A Call for Renaissance in Legal Ethics

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From the moment Professor Cohen described your creative experiment in approaching the elusive subject of ethics, I have been excited. It reflects an awareness that conventional ways of teaching law fall short of communicating the full scope, depth, and nature of this subject. For Aristotle ethics meant nothing less than an entire philosophy of human conduct aimed at the maximizing of human happiness. While rigorous case analysis and lawyer talk must still play their part, there is room in ethics for not thinking like a lawyer. There is room for nourishing attitudes and solidifying values. So I congratulate the creators of this program for calling for this week's retreat. Not a retreat in the sense of going backward but in the sense of a period of seclusion with one subject being the exclusive focus of reflection and discussion. I can think of no better way for you to begin this semester, this year and this decade.

The materials made available to you symbolize two perspectives or approaches to grasping the nettle of legal ethics. Each is necessary but in my view not sufficient. I shall comment on them but then want to add a third perspective.

I. The Rules

The first perspective is what Professors Hazard and Hode call, "the law of being a lawyer." I confess I am awed by the immensity of the written exegesis on this subject. <u>The Law of Lawyering</u> by Hazard and Hode is a two volume work of a thousand pages. Professor Wolfram's treatise on <u>Modern Legal Ethics</u> runs for 1000 pages with 200 pages of appendices. In the volumes of commentary and in the hierarchical arrangement of black letter code, commentary, illustrative cases and actual case authorities, the treatises have within a short span of years produced a quantity of verbiage that took twenty centuries to produce the Talmud.

This is the nuts and bolts of what a lawyer has to know or be able to find out. The Model Rules manifest their dominant concern with the lawyer-client relationship. Here we find sixteen principles concerning competence, diligence, communication, fees, confidentiality, and conflict of interest -- what Professor Hazard calls, "the core principles of the law of lawyering." And conflict of interest commands seven of these. These seven principles are fairly simply stated, but their detailed explication occupies hundreds of pages.

The basic injunction is simplicity itself: thou shall not represent a client if such representation will adversely affect another client. But to comply with this simple commandment, the firm I once belonged to has felt obliged to erect a formidable set of hurdles to be cleared before it accepts a client. First, the prospective client must reveal the names of all parties and third parties involved, including companies and their owners. Then the following sources should be carefully checked: the master client list, the computer, the master card file of all active and closed matters, the will file, and the real estate file. Finally, a conflict questionnaire must be circulated to all attorneys and key persons listed.

This reminds me of the story Chief Judge Bauer of the Seventh Circuit recently told the American Law Institute. Moses was coming down from Sinai with the ten tablets of the law. He was doing a very effective job of selling them to the people, pointing out their simplicity and the

ease with which they could be understood. Then someone in the back of the crowd got up his nerve to ask, "What are all those stones in that huge pile behind you?" "Ah," said Moses, "those are the regulations."

Unfortunately, this kind of fail-safe mechanism is a necessary part of modern lawyering. There is indeed a great deal of law to be learned or quickly ascertained. The rules are rules to be obeyed. They may be derived from ethical reflections by others, but they have little to do with your being ethical in any real, subjective sense. The reaction of lawyers, unfortunately, often gives rise to a line of tension within firms -- tension between those who, once the rules are complied with, look no farther and those who feel that ethics requires a spirit going beyond the rules.

II. The View from Academe

A second perspective arises from the papers you were required to read in preparation for this week's work. Since all the papers were authored by law school professors, we might call this the view from Academe. It is poles apart from the narrow focus on rules. It is the philosopher speaking, not the practitioner. In these particular papers it involves either almost total ethical abstinence or almost open-ended ethical reasoning.

The debate all stems from the second sentence of Model Rule 2.1 which says, "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."

Professor Wasserstrom started things with his 1974 lecture, in the wake of Watergate, by saying that except in defending criminal prosecutions a lawyer should not confine his role to that of an amoral technician. Indeed he went so far as to say that "[W]e need a good deal less rather than more professionalism in our society generally and among lawyers in particular."

A dozen years later, Professor Pepper defended the purely amoral role with an elaborate construct which he calls "The First-Class Citizenship Model." The key to his thinking is that the primary value of professional legal services is to foster untrammeled choice on the part of the client, even if it means economic, emotional, physical, or familial disaster. The corollary proposition is that since the client cannot hope to have or evaluate the specialized knowledge of the lawyer, the client is vulnerable. Therefore, to preserve the client's status as a first-class citizen, the lawyer must, except in extreme situations, view himself as an amoral technician. In Pepper's words, the client is like "someone who stands frustrated before a photocopier that won't copy (or someone whose car won't go) and needs a technician (or mechanic) to make it go. It is ordinarily not the technician's or mechanic's moral concern whether the content of what is about to be copied is morally good or bad, or for what purpose the customer intends to use the car."

Professor Pepper does hold out the possibility of a lawyer occasionally engaging in moral dialogue, educating both the lawyer and the client. But this takes time, he notes. He follows this observation with a sad commentary about the current practice of law: "With traditional forms of legal services perceived as too expensive for the middle and lower classes, and a consequent shift occurring toward less expensive, more efficient structures for providing legal services, the dialogue model may be difficult (perhaps impossible) to incorporate as an integral part of the lawyers' professional ethic."

Finally we have Professor Simon with what he calls "The Discretionary Approach." If Professor Pepper's model approaches the simplistic in its austere rejection of ethical advice, Professor Simon's is a labyrinth of complexity. A lawyer may, indeed should, engage in ethical discourse and decision making -- but only after taking three steps. First, the lawyer must assess

"the relative merits of the client's goals and claims [against those] of others the lawyer might service." Here one must survey the universe of legal needs around him and pick the most worthy, descending occasionally from Mount Olympus to bring in some ready cash to pay the rent. Once a client is accepted, the lawyer must "reconcile the conflicting legal values implicated directly in the client's claim." This in turn involves choosing, depending on certain principles, between substance and procedure, purpose and form, broad and narrow framing of issues. As to this latter decision, there are three further subprinciples which I shall not attempt to describe. One is tempted to observe that, at current billing rates, a client would be into four figures before getting any advice, ethical or legal.

All I can say is that neither the "First-Class Citizenship" model nor "The Discretionary Approach" resonates in my mind with any feel for the reality of lawyering. Or at least lawyering in the highest tradition as I have known it. For wise counseling has always been the hallmark of the law as a noble profession. And, so far as I know, the wise counselor has not declared ethical considerations out of bounds.

Let me quote from a letter written by 36-year old Louis Brandeis in 1893 to a young associate, William Dunbar, who was having trouble hitting his stride:

> The man who does not know intimately human affairs is apt to make of the law a bed of Procrustes. No hermit can be a great lawyer, least of all a commercial lawyer. When from a knowledge of the law, you pass to its application, the needs of a full knowledge of men and of their affairs becomes even more apparent. The duty of a lawyer today is not that of a solver of legal conundrums: he is indeed a counsellor at law . . . .
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> Your law may be perfect, your ability to apply it great, and yet you cannot be a successful adviser unless your advice is followed; it will not be followed unless you can satisfy your clients, unless you impress them with your superior knowledge, and that you cannot do unless you know their affairs better than they do because you see them from a fullness of knowledge. The ability to impress them grows with your own success in advising others, with the confidence which you yourself feel in your powers. That confidence can never come from books; it is gained by human intercourse . . . .[1]

Lest you think this just a reverie from olden times, I pass along some comments Archibald Cox made in 1986 to third-year students at a University of Maine Law School program on "The Law as a Public Profession." What he stressed as the two pearls of great price for a lawyer were creativity and independence which together enable one, as he put it, to live greatly in the law, to be the great lawyer, the happy lawyer. To live and work on this plane requires a knowledge of human nature, a sense of history, and a long-range point of view. And the key to independence lies, he said, in establishing one's worth so that he would not shrink from giving his views, even to the point of telling the client to go elsewhere.

Here is an actual example of that kind of independence. In speaking at Harvard's Memorial Church in a memorial service honoring the late Charles E. Wyzanski, Jr., for 45 years a United States District Judge, Professor Paul Freund traced Judge Wyzanski's early career. After a stint in the Solicitor General's office, in which he helped defend successfully the Social Security Act and the National Labor Relations Act in the Supreme Court, he returned to Boston to rejoin Ropes and Gray as an associate. In Professor Freund's words,

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[1] Mason, Brandeis: A Free Man's Life, NY: The Viking Press, 1946, p. 80.

At this stage he was confronted with another moral dilemma. He was asked to prepare a legal opinion attacking the validity of a proposed Massachusetts law, modeled on the federal Norris-La Guardia Act, limiting the use of injunctions against peaceful union labor activities. Charles could not in good conscience accept the assignment and so risked the termination of his employment. But the senior partners, Loring Young and Thomas Nelson Perkins, supported him, and he remained. Even afterwards he judged law firms by the way they would respond to a similar confrontation.

This stand on principle, this demonstration of character, became known, among others to President Roosevelt, and was a factor, according to Charles, in his appointment to the federal bench in 1941. It is not a bad criterion for such an appointment.

These three are my witnesses. Although I rest my case, I would not have you think that the subject of giving ethical advice to clients is easy or is to be approached in a cavalier manner. It requires humility and restraint as well as hard reflection on rich experience . . . and courage.

III. The Need for an Ethical Renaissance

So far, while we have discussed a narrow rules approach to ethical thinking and widely discrepant philosophies governing counseling, we have focused only on a lawyer's relations with the client. This is perhaps a major part of what can be taught in traditional law school style -- using principles, cases, and problems. But it is far from the entire field of a lawyer's ethical responsibilities. Indeed my major mission today is to add to the perspectives of rules and of Academe a third perspective -- a global one.

To begin, I lay on the table the basic facts which shape my view of the scope of ethical thinking appropriate to the calling of the lawyer. Some factors appeal to our highest aspirations; others to our defensive instincts. All point to the conclusion that the legal profession faces no more critical need today than that of bringing new vigor and creative thinking to the widest spectrum of our relationships to society.

The positive factors, exercising a greater pull on us than perhaps any other profession, including medicine, are these:

-- Our monopolistic privilege as gatekeepers to the entire justice system. Not only do we hold the key to access to that system, but what we do nearly always has an impact on more than just our client -- not only our client's adversary but frequently entire businesses, large classes of people, private institutions, governmental units and agencies, and even the course of law itself.

-- Our highly favored position as the country's most versatile generalists, giving us preferment in leadership roles at all levels of government.

-- The high level of prestige and affluence generally enjoyed by lawyers.

-- The tradition, not yet surrendered, of a noble profession.

The pull of these factors is reinforced by the push of more negative factors which, at least to thoughtful members of our profession, underscore the inadequacy of conventional thinking. They have an external and an internal side. The overshadowing external factor exerting an ethical push on us, whether we care to acknowledge it or not, is the ominous and gaping gulf between the need for and the delivery of legal services. In this Commonwealth, we are told that 85 percent of the legal needs of the poor are unmet. We are also told by the Commission on the Legal Profession of New England that legal services are not "comfortably affordable" for the 70

percent of people comprising the middle class.

The internal pressures on the profession all thrust toward dehumanization. Here is the dismal catalogue: the ballooning size of firms, through merger and the ratcheting effect of adding two to three associates for every new partner, to 400, 500 and more lawyers; the curtailing of prestigious partnerships and the devising of a hierarchical layering of classes of partners; the escalation of costs matched by the remorseless pressure to log billable hours; the consequent soaring of fees; the near absence of collegiality; the shifting and short-lived loyalties of lawyers and clients to firms; the compartmentalization of people and knowledge caused by intense specialization; the commercialization and marketing of law as a business; the rising dominance of the managerial elite. These pressures are felt to some extent by what solo practitioners are left, by small and middle-sized firms in the smaller communities of the country. But they are compelling in what I have called Megalawpolis. This is where Steven Brill in the June, 1989, issue of The American Lawyer predicts the future of lucrative corporate law and litigation will take place -- in the TTF's (the top twenty firms) of 500 or more lawyers, and in 180 midsize firms of over 200 lawyers. These pressures, as we shall see, raise ethical questions that the rules and the hornbooks don't address.

Just as underlying societal forces led in the 14th and 15th centuries to a Renaissance which revived and put new life into art, literature, and learning, so do all these positive and negative factors cry out for a renaissance of fresher, bolder, broader thinking about ethics and the legal profession.

IV. A Global Perspective

What I have termed a global perspective touches on facets either not addressed at all or only minimally by the Model Rules. Indeed, they do not lend themselves to a rules approach. I discuss four of these in diminishing order of scope of action but in ascending order of individual ability to influence action.

A. The Lawyer's Responsibility to Society

First, there is a vast field of both opportunity and responsibility in service to society. The Model Rules, in dealing with Public Service in Rule 6.1, confine themselves to the giving or supporting of public interest legal service. I prefer to deal with this as part of a lawyer's responsibility to the profession.

I see a much broader responsibility. John Gardner in his recent book, On Leadership, writes, "Versatility is built into the species, but the modern world diminishes it drastically through specialization." (p. 164) Yet, "[l]eaders have always been generalists." (p. 159) This suggests to me a modern version of noblesse oblige, not a responsibility based on birth or ranks, but a linkage between specially conferred preferment and special social responsibilities related to that preferment. To be specific, the very facts that lawyers have been inducted into the Eleusinian mysteries of legal analysis, have been given the exclusive role of gatekeeper to the justice system, and constitute the nation's most widely utilizable generalists generate, I maintain, an ethical responsibility to pay substantial dues to society. Part of these dues can and should be paid through service at all levels of government from town council to state and national legislatures, and in leading roles in non-government institutions serving public needs in the local community, region, state, nation, and even the international community.

Historically such service has been assumed to be part of a lawyer's life. Today, I am less sure that this is so entrenched a life way of lawyers -- especially a life way of the lawyer on the fast track, in the giant firm, on what some commentators call, "the cutting edge of the law." One

arena stands out as having been virtually abandoned by the most competent lawyers -- the state legislatures. Where once the business of making laws was overseen by many legally trained minds, it now tends to be entrusted to a few career legislative draftsmen who draft for a largely lay assembly.

Political activity was once a way of melding a lawyer's self interest in becoming widely known and his larger interest in serving society. That linkage of a simpler era has been, for the top lawyers in Megalawpolis, severed. The question for your generation is what new links can be forged.

B. The Lawyer's Responsibility to the Legal Profession

Model Rule 8 deals with a lawyer's responsibility to maintain the integrity of the profession by, principally, giving honest appraisals of prospective judicial and legal officers and reporting professional misconduct. And Rule 6.1 says that a lawyer discharges his responsibility to render pro bono legal service by providing services at no fee or a reduced fee, by working to improve the law, the legal system, or the legal profession, and by financially supporting legal service organizations.

The first rule cuts deeply but narrowly. The second reminds one of the memorably snide remarks about William Jennings Bryan, likening him to River Platte -- "a mile wide and an inch deep." Deep unease over the quality and delivery of legal services led the New England Board of Higher Education, a decade ago, to undertake a study of the legal profession in New England through a prestigious Commission on the Legal Profession and the Economy of New England. In its seminal report published this past October it proposes additional pre-law courses at college level, more practical skills training during the third year of law school, mandatory "bridge-the-gap" training before admission to the bar, and mandatory continuing legal education thereafter. But its most controversial recommendation, which sharply divided the Commission, was that mandatory pro bono service should be required of new lawyers in connection with transition education. The amount of time to be required was left for future debate but this report observed that a "reasonable" amount might be 100 hours over five years.

The idea of mandatory anything is repulsive to any group, particularly a group of highly trained professionals. The Commission's dissenters consider this an instance of trying to legislate ethical responsibility. But as for the reasonableness of the requirement, is not this an example of thinking too small? First of all, the report aims only at new lawyers. What about those at mid and top careers? The Massachusetts Bar Association's Committee for Lawyers Public Service Responsibility has presumably just completed its "Countdown to 500" project, an effort to get 500 attorneys to volunteer by January 1 to provide legal representation to the poor. Just think. A goal of 500 out of a bar of over 25,000! A goal of 2 percent!

Secondly, the Commission's observation that 100 hours of pro bono service over 5 years might be reasonable. This comes down to 20 hours or two and one half days a year. So even this bold report would settle for a pitifully small amount of time with services rendered by the newest neophytes. This is far below the recommendation of the ABA House of Delegates in 1988 that every lawyer donate 50 hours of service a year.

Let us consider the implications of this recommendation. Presumably it also implies, consistently with Model Rule 6.1, that if pro bono service is not feasible, because, for example, a top tax lawyer would be a fish out of water in eviction, child support, bankruptcy or utility termination proceedings, financial support of legal service organizations would be an acceptable surrogate. In 1985 the hourly billing rate for the average senior partner throughout the nation was $141 and that for the average senior associate was $90. This would point to financial support

contributions of $7,050 per senior partner and $4,500 per senior associate as the equivalent of the ABA's recommended 50 hours of pro bono service.

Yet the profession is falling so far short of these goals that the Boston Bar Association's splendid Law Firm Resources Project, after its first ten years, can boast only three firms which fund young associates for four to six months of service with Greater Boston Legal Services and only seven firms which make cash contributions to help underwrite the salaries of Legal Services attorneys. And the amounts given by the firms, ranging from $15,000 to $37,500, generous in aggregate, represent no more than $150 to $200 per lawyer.[2] For these firms this represents the cash equivalent of approximately one hour of service per partner.

No. The profession has yet to become viably serious about its pro bono responsibility. Beyond this lies responsibility to seek structures and systems facilitating better access to the justice system wholly apart from what the best of pro bono efforts can assure. But we shall have to leave that for another day.

C. The Lawyers' Responsibility to the Firm

Rule 5 of the Model Rules, the rule which deals with law firm relationships, concerns itself with the obligations of supervising attorneys, subordinate lawyers, and non-lawyer assistants to conform to the rules of professional conduct.

But in an age when an increasing number of lawyers must live in megalaw firms of 50 or more members, plus associates, paralegals, and support staff, comprising a community of several hundred to several thousand people, the individual lawyer cannot ignore the ethical implications of the place where most of one's daily life will be spent. Will he or she acquiesce in the dehumanizing pressures, punch the time clock and reserve the prospect of living a civilized and broad gauged life for after hours? Or should the lawyer seek to regain a sense of control of work and life style; to reposition the individual at the center of the stage, whether we focus on the lawyer or the client; to restore a sense of framework, of perspective, of the prolongation of a noble enterprise, in a word, to remain faithful to the call of a humanistic profession.

If the answer to the latter question is "yes," the ethical responsibility is to strive to humanize the office. Bigness is not necessarily inhuman. Bigness makes being human difficult but not impossible. In many interstitial ways big firms can build in nooks and crannies of quiet, of civilized conversation, of enriching exchange. Some of the possibilities are lunches in which various specialties take turns in sharing their experience and insights with the entire membership; enlisting the recollections of retired partners not for case solutions but for general wisdom; "storytelling" -- recreating in laymen's terms accounts of legal problem solving . . . for the enhancement of lawyers' self image and the education of lay people; firm end-of-day or end-of-week get togethers not on legal business; seeking exemplars, collecting oral histories, making videotapes; organizing seminars on counseling; sabbaticals; providing lawyers in residence for law schools and hosting academics and judges in residence at firms; conducting retreats and seminars.

Contrast this with the prescription of Steven Brill in The American Lawyer. He recognizes that lawyers "care about friendship among partners, about the firm's commitment to quality work, about the firm's professional reputation, about . . . commitment to community activities, and about the other intangibles that go with being a lawyer and glue together the institution that is their law firm." (June, 1989, p. 21) His solution is that the managing partner must provide what he calls the "institutional glue" by "walking around, constantly trying to give the firm within the firm a personalized atmosphere and non-aloof management." Id.

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[2] Boston Bar Association, Vol. 6, Update, No. 11, Dec, 1989.

I submit that humanizing a large law firm cannot be done by even the most skillful of managers; it represents an ethical challenge to every member.

D. The Lawyer's Responsibility to Self

Finally we come to perhaps the most important focus of ethical reflection -- the self. This is the only area not even touched by the Model Rules. And yet all hope for the profession and the society begins here.

The dismal conventional wisdom is that there is a Faustian choice: either aim for the heights and "cutting edge" of the legal profession, in which case you must sacrifice your hopes for a well rounded personal life, or, if you insist on the latter, settle for a more mediocre professional life. The billable hours expected of the young recruits to the big New York firms supports the thesis. Even those in smaller firms in smaller communities testify to the remorseless pressures of practice.

It is reassuring to hearken to our old mentor Brandeis. As a young man he copied in his notebook an observer's comment, "As soon as I heard that General Fremont worked day and night, I lost my confidence in him." Once again let me quote from a letter he wrote to his young associate Dunbar:

> A bookkeeper can work 8 or 10 hours a day and perhaps 12, year in -- year out, and possibly his work may be always good (tho' I doubt it). But a man who practices law, who aspires to the higher places of his profession must keep his mind fresh. It must be alert and be capable of meeting emergencies, must be capable of the tour de force. This is not possible for him who works along, not only during the day but much of the night, without change, without turning the mind into new channels, with the mind always at some tension. The bow must be strung and unstrung; work must be measured not merely by time but also by its intensity. There must be time for that unconscious thinking which comes to the busy man in his play.[3]

Other humanists, past and present, have sounded this theme of the importance of wholeness of self.

The venerated professor of philosophy, Paul Weiss observed, "[A] free life needs many anchors."[4] And the late A. Bartlett Giamatti, when President of Yale, in speaking to the Yale Law School about being lawyers in the grand tradition, captured the essence:

> The law is not simply a set of forensic or procedural skills. It is a vast body of knowledge, compounded of historical material, modes of textual analysis and various philosophical concerns . . . . It is a humanistic study . . . . Its larger purpose is to contain and continue our common life, or civilization, and to mediate or negotiate between our anarchic energies and civilized hopes.[5]

To accomplish all this, to round oneself, to regain and retain serenity, to attain the broad view and the long range perspective, requires one to gain control of one's time, to set priorities, to sacrifice the immediate gain for the larger goal of building a life that is lived, as Archibald Cox put it, greatly in the law. This, my friends, is how I view our ethical universe. Have a great week, a great decade, and after ten years of seasoning, help the legal profession usher in the twenty-first century with an Ethical Renaissance.

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[3] Mason, op. cit., p. 78.
[4] New York Times, Jan. 1, 1970, Age is Not a Number.
[5] Yale Law Report, Fall, 1983, The Law and the Public, p. 10.