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A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE

Daniel Markovits
Princeton University Press, 2008

REVIEWED BY ROBERT E. RODES, JR.

Professor Markovits has given us in *A Modern Legal Ethics* a profound, provocative, and closely argued philosophical treatment of his subject. He begins by asserting “that adversary advocates commonly do, and indeed are often required to do, things in their professional capacities, which, if done by ordinary people in ordinary circumstances, would be straightforwardly immoral” (1). Noting that lawyers commonly take issue with such a claim, he sets out to prove it in a chapter called “The Lawyerly Vices,” divided into two sections: “Lawyers Lie,” and “Lawyers Cheat.” Against these, he sets the “lawyerly virtues” of “professional detachment” and “fidelity.”

Professional detachment is the recognition that lawyers in their role as advocates speak on their clients’ behalf, not on their own. In the words of Model Rules of Professional Conduct, Rule 1.2(b), “A lawyer’s representation of a client ... does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” This detachment supports a fidelity that Markovits analogizes to the poet’s “negative capability” as articulated by Keats:

Keats argued that the negatively capable poet is usually able to efface himself, maintaining “no Identity” of his own, and (through this self-effacement) to work continually as a medium, “filling some other body—The Sun, the Moon, the Sea ...” and rendering this ordinarily mute body articulate. The lawyer is similarly required, by ... professional detachment, to efface herself, or at least her personal beliefs about the claims and causes that she argues. And through this self-effacement, the lawyer becomes able to work continually as a mouthpiece for her client. Just as the self-effacing poet enables his otherwise insensible subjects to come alive through him, so also the lawyer enables her otherwise inarticulate clients to speak through her. (93)

Markovits then sets out to consider whether this combination of lawyerly vices and virtues can be reconciled with the personal integrity of the lawyer. He rejects what he calls the adversary system excuse, which is that the otherwise objectionable things that lawyers do on behalf of their clients are justified by the demands of a system whose overall effect is justice for all. He characterizes this as a third-personal approach, in which the moral actor

considers all persons, including himself, to be of equal consequence, so that the outcome for anyone can be weighed against the outcome for anyone else. It follows that the actor should not give special consideration to the effect of the act on his own personal integrity (a first-personal approach) or on the particular individuals he is harming (a second-person approach). Markovits analogizes the lawyer in this situation to a hypothetical everyman who is told by a dictator that he must kill one of twenty innocent people or the dictator will kill all twenty. He argues that the wound to the man's personal integrity if he complies cannot be healed by the fact that he has saved nineteen lives.

It is through a second-personal or role-based approach that Markovits hopes to salvage the lawyer's integrity. He points out that in a democratic society we tend to accept legislative measures that we dislike because we participated in the political process and were fairly outvoted. Similarly, he says, we accept judicial determinations adverse to our interests because they were arrived at after a fair procedure in which we were fully represented. Thus, the lawyer's role is not simply to support the system, as it would be under the adversary system excuse, but to reconcile the client to the operation of the system and therefore to the whole project of neighbors living together in peace.

Markovits ends on a somewhat rueful note, pointing out that the social and professional structures that taught lawyers their role, supported them in exercising it, and affirmed their integrity in doing so have been considerably eroded in recent times:

Even as modern society depends on its lawyers to display some version of the lawyerly virtues, modern society at the same time denies lawyers the cultural resources that they need to fashion these virtues into their own, distinctive first-personal moral ideals, and instead leaves lawyers in the grip of cosmopolitan first-personal ideals according to which they must see their professional activities as vicious and cast themselves as villains. (246)

Thus, he tells us that his "argument has the form of a tragedy."

* * *

The problem with this elegant and sophisticated argument is that it rests on false premises. Some lawyers lie and some lawyers cheat, no doubt. So do some grocers, some real estate agents, and some professional golfers. Grocers, real estate agents, and professional golfers are subject to moral opprobrium if they lie and cheat. So are lawyers, along with everybody else. Markovits has quite failed to show that lawyers are required by their profession to lie and cheat. The most he has shown is that there may be some instances in which the disciplinary rules will not condemn them if they do so. And even that he has

shown only by considerable stretching of the common understanding of lying and cheating.

His examples of “lying” fall roughly into three categories: (1) presenting evidence that one privately disbelieves, discrediting evidence that one privately believes, and presenting arguments by which one is personally not persuaded; (2) keeping evidence favorable to one’s opponent from reaching the decision maker; and (3) not correcting mistakes into which one’s opponent may have fallen. Let us look at these in order.

In his analysis of the first category, Markovits seems to be thinking of a situation in which I have adjudicated my client’s case, found it lacking in merit, but continued to press it with all the forensic resources at my command. I deny that there is such a situation. In the first place, my client does not have the burden of proof on the story he tells me when he seeks my representation. I am entitled to believe that story until investigation makes clear to me that it is false or inaccurate. If investigation does make clear that my client’s story is false or inaccurate, I have no right to bring that story into court. Under the Rules (3.3(a)(3)), I must not present evidence that I know to be false, and I need not present evidence that I reasonably believe to be false. Furthermore, if I do not have or expect to get credible evidence for my client’s story, I am precluded by the pleading rules (FRCP 11(b)(3)) from going to court with it at all. By the same token, I cannot deny a true story that my client’s opponent tells even if I think he will not be able to prove it. The Advisory Committee Notes to FRCP 11 say, “A party should not deny an allegation it knows to be true.”

When it comes to arguing legal questions, both the Rules of Professional Conduct (3.1) and the pleading rules (FRCP 11(b)(2)) require that I have a non-frivolous ground to offer either for deciding the case in my client’s favor on the law as it stands or for revising the law to support my client’s claims. Whether I would or would not accept my argument if I were the judge does not seem relevant to the morality of making it. In any event, a straightforward argument as to the meaning of texts available to everyone involved cannot be called a lie without some risk of terminological inexactitude, whatever the opinion of the arguer.

In some states, including my own (Indiana), there is a further powerful block to lawyers’ lying in support of their clients’ causes. That is the oath that all lawyers take on admission to the bar.¹ I am oath-bound not to “counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust.” This language is based on that adopted by the American Bar

1. Indiana Admission and Discipline, Rule 22.

Association in 1908.² A number of states that adopted it then have since abandoned it, but the aspiration it expresses is good everywhere. Of course, I could, consistent with this language, lie as much as I liked if my client had a just cause. Fortunately, however, the oath goes on to say: "I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law." Language about avoiding falsehood appears in different forms in many state oaths that do not include language about avoiding unjust causes. For instance, the oath that Markovits took on being admitted to the Connecticut bar³ binds him to "do no falsehood nor consent to any to be done in court" and not to "sue or cause to be sued any false or unlawful suit or consent to the same."

An earlier draft of the 1908 ABA oath would have bound a lawyer to take "only such causes as shall appear to me to be just."⁴ This language was objected to as putting the lawyer in the position of a judge, and was rejected in favor of not taking cases that should appear to be unjust. The difference is important, and seems to be overlooked in Markovits's analysis. The question whether I can in conscience go to court with a story is not the same as the question whether I am convinced by it. In fact, my client's story will probably be morally, legally, or factually ambiguous; that is why my client has sought to have it established in court. If my client is clearly wrong, and there is no ambiguity to be resolved, I should turn down the case. The 1908 ABA Canons (Canon 30) put it this way: The lawyer's "appearance in court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination."

So if my client comes in telling me about an automobile accident, I can only guess whether a jury will find him or the other party negligent. What I would decide if I were on the jury is no easier to determine than what they will decide. Or if either my client or his opponent is lying I have no better ability than anyone else to decide which is the liar. I have every right to leave that decision to the people who are paid to make it. In fact, in a typical intake interview the question whether the client's story is credible is quickly subsumed into the question whether it will stand up in court. I suggest for a bottom line that my standard for taking a case to court should be: Could a reasonable person, knowing what I know, decide this case in my client's favor?

2. Carol Rice Andrews, "The Lawyer's Oath: Both Ancient and Modern," *Georgetown Journal of Legal Ethics* 22 (2009): 34-43.

3. Connecticut General Statutes § 1-25. "Do no falsehood" was changed to "do nothing dishonest" by a statute that took effect in October, 2002, shortly after Markovits was sworn in.

4. Andrews, "The Lawyer's Oath," 39-41.

If I can answer that question in the affirmative, I cannot see how my presentation of the case can be characterized as lying. A lie is an attempt to lead someone into error,⁵ and I am not aware that what I am attempting to lead judge or jury into is error. If I believed it to be error, I would not be trying to lead them into it, for the reasons just set forth.

What I have said so far applies to civil cases. Criminal defense work is a little different, because I must defend my client in court even if I am convinced that he is guilty as charged. The Indiana oath, for instance, qualifies the undertaking not to raise an action, proceeding, or defense which shall appear to me to be unjust by adding, "but this obligation shall not prevent me from defending a person charged with crime in any case." Similarly, Rule 3.1 of the Model Rules of Professional Conduct, after its general prohibition of baseless litigation, says, "A lawyer for the defendant in a criminal proceeding or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element be established."

It is this requirement that every element be established that distinguishes criminal cases from civil cases. In a civil case, the justice of the outcome is not affected one way or the other by the procedure. If you steal my car, and I sue in replevin to get it back, even if your attorney is drunk and the judge is asleep, it is still my car, and a judgment returning it to me is just. But in a criminal proceeding arising from the same theft, you cannot be justly convicted if your attorney is drunk and the judge is asleep. The principles of justice to which we are committed as a society require proof in a fair trial before a person can be punished. For this reason, the issue in any criminal case is not whether the defendant did what he is charged with doing, but whether the prosecution has proved him to have done it. Accordingly, when I defend a client by seeking to disprove the prosecution's case, I am not trying to get the judge and the jury to believe something that I may well know is not be the case, i.e., that my client did not do what he is accused of doing. Rather, I am trying to get the judge and jury to believe something that is quite apt to be the case, i.e., that the prosecution has not proved that he did it.

Markovits's second category of lying, keeping evidence favorable to my opponent from reaching the decision maker, covers seeking at trial to discredit opposing witnesses, even though I know they are telling the truth, encouraging clients not to leave a paper trail, and asking a client's relatives or employees not to talk to opposing counsel. None of these falls within any definition of lying that I know of. Nor, I submit, does any of them fall within Markovits's broad category of "things which if done by ordinary people in ordinary

5. See *Catechism of the Catholic Church*, par. 2483: "To lie is to speak or act against the truth in order to lead someone into error."

circumstances would be straightforwardly immoral.” (1-2) Not leaving papers around for people to peruse who wish me ill seems well within the boundaries of the morally acceptable as most people understand them. So does asking relatives and employees not to cooperate with people who are seeking information to use against me.

When it comes to discrediting the opposing witnesses in a civil case, remember that I am operating on the hypothesis that the story my client has told me is true, so that any testimony inconsistent with that story is false or misleading. If that hypothesis is untenable, I have, as I have said, no right to be appearing in court. Somewhat different considerations govern the discrediting of an opposing witness in a criminal case. I may be under a duty to do so even if I know he is telling the truth. Again, however, the issue in the criminal case is not whether the accused did what he is accused of doing, but whether the prosecution has proved its case. To the extent that the witness is discredited, the case is not proved.⁶

Not correcting an opponent’s mistakes, Markovits’s third category, may be a violation of the Golden Rule, but it seems far-fetched to call it a form of lying. In any event, correcting the other person’s obvious mistakes is in most cases the decent thing to do, and I believe lawyers are as much and as little inclined to do it as non-lawyers are.⁷ There are, to be sure, both transactions and litigations in which the position of one’s opponents is so unjust that one may feel justified in taking advantage of any mistake they may fall into. There are also cases where confidentiality may preclude correcting errors. But these are not very common cases, nor are they cases in which the moral issues are different for lawyers from what they are for other people.⁸

Under his heading “Lawyers Cheat,” Markovits includes raising time-barred claims in the hope that the other party will not know to plead the statute of limitations (65n), threatening one litigation in order to settle another (61), putting unenforceable terms into a contract hoping the other party will not learn that they are unenforceable, and will therefore comply with them (65), taking debatable positions in a tax return, expecting to get away with them by

6. There is a distinction to be made here between undermining a witness’s credibility by showing that he has a bad memory or bad eyesight and undermining it by attacking his character. The 1908 oath requires me to “advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged.”

7. Monroe H. Freedman and Abbe Smith, *Understanding Lawyers’ Ethics*, 3d ed. (Newark, NJ: LexisNexis, 2004) has an Appendix containing an interesting discussion by a group of lawyers, including Freedman himself, about whether to correct such a mistake. It should be noted in passing that *Restatement (Second) of Contracts* § 153 makes a contract voidable for a mistake by one party known to the other.

8. Markovits seems curiously unaware of any principle of lay morality that calls for keeping confidences.

not being audited (65), arranging a client's corporate structure to minimize vicarious tort liability (65), and pleading the statute of limitations "to defeat a morally valid debt" (64-5). These are a mixed bag. Some I would do, and some I would not. I could probably think up a hypothetical in which I would be willing to go to court with a time-barred claim, but none comes immediately to mind. Short of litigating or threatening to litigate, I would probably write a letter or two if my client's claim was morally compelling. I would have no problem with threatening one litigation in order to settle another, as long as both were legitimate, as they were in Markovits's example. I would not put an unenforceable term into a contract. If I took a debatable position in a tax return, I would flag it. I would be willing to arrange a client's corporate structure to minimize vicarious tort liability, but I would do everything I could to see that all the units were adequately insured.

As to the statute of limitations, I think the situation is one particularly suitable for the kind of moral dialogue envisaged by Thomas Shaffer and Robert Cochran in their book, *Lawyers, Clients, and Moral Responsibility*.⁹ The typical case does not involve the simple "morally valid debt" to which Markovits (65) refers. The lapse of time is apt to introduce all manner of morally significant variables that my client will probably understand better than I do. If my client is a decent person, and has discussed and thought about the question fully, I will probably not feel obliged in conscience to gainsay him.¹⁰

Putting an unenforceable provision in a contract, and taking a tenuous position in a tax return without warning the IRS can, I suppose, be properly regarded as cheating because they involve getting away with something because the other side does not notice. The other items on the list, however objectionable they may be, do not constitute cheating as I understand the term.

Most of Markovits's enumeration of ways lawyers lie and cheat deals with what they can get away with rather than with what they are obliged to do. On the latter subject, he refers only to Rule 1.2, which seems to require lawyers to subordinate their moral judgments to their clients' demands, and Rule 1.16, which, although it allows a lawyer to withdraw from the representation if "the

9. Thomas L. Shaffer and Robert F. Cochran, Jr., *Lawyers, Clients, and Moral Responsibility*, 2d ed. (Eagan, MN: West, 2009).

10. David Hoffman (1784-1854), the "father of American legal ethics," was quite clear on the question: "I will never plead the Statute of Limitations, when based on the mere efflux of time, for if my client is conscious he owes the debt, and has no other defence than the legal bar, he shall never make me a partner in his knavery." Thomas L. Shaffer, *American Legal Ethics: Text, Readings, and Discussion Topics* (New York: Matthew Bender, 1985), 64. While I do not find Hoffman as elitist or as generally outdated as some authors, including Markovits (214-17) seem to, I do think he goes too far here.

client insists upon taking action that the lawyer considers repugnant," limits the right by saying in a Comment that the withdrawal must not have "material adverse effect on the client's interests." The impact of Rule 1.2 is considerably mitigated by 1.2 (c), which permits the lawyer to "limit the scope of the representation if the limitation is reasonable and the client gives informed consent." A good friend of mine who used to handle child custody cases regularly told her clients that she would not do anything that she thought would harm the child. Such a limitation seems entirely appropriate under Rule 1.2 (c). It would surely be possible to put similar limitations on other kinds of representation.

In his discussion of Rule 1.16 (72-73), Markovits points out, quite correctly, that a lawyer who has already become complicit in a client's immoral behavior cannot easily undo the harm that has been done—although the addition of subparagraphs (2) and (3) to Rule 1.6 have improved matters a good deal. But there is nothing except moral ineptitude to keep a lawyer from refusing to become complicit in the first place. Responsibility for cooperation in other people's misdeeds is a well-covered topic in moral philosophy and moral theology, and there is nothing in membership in the bar that exempts a person from following the applicable principles or prevents his doing so.¹¹

Markovits says (65) that "the reported cases ... plainly rebuke and even sanction lawyers who seek too strenuously to prevent their clients from unfair advantage taking." He cites two cases to support this claim. In one, the lawyer violated the most rudimentary conflict of interest doctrine;¹² in the other, I believe the court was wrong to sanction the lawyer.¹³

11. See my "Forming an Agenda—Ethics and Legal Ethics," *Notre Dame Law Review* 77 (2002): 984-85, and my "On Lawyers and Moral Discernment," *Journal of Catholic Legal Studies* 46 (2007): 273-74.

12. *State v. Leon*, 621 P.2d 1016 (Kan. 1981). The lawyer, after representing the wife in a divorce proceeding, wrote her a letter claiming that he represented her husband, and was considering contempt proceedings against her for failure to make certain payments required by the divorce decree. In disciplinary proceedings, he denied that he had actually been representing the husband. The disciplinary panel said: "He was either retained as he stated in the letter or he made a false statement. Either action is unacceptable conduct for a lawyer and deserves punishment." The court agreed.

13. In re *Harshey*, 740 N.E.2d 851 (Ind. 2001). The lawyer represented a corporation that was suing another corporation. The client was jointly owned by a man and his wife, who were in the process of divorcing. The lawyer received what he considered a very favorable settlement offer, which the husband, as president of the client corporation, ordered him to refuse. He, believing that the husband had no reason for the refusal except to deprive the wife of her share of the resulting funds, brought the matter to the attention of the divorce court. That court ordered the husband to accept the settlement. In my opinion, what the lawyer did was amply justified under Rule 1.13, which covers the duties of a lawyer acting for an organization. For a corporate officer to seek to impoverish the corporation in order to spite a fellow stockholder

* * *

It is unfortunate that Markovits has attached his profound and valuable reflection on the lawyerly virtues and the importance of legal representation in a democratic society to this untenable account of the lawyerly vices. It is perfectly possible to practice law without lying or cheating, and it is those lawyers who do so who stand most to profit by Markovits's articulation of what they are about. Our society has many good people with decent purposes and plausible claims who need the services of our profession to guide them through the intricacies of the legal system and to speak for them when they must be spoken for. Markovits has nicely articulated this need and the importance of having it well met.

But the issues that come up for adjudication are not usually black and white so that somebody has to be advocating for the bad guys against the good guys. Markovits says, quite rightly, that "lawyers can successfully invite litigants to engage the legal process ... only if they resist themselves judging their clients" (208). The resistance is a good deal easier than he seems to think. Most disputes are pursued in reasonably good faith on both sides, and require what the Legal Process scholars of the 1950s and '60s called "institutional settlement,"¹⁴ so the parties can put their dispute behind them and get on with their lives. The process calls for dialogue, including moral dialogue, between lawyer and client.¹⁵ The dialogue should result in lawyer and client being on the same page both legally and morally when they approach the system. Lawyers may not be wholly sanguine about either the merits or the outcome of their cases, but there is no reason to suppose, as Markovits does, that they make a habit of deploying their forensic skills in support of cases that they have already decided ought to lose.

One of the Comments to the Preamble of the Model Rules of Professional Responsibility says: "when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done." I agree with Markovits in finding this justification, "the adversary system excuse," inadequate. His point is that if cases are well presented, even the losers will be reconciled to the result, not because they think justice has been done, but because they recognize that their claims have been carefully listened to and impartially determined. In one of my ventures outside the academic world, I took a case to court for a client and lost handily.

is not hard to see as "a violation of a legal obligation to the organization."

14. Henry M. Hart, Jr. and Albert P. Sacks, *The Legal Process* (Tentative ed. 1958), 4-6.

15. This kind of dialogue is a major theme of Shaffer and Cochran, *Lawyers, Clients and Moral Responsibility*.

“Well,” said my client, “you gave it your best shot.” I found that comforting, and I believe my client did also. This is the kind of comfort that can be hoped for from good lawyering, and we owe Markovits a debt of gratitude for pointing it out so well. But lawyers do not have to lie or cheat in order to accomplish it.