

Toward A Philosophy or Theory of the Legal Profession — Monroe Freedman's "Understanding Lawyers' Ethics"

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For many years, Professor Monroe Freedman has been one of the most respected, courageous, and forthright teachers and authors in the mushrooming field of legal ethics. In 1975 he wrote "Lawyers' Ethics In An Adversary System"¹ which strongly suggested that clients should be represented to the lawyer's fullest capacity even where the lawyer knows that a client in a criminal trial may try to commit perjury.² It was also suggested that a lawyer should cross examine a witness whom the lawyer knew was telling the truth, where the lawyer knew that his or her client was innocent of charges made.³ In a chapter called "Access to the Legal System: The Professional Obligation to Chase Ambulances"⁴ he argued that lawyer advertising and solicitation be authorized because so many worthwhile causes of action were not brought because of the ignorance of the population about things legal.⁵ Freedman's point was that the legal profession and individual lawyers had a duty to prevent injustice to their clients and others by retaining client confidences in all cases except where human life is threatened by their silence.⁶

Some of Professor Freedman's ideas had been placed in articles often preceded by speeches to lawyer groups. In one such lecture, while serving as co-director of the Criminal Trial Institute, he gave a lecture on what he considered the three hardest questions faced by criminal defense lawyers.⁷ As he put it,

Those questions were: (1) Should you put a witness on the stand when you know the witness is going to commit perjury? (2) Should you cross-examine a prosecution witness whom you know to be accurate and truthful, in order to make the witness appear to

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1. MONROE FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975).

2. *Id.* at 31, 40.

3. *Id.* at 48.

4. *Id.* at 113.

5. *Id.* at 116, 120.

6. *Id.* at 6-7.

7. *Id.* at viii.

be mistaken or lying? (3) Should you give your client advice about the law when you know the advice may induce the client to commit perjury? I concluded, with admitted uncertainty, that the adversary system, with its corollary, the confidential relationship between lawyer and client, often requires an affirmative answer to those questions.⁸

These remarks were reported in the Washington Post, and Judge Warren Burger then of the United States Court of Appeals for the District of Columbia, and other judges and lawyers, attempted to have Freedman disbarred and dismissed from his professorship at George Washington University.⁹ Although this attempt failed, it demonstrated the deep resentment many lawyers and judges had to these views on legal ethics. This episode is an example of an attitude, long the view of some who work with lawyer discipline that we should not only look at what lawyers do but also what ideas they hold.¹⁰

Of course, none of these attempts at thought control dissuaded Monroe Freedman. In fact, he said that this occurrence spurred him to write "Lawyers' Ethics in an Adversary System."¹¹ His latest book is

8. *Id.*

9. *Id.*

A brief report of my lecture appeared in the Washington Post the next morning, producing two different but oddly similar reactions. First, a very liberal federal judge wrote to me, saying that I had done a disservice to the profession and to the rights of criminal defendants by publicly airing such issues. Second, several very conservative federal judges, led by Chief Justice Warren Burger (then a judge in the United States Court of Appeals for the District of Columbia Circuit), unsuccessfully attempted to have me disbarred and dismissed from my position as a Professor of Law at George Washington University. In fact, only one day after the Washington Post story appeared, I received a registered letter from the United States District Court Committee on Admissions and Grievances, informing me that disciplinary proceedings had been begun against me, on the complaint of several federal judges that I had "expressed opinions" in apparent disagreement with the Canons of Professional Ethics. (Prior to that episode, I had not intended to write about professional ethics. Indeed, my first article on the subject was induced in part by the extraordinary effort to use disciplinary proceedings to prevent discussion of the issues. I was therefore tempted for a time to dedicate this book "To the Chief Justice of the United States, but for whose efforts this book would never have been written).

10. Harry Cohen, *Lawyer Certification, Civility, "Good Moral Character" and Pressures for Conformity*, 1 J. OF LEG. PROF. 59, 69 (1976).

11. *Supra* note 9.

"Understanding Lawyers' Ethics"¹² which one reviewer called "Vintage Freedman in a New Bottle"¹³ creating a sense of "déjà vu" in readers familiar with Freedman's work.¹⁴ Freedman, he says, "still lives in too simple a moral world."¹⁵ "His world-view establishes a hierarchy of values where some value must always be a trump. 'Life' trumps confidentiality, but little or other else does."¹⁶

Is this attitude merely a review of Freedman's work, or is it a different view of a philosophy of lawyering, or even of the legal profession? A case may be made for the conclusion that many commentators interested in the problems of the American legal profession, are gingerly trying to espouse their philosophy of American lawyering.

One way to glean a philosophy of lawyering or of the legal profession is to compare the various provisions in compilations of legal ethics rules. In historical summary of the rules, Freedman points out that the original American Bar Association Canons of Ethics were so "vague and self-contradictory"¹⁷ that they were utilized to discriminate against women and minorities of all kinds. Finally, after some sixty years, the American Bar Association repudiated them and the Model Code of Professional Responsibility [Model Code] was accepted.¹⁸ The Model Code was immediately criticized and within fourteen years, the present day Model Rules of Professional Conduct [Model Rules] were adopted.¹⁹ Many law teachers have demonstrated that these Codes were created, as much for the improvement of the profession's image, as for protecting the public and making legal services available to all in the country.²⁰ To Freedman, legal ethics should deal with lawyers helping others to protect their rights, "rooted in the Bill of Rights as expressed in the American adversary system."²¹

The Model Code, he argued, more than the Model Rules, provides that the professional judgment of the lawyer must be exercised solely for the benefit of the client and free of compromising influences and

12. MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS (1990).

13. This is the title of Professor Thomas Morgan's book review, Thomas Morgan, *Vintage Freedman in a New Bottle*, 4 GEO. J. OF LEG. ETHICS 847 (1991).

14. *Id.* at 848.

15. *Id.* at 852.

16. *Id.*

17. Monroe Freedman, *supra* note 12 at 4.

18. *Id.*

19. *Id.* at 5.

20. *Id.* at 6.

21. *Id.* at 7.

loyalties.²² Undue concern for the members of society generally may be a compromising influence.²³ The Model Rules, it is said, "reflect a significantly different view of the lawyer's role and of the lawyer's relationship to the client."²⁴ The Model Rules cast the lawyer as an "officer of the legal system" and not an "officer of the court."²⁵ Because of this fact, he declares, the Model Rules are rooted in a different approach to lawyers and the legal profession.²⁶ Legal ethics choices determine moral values.²⁷ Decisions on "issues of lawyers' ethics establish one's moral priorities and thereby define your own moral profile."²⁸

Freedman, one of the most vociferous defenders of the adversary system, says that the adversary system is under unprecedented attack in the United States, possibly because of this change in attitude.²⁹ Without this system, he suggests, our constitutional system would be in

22. *Id.* at 8.

23. *Id.*

24. *Id.*

25. *Id.* at 10.

26. *Id.* at 9.

The Model Rules of Professional Conduct reflect a significantly different view of the lawyer's role and of the lawyer's relationship to the client. As expressed by Dean Norman Redlich, one of its most fervent supporters, the Model Rules "project a different set of values" from those of the Code, and "[t]he fate of the entire project may well hinge on the bar's willingness to accept the altered role model that the Model Rules envision." (Footnote omitted.)

Those differences are apparent in the Model Rules' description of the lawyer in the opening sentence of its Preamble. As we have seen, the Model Code begins by stressing the client — "respect for the dignity of the individual and his capacity . . . for enlightened self-government." By contrast, the Model Rules begin: "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." In a sense, of course, the description is simply a truism, but the difference in emphasis is intended to convey the altered role model to which Dean Redlich refers.

Particularly significant is the phrase "officer of the legal system." For a time, those who sought to minimize the lawyer's role of service to individual clients would characterize the lawyer as an "officer of the court." (Footnote omitted.) The intended implication is that the lawyer serves principally as an agent of the state. The Supreme Court has recognized, however, that the lawyer's traditional function is to serve the lawful interests of individual clients, even against the interests of the state.

Id. at 8-9.

27. *Id.* at 11.

28. *Id.*

29. *Id.* at 14.

trouble.³⁰ Compare our system, with all of its faults, with those in Cuba, Bulgaria, the Soviet Union and China.³¹ There, lawyers trust the State to find "objective truth."³² The Soviets, for example, wish to realize "the conflictless trial."³³ The trial cannot be "conflictless," Freedman argues, because the "lawyer is not the agent or servant of the State rather he or she is the client's advocate against the State and other large institutions and interests."³⁴

Even in civil litigation the adversary system has mitigated the grievances of "several minorities, women, consumers, tenants, citizens concerned with the health and safety in our environment, and others."³⁵ No other legal system in the world has produced social revolution and justice through the legal profession and the courts without extreme bitterness and hatred.³⁶ Even the ordinary personal injury suit is an "expression, procedurally and substantively, of important public policies."³⁷ Here is an effective social process through which individuals can redress grievances in a peaceful fashion.³⁸ The civil adversary system is as much a part of our constitutional tradition as where criminal law is involved.³⁹

30. *Id.* at 13.

31. *Id.* at 15.

32. *Id.*

33. *Id.* at 16.

34. *Id.*

35. *Id.* at 19.

36. *Id.*

37. *Id.* at 20.

38. *Id.*

39. *Id.* at 22.

Trial by jury is particularly important in criminal litigation but, like other aspects of the adversary system, its value in civil trials is considerable. One of our most respected federal trial judges, William G. Young, has commented that: (footnote omitted)

Without juries, the pursuit of justice becomes increasingly archaic, with elite professionals talking to others, equally elite, in jargon the elegance of which is in direct proportion to its unreality. Juries are the great leveling and democratizing element in the law. They give it its authority and generalized acceptance in ways the imposing buildings and sonorous openings cannot hope to match.

Further, as Chief Justice Rehnquist has reiterated, jurors' "very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye." (Footnote omitted.) Dean Paul Carrington adds the pungent comment that juries are "a remedy for judicial megalomania, the occupational hazard of judging." (Footnote omitted.)

Beyond these purposes, the American jury system is "our most vital

The inquisitorial system, an alternative to the adversary system, runs counter to constitutional interests in privacy, security of the individual. The root of our basic protections against the government, the right to a trial with representation by an independent lawyer is what we are talking about.⁴⁰ What Freedman calls the individualized "sense of having been treated fairly" is connected to the adversary system.⁴¹ Critics argue, he says, that our system involves inequality in the justice accorded because the quality of representation may be seriously out of balance.⁴² This results, he says, because of our capitalistic economic structure, and not because of the adversary system.⁴³

To Freedman, a lawyer is not an officer of the justice system as the Model Rules would have it, but he or she is a representative of individuals or groups under a contract which involves "deliberate, conscious decision."⁴⁴ The Model Code allows a lawyer to choose clients but once a lawyer has accepted a client, the lawyer's autonomy is sharply circumscribed.⁴⁵ Under the Model Rules, it is suggested the lawyer seems to have more control over the client's case with client autonomy circumscribed.⁴⁶

Throughout the book, Professor Freedman deals with what he considers the moral limits of lawyer's actions. Whether it be to accept a client or zealously represent a client, there are moral limits.⁴⁷

Understanding Lawyers' Ethics is a legal ethics textbook, covering all of the standard subjects. It is something more. It is a theory of lawyers and the legal profession.

What should the organized legal profession espouse as their philosophy or theory of the legal profession? My own philosophy was of

day-to-day expression of direct democracy," in which "citizens are themselves the government." (Footnote omitted.) Another effect of the jury, therefore, is to "limit . . . the power of legislatures who eventually must countenance the nonenforceability of [criminal] laws which citizens are unwilling to enforce." (Footnote omitted.) Similarly, jurors can bring the moral sense of the community to bear in civil cases in finding for plaintiffs or defendants and in assessing damages.

Id. at 26.

40. *Id.* at 27.

41. *Id.* at 39.

42. *Id.* at 41.

43. *Id.*

44. *Id.* at 49.

45. *Id.* at 58.

46. *Id.* at 63-64.

47. *Id.* at 70.

the American legal profession embodied in two articles written in 1966⁴⁸ and 1970.⁴⁹ It was suggested that the legal profession must be viewed as one "unfettered by the past conception of the bar as an integrated cohesive unit with common interests."⁵⁰ "A pluralistic approach to the problems of the profession was proposed. After factual investigation, each diverse group can be categorized and its problems put in better perspective. The concept of having one set of legal ethics rules for the entire profession without factual discrimination probably should be terminated or exchanged for a more realistic concept which would recognize the diverse interests of the bar. No pretense should be made that the bar ever can be an integrated whole. It might be possible, however, to draw these diverse groups together and create a unity based on understanding and similar educational background."⁵¹ This is where Monroe Freedman's philosophy of the profession enters the picture. His approach is a starting point in dealing with legal ethics, and the legal profession's situation. Freedman's theory is a generalized view. After that point is reached a more particularized factual context must be utilized to specify rules and mandates.

48. Harry Cohen, *Pluralism in the American Legal Profession*, 19 ALA. L. REV. 247 (1966).

49. Harry Cohen, *Confronting Myth in the American Legal Profession: A Territorial Perspective*, 22 ALA. L. REV. 513 (1970).

50. Harry Cohen, *supra* note 48 at 247.

51. *Id.* at 261.

A new approach to the problems of the profession is necessary. In the past these diverse groups were confronted with answers based on a vision of the legal profession as an association of similar stereotypes with common interests. Various segments of the profession have different needs and goals, and for this reason it is now necessary to begin to think in terms of multiple groups of lawyers. Different kinds of specialties and clienteles must be taken into consideration. The lawyer who spends most of his time working in the matrimonial field has particular problems not shared by the lawyer who represents large industry. The house counsel or government lawyer is not interested in the same problems as the general practitioner. Lay competition does not effect all lawyers to the same degree.

Id.