

Professional Responsibility: Keeping Law on a High Plane

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About one hundred years before most of us graduated from law school, the United States Supreme Court made the following observations about the legal profession:

“Without [the legal profession] society could not well go on. But like all great instrumentalities, it may be potent for evil as well as good. Hence, the importance of keeping it on the high plane it ought to occupy. . . . *Its character depends upon the conduct of its members.* None are more honored or more deserving of honor than those. . . who, uniting ability and integrity prove faithful to their trusts and worthy of the confidence reposed in them.” *Baker v. Humphrey* (1879) 101 U.S. 494, 502 (emphasis added).

For the past twenty years, I have spent the majority of my professional time representing lawyers. Some of my lawyer-clients have made mistakes, some have done worse, and some have done nothing wrong at all. However, each of my lawyer-clients has had to confront an uncomfortable, but undeniable fact. In every legal malpractice case the defense has the added burden of overcoming a strong public bias against the legal profession.

There can be no doubt that the prevailing view in our society is that we have not met the Supreme Court’s challenge of keeping the legal profession on the “high plane it ought to occupy.” If we accept the Court’s assessment that the character of our profession depends upon the conduct of its members, it is apparent that each of us must reexamine our approach to the practice of law. Theodore Roosevelt once said that: “Every man owes some of his time to the up-building of the profession to which he belongs.” One way to fulfill this mandate, and to restore honor to the legal profession, is to bring a new level of professional responsibility into our relationships with our clients, our adversaries, and others we encounter in our professional endeavors.

Through the years, I have had the privilege of speaking with, and learning from,

hundreds of lawyers on issues affecting our profession. During the course of one seminar, the lawyers in attendance and I became involved in a discussion that led us to a new understanding and definition of professional responsibility. The topic we were discussing was the obligation of a lawyer who receives an inadvertently disclosed confidential communication from an adversary. There were about fifty people present that day, and I asked the questions I had asked at other seminars when discussing this topic, which were: (1) Does an attorney's ethical obligation to represent a client zealously require the attorney to keep the confidential information inadvertently disclosed and to use it for the benefit of the client; or (2) Do those ethical obligations require the attorney who has received the confidential communication to contact the attorney who was the source of the inadvertently disclosed information, advise that attorney of its receipt, and abide by his or her directions? In that particular audience, about forty out of the fifty people chose the second option as more consistent with an attorney's professional responsibility. Next, I asked if the lawyers would tell their clients that they had received the communication, that they were notifying the attorney who had produced it, and that they were going to return it in accordance with that lawyer's request. A large majority responded that they would not mention the incident to their clients. I then asked a question I had never asked at any previous seminar: If you were the defendant in a legal malpractice case, would you want and expect to be told about the situation? Virtually everyone responded affirmatively, and indicated that they would be very angry if they learned they had been left in the dark.

The double standard that this group of responsible attorneys had set, treating their clients in one way, but expecting to be treated differently if they were the client, led us to a simple definition of professional responsibility that is best illustrated by the following parable. A beggar went into a house of learning and asked three rabbis if they could teach him the essence of the Torah (the first five books of the Old Testament, which contain the Jewish law) while standing on one foot. The first rabbi became angry, accused the beggar of being insolent and told him to leave. The second rabbi pondered the question for some

time and responded that it would be impossible. The third rabbi looked at the beggar, stood on one foot and said: “Treat others as you would have them treat you. The rest is commentary.” Applying that principle, lawyers should consider defining professional responsibility in terms of treating our clients, our adversaries and others whom we encounter in our professional lives as we would desire and expect to be treated in similar situations. If each of us were to do so, we would take a significant step toward moving our profession to the high plane it ought to occupy, and restoring the sense of honor that has been compromised, particularly during the last quarter of the 20th century.

To understand why we are not treating our clients as we would expect to be treated, I asked the participants in the seminar to explain why they would not have told their clients of the inadvertently disclosed confidential information. In response, they expressed concerns that the clients would have demanded to see the documents, thereby creating a conflict for the attorneys, who believed their professional duty required them to return the documents to the other side. Rather, than hiding the information from the client, the attorney has an obligation (as in any circumstance where ethical concerns are presented), to research the applicable law, and to determine the appropriate course of conduct. If the attorney’s research produces no clear result and the attorney is uncertain regarding his or her professional and ethical responsibility, one option is to inform the client of the results of the research, to present the client’s position to the court (e.g., by arguing that any privilege attaching to the document in question has been waived by the inadvertent disclosure), and to tell the client of the need to abide by the court’s decision. On the other hand, if the attorney determines upon proper research that he or she cannot ethically take the action requested by the client, the appropriate course of conduct is to advise the client that professional and ethical responsibilities prohibit taking the action requested. If the client is unwilling to allow the attorney to proceed within appropriate ethical boundaries, the proper approach in most circumstances is to arrange to withdraw from the representation consistent with the fiduciary obligations relating to withdrawal.

Many attorneys will argue that they can see the merit of treating a client as the attorney would like to be treated if he or she were the client, but that it is simply unworkable to treat adversaries as we would expect to be treated in a like situation. After all, these attorneys would argue, our role is to pursue the interests of our clients zealously, and that necessarily means that we cannot treat our adversaries as we would expect to be treated in a like situation. I respectfully disagree. While it is the professional responsibility of all lawyers to take lawful and ethical measures required to advance their clients' endeavors, it is professionally irresponsible to advance arguments that are frivolous or not made in good faith. While these obligations may sometimes appear to clash, a studied and thoughtful approach can almost always produce a result where the client's interest is protected, but where the legitimate interests of others and of the administration of justice are also served. (See *Kirsch v. Duryea* (1978) 21 Cal.3d 303, 309, 146 Cal.Rptr. 218.)

As I was preparing to write this article, I heard a news story on the radio that illustrates this point. The issue being discussed was the new law requiring the networks to show three hours per week of educational children's programming. The woman who had been spearheading this effort for nearly thirty years described her fight with the *lawyers* for the networks. Specifically, she talked about how the *lawyers* had argued that regulation was unnecessary because the networks were meeting their responsibility. As an example, these lawyers argued that the show *The Jetsons* was educational as it taught children about what life would be like in the 21st century. Her commentary was that she could respond only by asking if the lawyers for the networks were drunk. While listening to this story, I considered the definition of professional responsibility I have described in this article, and found it difficult to imagine that any of the lawyers for the network considered *The Jetsons* as educational television for their own children. By adopting a double standard, they added to the negative public image of our profession.

I agree wholeheartedly with the observations of the Supreme Court made more than one hundred years ago that the character of the legal profession depends on the conduct of

its members, and that it is imperative to keep our profession on the “high plane it ought to occupy.” I do not believe that we have met that challenge. Hence, borrowing the words of Theodore Roosevelt, it is now our professional responsibility to “up-build”our profession. While most lawyers make a concerted effort to unite ability and integrity in the practice of law, if we are to succeed in restoring honor to the legal profession, we must all challenge ourselves to bring a new level of professional responsibility into all of our professional relationships.