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Lawyers' Ethics in an Adversary System

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BOOK REVIEW

LAWYERS' ETHICS IN AN ADVERSARY SYSTEM. By Montoe H. Freedman.¹ Indianapolis, Indiana: The Bobbs-Merrill Co., Inc. 1975. Pp. 267. \$12.50.

Reviewed by Robert H. Kennedy²

Parts of this book have already appeared in law reviews and journals—and consequently can be assumed to have been largely unread. Publication in book form is therefore most welcome despite some deceptive packaging (half the book is devoted to a reprint of the ABA Code of Professional Responsibility). Dean Freedman will not comfort law students looking for answers, but he will intrigue those who seek proper questions. Nor will he satisfy anyone looking for another high-pitched diatribe aimed at the profession. This book is neither denunciatory nor really prescriptive; rather it is a thoughtfully constructed call for a more realistic examination of the standards by which the bar claims to govern itself.

That the Code of Professional Responsibility is a self-contradictory and deficient instrument is a commonplace. Why it remains so sluggishly unresponsive to the needs of the bar and society is less obvious. Professor Freedman argues that the irrelevancies of the Code stem from the bar's historic inability or unwillingness to perceive what lawyers really do, and to correlate those findings with the social and political interests the profession is intended to serve. His technique is to put the reader in the shoes of a lawyer faced with a wrenchingly concrete ethical problem and to illuminate how little help is available from the undifferentiated and often contradictory abstractions of the Code.

Professor Freedman has tried lawsuits. Despite his present academic role, his credentials as a "real" lawyer are ample, and his perceptions and descriptions of the paradoxes of lawyering are invaluable. The major thrust of the book is that any analysis of legal ethics must be bottomed upon an awareness of the practical context in which lawyers live. With this in mind, Freedman proceeds to consider how the ethical confrontations of the profession remain unresolved through any literal application of the conflicting generalities of the Code. Lawyers, to be responsive to their varied obligations, are presented with difficult Hobson's choices. Freedman gives us several examples, and the examples are not forced; nor can they be attributed to the changing relationships with which the bar has lately been faced. While it has

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been only 5 years since the Code of Professional Responsibility was proposed and adopted by the American Bar Association, the points Dean Freedman makes in this volume are equally as valid if aimed at the prior Canons of Ethics. The criticisms are not directed at any failure of the bar to understand new relationships, but rather at years of abstract and often flaccid analysis of what lawyers actually do, and have been doing, since time out of mind.

The new Code was developed by no doubt distinguished counsel in response to a long-felt belief that further patching of the old Canons of Ethics risked turning an historic legacy into an evident anachronism. A complete rewrite was undertaken—and it is a rewrite that emerged. Changes in form and style are far more obvious than is new analysis. If one knew what a good, internally consistent, and relevant Code would look like, one could say perhaps that this one is only ceremonial or truly bad. Professor Freedman's point is that we don't know how to go about constructing a good set of rules to govern ourselves because we have never undertaken a realistic analysis of what we do.

An example of the author's technique can be drawn from his chapter with the highly charged title, "Access to the Legal System: The Professional Responsibility to Chase Ambulances." "Ambulance chasing," like "splitting fees" and "solicitation," is imbued with emotional content; the words allegedly identify an officially condemned practice. Freedman would have us ask, "Why condemned?" in light of the equally important but possibly contrary affirmative obligations of a lawyer to make legal services available. What does the condemnation of "chasing" and "solicitation" actually mean in light of the more systemic societal obligation to make legal services available to the public? Consider the obligations of strict candor and of strict confidentiality. Should a lawyer, for example, betray a client's confidences or preserve them by participating in a deception of the court, where those are his only real choices?

To return to "ambulance chasing," Canon Two of the Code provides that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." Freedman convincingly argues (though from a poorly selected example) that if lawyers don't chase clients, many people with recognized legal rights will not be advised or assisted at all—or not until their rights are diminished or lost. As keepers of a mystery, lawyers take as a first principle that they alone are able and authorized to determine the existence of legal rights. Condemnation of "the unauthorized practice of law" is supported by that principle and helps assure control. Yet through prohibitions

of "solicitation" and "advertising," the bar requires prospective clients somehow to determine, without a lawyer, when they need one and how to find a competent one without assistance. The person who is therefore, by definition,³ ignorant of the basic existence and scope of his legal rights is engineered into being lulled or misled—often to his permanent loss. Dean Freedman asks how those circumstances comport with an obligation to make legal services available to the public.

A comparable example, not addressed by the author, is the bar's prohibition against any division of fees except "in proportion to the services performed and the responsibility assumed by each lawyer." Fee splitting is known to be an obvious evil, proscribed to lawyers. Why? Henry Drinker, the most eminent writer in this field, explains that institution of the rule was a "distinct step in keeping the legal profession from becoming a mere business."⁴ Aside from the gratuity to mere businessmen, what questions that kind of explanation answers are not apparent. Ethics committees routinely repeat the phrases in rendering their opinions, but in reality, fee splitting is about as common as it is condemned. Its persistence is arguably evidence of its necessity.⁵ A regular division of fees, wholly without reference to work done, or responsibility assumed, is not an exception; it is the rule in broad areas of negligence practice. Standard referral fees are ritualistically observed. There is a common understanding that forwarding lawyers need neither do work nor assume any responsibility. While statistics are not available, certainly a majority of civil lawsuits filed result from a fee splitting referral system. Is not the personal injury referral system, with its systematic division of fees, when combined with forms of advertising, an effective social mechanism for the public announcement that legal rights both exist and can be enforced? Does not the mechanism, by and large, deliver the clients to the negligence specialist? No bar association known to this writer has ever taken public advertisements to advise the public of those rights or how to preserve them.⁶

3. Although the concept of "unauthorized practice" is supported in part by the belief that only lawyers know "the law," courts also, in limited circumstances, apply the notion that everyone is presumed to know the law.

4. H. DRINKER, *LEGAL ETHICS*, 186 n.30 (1953).

5. A searching reanalysis is at least suggested where the conduct of a professional group is at odds with the group's code of conduct; and where, as the ABA's Special Committee on Evaluation of Disciplinary Enforcement not long ago reported, there is a "scandalous" apathy and hostility to enforcement of the Canons.

6. It has been suggested that condemning "fee splitting" guarantees that referrals will be based on merit rather than mere commerce. There is no good evidence of that. How does one measure the effects of a rule not observed? In addition to merit, referrals are influenced by old school ties, habit, and such considerations as the receiving lawyer's cooperation in taking "dog" cases which for some reason the sending lawyer must process.

Dean Freedman's point is that the Code is unrealistic and often offers little practical guidance for such problems because it is an abstraction. It is not based on an analysis of what lawyers do in the context of the society in which they function. The book serves to illustrate the *need* for and the *kind* of analysis that might be made. The mere presentation of some of these issues disturbs some members of the bar; but that can be no excuse for ignoring the issues. Without an adequate systemic analysis the profession will continue to appear to be a "mere business"—and not a very thoughtful one at that. Without a realistic understanding of what legal practice is and of the social interests to be advanced or retarded by the legal system, ethics committees will continue to occupy their time with what the Secretary of the Association of the Bar of New York has called the "etiquette and tawdry pilfering" of a few of its members. No one ever suggests that such committees be abandoned, but anyone who doubts that ethics committees rarely, if ever, address serious professional conflicts must only look at what they do. Opinions are regularly rendered to guide the bar by a rote application of the Code's unexamined formulas. The process is a parody of Talmudic analysis. For example, the Committee on Professional Ethics of the Florida Bar is composed of intelligent and thoughtful lawyers. It has "selected" and published 34 well-written opinions for 1974-75. Presumably, the 34 were selected from the whole for their special meaningfulness to the practicing bar. In *no* case is a declared proposition supported by any adequate discussion of the interests involved, or any apparent consideration of the manner in which those interests, once identified and once ordered, are affected by the result announced. Consequently, like the results of applying any magic formula, the opinions cannot be examined except as they comport with prior opinions or may form a basis for the next round of similar applications.

In the opinions, for example, the bar is advised of the following: that there are geographical limits to the range of yellow page listings a lawyer may use (the opinion enlarges upon rules rendered in several earlier opinions on the same subject); that a lawyer may not, "however worthy the service," form and operate an organization to locate and serve persons eligible to receive surplus tax funds (despite the committee's acknowledgment that not unfrequently such persons will not be reached by the statutory process); that a lawyer may not use a pro-

Further, as the referral fee is ultimately based on the total amount recovered by the client, it should be to both client's and referring counsel's advantage that the matter be handled by competent counsel. Excessive fees are separately condemned, so prevention of that evil is not the basis for the rule.

fessional card having a three-dimensional effect (such a card does not comport with "dignity"); that a lawyer may use the abbreviation "Dr." as a title, only if his name is not followed by "J.D." (the opinion refers to five earlier opinions on the same subject); that a Spanish speaking lawyer may not be listed in a Spanish language telephone directory (unless it is published by the telephone company); and that the relative size of type on a judge's campaign brochure is ethically governed. These are hardly serious problems. Perhaps ethics committees are not an appropriate forum for discussion of the real relationship between the society and the profession; certainly if they are not, we must stop believing that we are accomplishing with them what must be done.

Dean Freedman encourages us to look to the existence of matters of professional responsibility more fundamental than the trivialities dealt with in committee opinions, and suggests one possible method to address such matters. Where ethics committees seem merely to compare the words of the Code to the activity under consideration and exact a result, the author suggests study of the realities of legal representation in a society seeking freedom and dignity for individuals. Implicit in Freedman's presentation is the fact that the existence of any Code is some impediment to realistic thought processes; the structure of all language (and particularly code-like language) encourages a confusion of ideas with things. Legal language is well-larded with concepts having no physical analogues: Truth, Justice, Right, Duty, Responsibility. "What is a crime?" is a different kind of question from "What is a shoe?" While symbolic code language is useful in certain forms of abstract discussion (for example, in speaking to bar conventions) the usefulness of such symbols fades away in the presence of real things. There is, in the real life of a practicing lawyer, an elusive point of discontinuity where the symbolism must be disregarded as a meaningless impediment to good judgment. Until the Code's bare abstractions are fleshed out with constructions grounded in social reality, lawyers will be left adrift.

An example of this kind of hypostatization can be drawn from one of the changes in terminology effected by the Florida Bar at the time of its adoption of the ABA Code of Professional Responsibility. The ABA Code states that a lawyer *may* reveal the intention of his client to commit a crime and the information necessary to prevent the crime. The Florida Disciplinary Rule provides that a lawyer *shall* reveal that information. Neither Code says what a "crime" is. The answer to that question is far from obvious, even to the keepers of the dictionary. For reporting purposes, is an intent to commit a traffic misdemeanor

equivalent to an intent to commit murder? May a Florida lawyer silently listen to his client's proposal to cross against the "Don't Walk" light? Somewhere between the two "crimes" is a point of disengagement where "crime" becomes "non-crime." Rules constructed of figurative language cannot be enforced or followed except at their parameters, and lawyers live in the undifferentiated center between the poles. Further, what change has Florida effected by imposing a mandatory duty to do that which is inherently ambiguous? What was intended by the change? Bad reasoning, or none, results from attempted application of mere code words without concrete analysis of what lawyers do and what the society expects, or is entitled to expect, of them.

Dean Freedman tells us, "The system of professional responsibility that I have been advancing . . . attempts to deal with ethical problems in context—that is, as part of a functional sociopolitical system concerned with the administration of justice in a free society." (p. 46) The book advances no "system of professional responsibility." What it does do, and does well, is to advance the argument for a return to a kind of realistic questioning largely ignored in the literature. It illuminates the need for that discussion to begin to come to grips with what lawyers actually do and are supposed to do.

To lower the level of my enthusiasm, I note that Professor Freedman's book has some structural weaknesses. While Chapters 1 through 7 together with Chapter 10 make a solid 110 page unit, Chapter 8 ("Certification of Trial Lawyers") is a four-page exercise illustrating the obvious, *i.e.*, that the responsibility for an inadequate trial bar rests heavily upon judges who are unable to recognize or unwilling to do anything about incompetency. Chapter 9 ("The Myth of British Superiority") is both thin in analysis and misplaced in this volume.

If one mark of a profession is that it governs itself conscientiously for the public good, we cannot be content with a bar that ignores the need for, and tools of, the analysis necessary to define either the public good or its own role as part of that public. Dean Freedman offers a good beginning.