The harm that may be done by my ardent support of my client is not my concern. It is the concern of the other lawyer, or the other party's therapist, or the party themselves. I am protected by the unique "role morality" of the litigator.

This ethic is so strong - so deeply inculcated into our professional psyches (from the first day in law school) - that arguably only a formal process - with a different structure - can affect a change of attitude and approach. That is certainly the idea with collaborative practice.

Does collaborative law have risks? Absolutely! Is it imperfect in its implementation? Certainly. However, collaborative practitioners are responding to the same misgivings expressed by the writers cited above - the toll exacted by conventional litigation's solution to dispute resolution. For some, the disqualification requirement is too rigid and risky - so they are inclined to adopt a more "cooperative" approach. For others, only the implementation of a process that seeks to institutionalize transparency and good faith will accomplish the desired goal. The rationale for a more structured process (with commitment agreements, etc.) is that the ethic of legal practice is like the proverbial ocean liner that needs to turn. Strong, concerted force is required and even then, the changes in direction are small and incremental. Few can argue, however, with the growth and success of the model. The suggestion in this essay is that collaborative law was a seed planted in the very fertile soil of widespread discontent over the prevailing ethic of the adversarial system of dispute resolution.
