Notre Dame Law Review

Volume 77
Issue 3 *Propter Honoris Respectum*

Article 3

3-1-2002

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THE LAWYER AS MORAL COUNSELOR: HOW MUCH SHOULD THE CLIENT BE EXPECTED TO PAY?

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My teaching and writing over my two decades in the legal academy has concentrated on two broad areas. One of them is constitutional law, which, of course, includes such topics as slavery, affirmative action, abortion, the speech rights of the Ku Klux Klan, gun control, and other topics guaranteed to stir controversy. The other is professional responsibility. Of the two, there is no doubt in my mind as to which is the more truly difficult to teach. It is, of course, the latter.

Part of the difficulty is explained by the fact that most students, perhaps following the lead of too many of their professors, basically disdain the course as an imposition on their scarce time that has little to do with their goals of becoming lawyers, at least as "lawyering" is defined in the marketplace for legal services. Even more important, though, in explaining the existential difficulty of the course is the fact that in it one is (or, most certainly, *should* be) addressing questions relating to what it means to lead an honorable life. This is not really true of a course in constitutional law, if for no other reason than the fact that very few lawyers will actually be called upon to make decisions relating to these controversies. Few lawyers "practice" constitutional law; even fewer will be in a position to adjudicate controversies about the meaning of, say, the Fourteenth Amendment. These controversies will remain, for all but a very few, intellectual abstractions.

Just as important is the fact that it is easy enough to say to one's intellectual opponents that, "Although I disagree with you, I nonetheless respect you as a fine person." Most of us are willing to believe that "reasonable persons can disagree" about almost all significant constitutional questions and that people of good faith can be found on either side. Indeed, one of the most attractive features of the legal academy is the opportunity to develop close relationships with col-

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leagues with whom one strongly disagrees on a number of important legal issues. Part of the joy of the academy is the true joy taken in argument itself.

A course in professional responsibility or legal ethics presents different problems. If one takes seriously the question of what it means to be a morally admirable lawyer, one knows two things: first of all, *all* lawyers, regardless of their area of specialization, will be called upon to answer this question, perhaps every single day. Secondly, in debating what it means to lead a moral life, it is very difficult to say to someone with whom one fundamentally disagrees, "Even though I think you are choosing a life that I cannot admire, I nonetheless respect you as a fine person." Perhaps this is not quite true if one is engaged merely in abstract discussions of, say, the merits of consequentialist and deontological approaches to ethics. No doubt it is possible for utilitarians and deontologists to be friends. But if one is talking about truly concrete examples and asking what a virtuous person would do in the situation, it may be harder to maintain a friendly relationship if one person views an action as appalling even as the other embraces it as morally defensible or even compelled.

There is, then, always an emotional weight in professional responsibility courses that is, when all is said and done, absent in courses in constitutional law. It is a weight captured in Thomas L. Shaffer's making the central question in his own teaching of "legal ethics" "[w]hether it is possible, in America, to be a lawyer and a good person—and, if so, how."[1] I admire his willingness to ask such questions. More to the point, perhaps, is that his own powerful example has served to empower me in sometimes raising similar issues. I am therefore delighted to join many of his other friends, colleagues, and admirers in paying tribute to him in this *Propter.*

Among the relatively small group of academics who have devoted their professional lives to pondering the meaning of "professional responsibility," Shaffer is especially notable for his emphasis on the lawyer-client relationship as a true encounter between human beings, each of whom is presumptively trying, as best as possible, to live a decent life and to be a good person. The lawyer, that is, does not merely convey certain technical information to a client who would find the information useful; rather, the lawyer must always be ready to engage

1 THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS, at xxi (1985).

in serious dialogue—what Martin Buber would have called an "I-Thou" relationship.[2]

The organized bar itself recognizes that the practice of law cannot be reduced to technical legal concerns. Thus, Rule 2.1 of the *Model Rules of Professional Conduct* adopted by the American Bar Association states:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as *moral*, economic, social and political factors, that may be relevant to the client's situation.[3]

The comment to the rule states that

> [p]urely technical legal advice . . . can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.[4]

A further comment states that "[i]n general, a lawyer is not expected to give advice until asked by the client."[5] However, although "[a] lawyer ordinarily has no duty to . . . give advice that the client has indicated is unwanted," it is also the case that "a lawyer may initiate advice to a client when doing so appears to be in the client's interest."[6]

I have discovered over the years that few parts of the Model Rules are more difficult to teach than this one. Most students, for example, seem extremely resistant to the idea that they have any duty at all to raise moral questions with a client. It may be because they envision their likely legal practice in a large, corporate-oriented law firm, as one in which they will rarely, if ever, have actual contact with live clients, especially early in their career. Of course, one might suggest that young associates, if uncomfortable with certain aspects of a case, might raise moral questions with their supervising partners and suggest that *they* (who presumably do on occasion meet live clients) transmit these concerns, but most students find this even more unthinkable than moral engagement with a client.

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2 THOMAS L. SHAFFER, ON BEING A CHRISTIAN LAWYER: LAW FOR THE INNOCENT 28 (quoting Martin Buber, citation not provided).

3 MODEL RULES OF PROF'L CONDUCT R. 2.1 (2001) (emphasis added).

4 *Id.* cmt. 2 (emphasis added).

5 *Id.* cmt. 5.

6 *Id.*

In years of asking students about their hesitation to envision themselves as engaging in such conversations with live clients, the most frequent response runs along the following lines: clients are presumed to be morally serious individuals who have reflected on what they are doing and, therefore, are in no need of any further probing from a lawyer. Furthermore, the lawyer is scarcely likely to be an "expert" in moral analysis, assuming there is such a thing at all. At the very least, almost no law schools devote any significant time or energy to honing their students' skills in making moral judgments. And, for those who believe there is no such thing as "expertise" in moral analysis, that is because morality is, at the end of the day, entirely a matter of individual opinion and choice. It is not, most students appear to believe—joined, one suspects, by most of their teachers—really subject to rational analysis. Lawyers, that is, have nothing really useful to say about matters of morality because *no one* has anything particularly useful to say. If this is the case, incidentally, then it is obviously irrelevant that law schools make no effort to include moral analysis within their curriculum inasmuch as doing so would have little more practical payoff than, say, offering a course on astrological analysis.

Of course, the professional responsibility course itself illustrates the problem, especially if it professes to be a course, at least in part, on "legal ethics," as contrasted with a law focusing more precisely only on "the law governing lawyers."[7] Many students object that they need no ethical instruction from those whom they sometimes view as sanctimonious faculty members. If they wish to engage in conversations about their moral values or conceptions about the lives they hope to lead as a lawyers, they will reserve them for encounters with close friends and intimates. They are similarly unsympathetic to the view that they should initiate such conversations with relative strangers called "clients." Isn't this a demand in effect that they themselves behave in a morally arrogant and sanctimonious manner insofar as it tells clients—just as professors too often suggest to their students—that they have probably not thought sufficiently about the moral implications of their desires and that the lawyer is available to save the (moral) day?

As Tom Shaffer long ago recognized,[8] there is always the danger of what he calls an "ethics of isolation,"[9] in which someone claims the

7 Not surprisingly, the *Restatement of the Law Governing Lawyers* is the title given by the American Law Institute to most of its work in the area. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

8 *See, e.g.*, SHAFFER, *supra* note 2.

9 *Id.* at 13–20.

right, basically, to pronounce moral truths to a de facto inferior who is expected to accept the instruction with little or no further questioning. He is surely correct that there is little to be said for such an attitude by lawyers (or professors). Concomitantly, one can easily understand why the recipients of such "advice" would feel demeaned and not taken seriously as persons who might, indeed, have reflected long and hard before coming to conclusions that, by stipulation, the lawyer views as morally problematic. If moral conversations are part of the lawyer's role, as I think they must be, the justification must be, paradoxically or not, the role that such conversations play in assuring the lawyer that he or she is leading a moral life, rather than monitoring the client's morality. The justification must also include the possibility that it will turn out to be the client who teaches the lawyer rather than the other way around.

So there are two aspects of moral engagement between lawyer and client that are worth noting: first, it is not clear that such engagement draws on the specifically "professional" knowledge ostensibly possessed by the lawyer and, of course, that is lacking in the client. No one, for example, expects the lawyer to ask for the client's views about how to construe the Fourteenth Amendment or the Internal Revenue Code. The client seeks out professional advice precisely because he or she cannot truly comprehend the relevant legal materials without the lawyer's assistance. But, as noted earlier, this is scarcely the case with regard to moral issues. Second, the reason for a genuine encounter with the client as to the potential moral ramifications of the client's proposed conduct is as much to protect the lawyer's status as a moral being as it is to "save" the client from moral disaster.

Consider, for example, two ways of initiating a conversation. One might begin, "Have you considered the moral ramifications of what you are doing?" Another might begin, "I must raise with you certain qualms I have about using my legal skills to enable you to achieve your aims." The first suggests more the self-confident attorney who indeed wants to prevent the client from making what the attorney considers to be a moral misstep; there is no indication that the attorney wishes to engage in a genuinely mutual conversation. The latter is quite different, a more tentative invitation to a real conversation in which the "qualms" can be spelled out and responded to by the client.

Let us assume that the invitation is in fact accepted, and the conversation ensues. What interests me for the purposes of this short essay is a question that I asked Tom Shaffer many years ago when he was kind enough to visit my class at the University of Texas Law School: who should pay for this conversation? After all, as has often been pointed out, what distinguishes the lawyer from one's (true)

"friend"[10] is that the lawyer is (with exceptions that need not concern us) hired by the client to provide a professional service and that the lawyer charges a fee, often a quite substantial one. If we put contingent-fee cases to one side, most fees are billed in hourly—or even subhourly—units, for "professional services rendered." So what is it, precisely, that justifies an attorney in billing the full fee—or perhaps any fee at all—for time spent in moral, rather than strictly "legal," conversation? That there is a distinction between "law" and "morality" is not only a tenet of positivist legal philosophy; it is also presupposed by the American Bar Association itself insofar as Rule 2.1 explicitly authorizes the attorney to "refer not only to law but to *other* considerations such as moral . . . factors"[11] I expressed some reservations about the lawyer's charging full fees for time spent in examining the moral implications of the case. Tom, as I recall, believed this was an essential part of the lawyer's service, every bit as important, one presumes, as the offering of strictly legal information, and therefore the lawyer deserved to be compensated fully.

This issue is directly addressed in a comment to the recently promulgated *Restatement of the Law Governing Lawyers* by the American Law Institute. Setting out the "Lawyer Functions in Representing Clients-in General," section 94 includes the following: "In counseling a client, a lawyer may address *non-legal* aspects of a proposed course of conduct, including moral . . . aspects."[12] Then comes the interesting comment: "Whether a lawyer may appropriately charge an hourly fee for [such] advice . . . depends on whether the parties contemplated that the lawyer's compensated services would include such advice."[13]

To put it mildly, immediate problems present themselves with regard to determining whether "the parties contemplated" that advice-giving would be part of the compensated legal services. Perhaps, as with *Miranda* warnings, a lawyer should be expected to specify, at the time of the initial hiring, that the services will indeed include the specified "non-legal" aspects and that the client agrees to pay for any such services rendered.

Still, one can ask if the fee should perhaps be reduced. Professor Rotunda offers his own comment on the "Comment":

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10 See generally the response by Arthur Leff and Edward Dauer, *Correspondance: The Lawyer as Friend*, 86 YALE L.J. 573 (1977), to Charles Fried, *The Lawyer as Friend*, 85 YALE L.J. 1060 (1976).

11 MODEL RULES OF PROF'L CONDUCT R. 2.1 (emphasis added).

12 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 (emphasis added).

13 *Id.* cmt. h.

> It is difficult to understand how this Comment is supposed to be applied. If the lawyer decides to spend several days studying Aristotle's *Ethics*, or St. Augustine's *Confessions* before advising a client, then one supposes that the lawyer should not charge for that time unless the client and lawyer contemplated that. However, what is much more likely to happen is that the lawyer, in advising the client whether to pursue a course of action, also advises that the particular course of action may be unwise from the standpoint of publicity, morality, etc. What the law "should be" often influences the direction of the case law. One cannot imagine that the lawyer—in the course of advising the client that a defamation suit in a specific context may be viewed by others as an attempt to stifle free speech—must separately bill the quarter-hour of the hour conversation that referred to moral issues.[14]

We might begin with the first part of Professor Rotunda's comment, which appears to concede that the client should *not* be expected to pay for the time the lawyer spends in bringing himself or herself "up to speed" on the moral aspects of the case. It is not self-evident why this should be the case. After all, lawyers are not expected to study new areas of law appropriate to a given representation "for free." If the case, perhaps unexpectedly, required some knowledge of Japanese law, one would expect the lawyer to spend the appropriate time learning the law in question (though perhaps not learning Japanese in order to be able to read it in the original) and the client to pay the full hourly fee for the time spent. So why doesn't the same answer hold if the lawyer, recognizing that a moral issue is presented by a case, believes it necessary to spend some time on recent philosophical writing? After all, even if the lawyer majored in philosophy as an undergraduate some years ago, it is altogether possible that recent articles on, say, the principle of double effect might cast new light on the specific issues confronting the lawyer (and client). We would surely look askance at a lawyer who relied on what he or she had learned about the Commerce Clause or the Fourteenth Amendment in 1990, without looking at what the Supreme Court has done in the past decade. It would be malpractice not to spend the appropriate time catching up with more recent cases (and, perhaps, at least some of the law review commentaries on the recent cases). Rotunda's initial assumption cannot be understood except within the traditional positivist distinction between law and morals and the premise that the lawyer's principal duties lie within the former realm, with the latter as a relatively low-cost "add-on."

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14 RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE 398 n.4 (2001).

But this distinction makes it hard to understand why he concludes his comment by, in effect, dismissing the idea that the careful attorney must excise from the bill the time spent on explicitly moral conversation. Perhaps the appeal is to a notion of "de minimis" moralizing. If, after all, the moral conversation took only fifteen minutes, then we might well feel that it might simply be too much trouble to disaggregate the time spent on morals rather than on "law." But what if the conversation was indeed serious and took the time appropriate to the subject, whether an hour or, indeed, a day? And, to return to my principal argument, what if the conversation is motivated not only (if at all) by the abstract desire of the attorney to bring moral enlightenment to the presumptively obtuse client, but, rather, by the attorney's desire in effect to preserve his or her own conception of moral integrity by bringing qualms to the attention of a presumptively non-obtuse client?

My own inclination is to think that the lawyer and client should, in effect, split the bill with regard to time spent in conversation about morals because, according to my premise, the conversation is as much in the lawyer's interest (as well as, of course, at the lawyer's behest) as in the client's. I would not, incidentally, take a similar view with regard to the other "non-legal" areas acknowledged by the ABA, which, recall, include "moral, economic, social and political factors."[15] Advice as to the last three is much more likely to be instrumental, pointing to the possibility, for example, that pressing too far for one's formal legal rights might lead to a political backlash that would ultimately make the client worse off, and so on. That advice *is* unequivocally in the client's interest, even if one expresses some reservations about the lawyer's professional capacity to analyze economics, society, or politics. So it is only fair that the client pay the full fare.

CONCLUSION

Many persons' first introduction to law, at least for those of Tom Shaffer's and my generation, was probably the *Perry Mason* shows on television; for younger people, it may have been *L.A. Law* or some similar program. (For people now in law school, perhaps it is *The Practice* or, God help us, *Ally McBeal.*) These programs, of course, are very different from one another in their pictures of legal practice, but all are similar in downplaying one of the fundamental realities of the lawyer-client relationship, the cash nexus. Most lawyers charge for their services, and few clients indeed can expect to receive adequate

15 MODEL RULES OF PROF'L CONDUCT R. 2.1.

legal representation for free. This is sometimes an embarrassment for a group of people one of whose standard tropes is that it is indeed a "profession" devoted to public service (including the important service of providing for the vindication of legal rights) rather than a "business" devoted, as most businesses are, to amassing profits for those engaged in the enterprise.

Tom Shaffer's normative conception of the legal profession is one composed of "gentlemen,"[16] who, presumably, as befits the code, rarely talk about such vulgar things as money. But, as already suggested, money is not only, as the late Jesse Unruh, a powerful California politician of the mid-twentieth century, stated, "the mother's milk of politics";[17] it is also the mother's milk, or at least the lubricating oil, of the legal services industry. And we therefore need to develop a way of talking about this, and in the context of something other than such obviously unethical (and probably illegal) practices as padding time reports.[18]

Shaffer's model lawyer, quite correctly I believe, envisions him/herself as having a duty to engage the client in moral dialogue. But the lawyer is, presumably, charging for the representation, however much one might prefer to overlook that awkward fact. It is, I think, incumbent on those of us who view "full-service" lawyering as including the paying of proper attention to "non-legal" aspects of a case to confront more than we have the implications for the way that lawyers compute their fees. I am less confident that I know the correct answer to the conundrums that might be presented than I am that the problem warrants substantial discussion.

One could forego any such discussion if we confined lawyers to performing only "legal" tasks. One of the great merits of Tom Shaffer's lifetime of work is to expose the abject poverty of any such understanding of the lawyer's role. That he has not answered every last question suggested by his distinctive vision of "professional responsibility" scarcely counts as criticism. We measure greatness not only by the answers provided by a scholar, but also by the depth of the questions they leave the rest of us to work on. Tom Shaffer has provided

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16 SHAFFER, *supra* note 1, at xxiv–xxv. There is an obvious problem presented by the gendered term. "I believe," writes Shaffer, that

> the ethics of gentlemen lie deep in what an American lawyer is. I also find serious personal tensions for students in this moral point of view, especially among women students. American ladies share the moral point of view of American gentlemen, but, even so, ladies are not gentlemen, are they?

Id.

17 *Now Is the Time for All Good Men*, TIME, Jan. 5, 1968, at 44 (quoting Unruh).

18 *See* SHAFFER, *supra* note 1, app. II–7 [13.31].

both answers *and* questions, and I am happy to salute him and acknowledge the importance of his own work to my own ventures in contemplating what might be meant by a life well-lived in the practice of law.