



6-1-1977

Attorneys, Clients, Ethics

Elliott M. Abramson

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Elliott M. Abramson, *Attorneys, Clients, Ethics*, 52 Notre Dame L. Rev. 797 (1977).

Available at: <http://scholarship.law.nd.edu/ndlr/vol52/iss5/1>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

ATTORNEYS, CLIENTS, "ETHICS"

*Elliott M. Abramson**

I. Introduction

Present definitions of the attorney-client relationship, based upon our adversary system of justice, present a need for the legal profession to undertake a re-examination of both its methods and purpose. While the adversary system is useful, to a limited extent, in the search for the truth of a matter, many of the rules and devices of litigation, as they are actually conducted, defeat the development of the truth.¹ Prescriptions of the attorney-client relationship, based upon this system, demand loyalty and zeal for the client's cause² but do not impose on the lawyer a positive obligation to the cause of truth. The consequence is that the search for truth "fails too much of the time."³ In exploring this problem, this article will examine certain duties, responsibilities, and privileges of the lawyer, and will suggest that the ethical rules governing the attorney's conduct be altered so as to define for the lawyer a role in which his obligation to justice is of greater significance than the narrower concerns of loyalty to the client.

Two fact patterns in the civil area will provide the basis for discussion here. Monroe Freedman renders the first of these situations:

Because of his examination of a client's correspondence file, Williston [later to become the famous Harvard law professor and expert on Contracts] learned of a fact extremely damaging to his client's case. When the judge announced his decision, it was apparent that a critical factor in the favorable judgment for Williston's client was the judge's ignorance of this fact. Williston remained silent and did not thereafter inform the judge of what he knew.⁴

The second situation involves a 50-year-old man who, because no one in his family has lived beyond that age, consults a tax lawyer for advice regarding the disposition of his property at his death. The client indicates that he understands that estate taxes may be avoided by establishing a trust. In response, the attorney advises that taxes may thus be saved only if the client lives for at least three years after the creation of such a trust, or, if the client dies before the end of the three-year period, only if the trust was not created "in contemplation of death." If the client asks how this latter factor is determined, Freedman contends that:

It is likely that virtually every tax attorney in the country would answer the client's question, and that no one would consider the answer unethical.

* Associate Professor of Law, Willamette University; J.D. Harvard University, 1963; A.B. Columbia College, 1960.

1 Frankel, *The Search For Truth—An Umpireal View*, 30 REC. A.B.C.N.Y. 14 (1975).

2 ABA CODE OF PROFESSIONAL ETHICS CANON NO. 7.

3 Frankel, *supra* note 1, at 17.

4 Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1470 (1966). Freedman has replicated much of this article in M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975).

However, the lawyer might well appear to have prompted his client to deceive the Internal Revenue Service and the courts, and this appearance would remain regardless of the lawyer's explicit disclaimer to the client of any intent so to prompt him. Nevertheless, it should not be unethical for the lawyer to give the advice.⁵

For purposes of analyzing lawyer-client relations, these situations conveniently present an adversary and a preventive law context. It will be suggested that the lawyer in the former situation has no obligation to serve his client with the fidelity which Freedman applauds, and that the lawyer's counseling in the latter situation is not a proper exercise of the discretion inherent in the lawyer-client relationship.

II. The Role as Litigator

In the field of litigation, the rationale of a trial is twofold: to determine the "actual" relevant facts which underlie a disputed situation; and to reach a legal conclusion through an interpretation of the relevant facts through the law's prism.⁶ Neither of these objectives compels the lawyer's silence when he comes upon material which is adverse to his client's cause. Instead, the attorney is obliged to introduce all relevant considerations, including those which may undermine his own client's position. This obligation is no more than a conclusion from presuppositions which are anchored in the overall process to which the client is entitled.

In contrast to a dispute situation which is arbitrarily adjusted, the trial process is played out because it is thought that the client should have his day in court—the opportunity to have his side of the story told. This implies that he and his legal representative should be allowed to present relevant facts as they sincerely believe them to have occurred and to assert, argumentatively, the legal conclusion which they believe may appropriately be drawn from the facts.⁷ This institutional structure intimates the opportunity to reach a result based upon fair and comprehensive consideration of all the facts. Permitting one of the participants to withhold the disclosure of facts, known exclusively to him, makes the availability of the fact to the litigation process dependent upon the location of the fact.

Objection might be made that determination of relevant facts assumes some of the very matters to be concluded by the dispute resolution process and that, therefore, material not disclosed by the adversary nature of that process need not, by definition, be revealed. In other words, part of what the adversary process does is to winnow the legally significant facts; if a fact is not

5 Freedman, *supra* note 4, at 1480.

6 In assessing the litigation hypothetical, it will be convenient to assume one institutional entity, the judge, fulfilling both these functions. He establishes what "actual," germane, physical events happened and then resolves the dispute by applying the law he determines to be controlling to the facts.

7 The law is an elusive phenomenon. Even in cases where all the parties agree on the facts, the legal conclusion to be drawn from such facts can well be disputed. For example, in a particular case, it may be indisputably established that a state loans textbooks for use in parochial schools, but whether such action violates the first amendment's prohibition against state action establishing a religion—the law—will be a hotly contested issue.

elicited through the process it is considered a-factual. However, it seems that if the process itself designates the relevant legal facts in the course of yielding its judgment, it does so by selecting among facts presented to it as potentially relevant. To acquire the material upon which it operates, the adversary system relies on the perceptions of its participants as to what is relevant. Withholding such a fact prevents the realization of the full potential of the process since a potentially relevant fact, if actually introduced, may be elevated to the status of actual relevance and may thus influence the final resolution. Thus, the adversary character of the system affords the right to argue, not the privilege to conceal.⁸

It may be asserted that the lawyer is justified in withholding information adverse to his client's interest because of the need for total confidentiality between the client and his chosen advocate. If all potentially relevant information the attorney elicits concerning his client's case must be disclosed to the dispute resolution body, then, the argument proceeds, the client will be inhibited from fully informing his attorney. Effective representation will be crippled because the lawyer is not totally privy to germane material. If consultation with an attorney entails the possibility that he will make available to the dispute resolution tribunal material adverse to his client, the seeking of professional advice and assistance may be undesirably constricted.

Refutation of this line of argument is coiled in the following queries. Under a system in which the attorney must disclose facts unfavorable to his client's case, would the client choose not to provide his attorney with the fullest range of resources from which an effective case may be constructed? In other words, would a client, rather than reveal damaging information to his attorney, keep unfavorable facts to himself if, on balance, doing so results in an enervated presentation of his side of the dispute? Similarly, it might be asked whether a client would prefer to forego any presentation whatsoever of his side of a case, by passing up consultation with counsel, rather than reveal material unfavorable to his position. Finally, if adverse material is perceived by a client to be so devastating to his own cause that disclosure would be tantamount to rejection of his cause (remembering that clients tend to be rather self-righteous and are not likely to view many factors as so crushing), why should there be concern over the inhospitability of a system to a cause which hopes for victory by concealment of crucial material?

⁸ See Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966). Professor Noonan has voiced sentiments resonant of what has just been expressed:

Extensive subordination of the lawyer's interest to those of his client also has an effect on the lawyer himself . . . [Freedman's position seems] to ignore the dangers inherent in defining the lawyer's role without broader consideration of the demands of human personality and of society. I would hope that reflection on the nature of the moral automatons which lawyers would logically become under Professor Freedman's view might cause him to reconsider his premises.

A lawyer should not impose his conscience on his client; neither can he accept his client's decision and remain entirely free from all moral responsibility . . . He is also a human being and cannot submerge his humanity by playing a technician's role.

Id. at 1491-92.

III. The Role as Counselor

Consideration may now be turned to the second of the attorney-client situations described—that of the counselor who advises the client to assume insincere postures. In such a context, the attorney marches in essentially fraudulent tandem with his client under the guise of merely explaining, informing, and describing the consequences of alternative courses of action available. The question here is whether technique can be considered as purely and neutrally applied when the attorney, who makes accessible such technique, clearly understands that it will be applied to achieve objectives which are not consonant with the spirit and purpose of the law. As indicated above, Freedman concludes that in this counseling situation the attorney may, free from ethical misgiving, advise the client what actions the latter should take in order to optimize his material advantage.⁹ But, in the stated example, the consequences flowing from the client's actions are directly contingent on the sincerity and authenticity of his intentions respecting the disposition of his property. If the client intends to make a gift because he contemplates death, the legal system within which he pursues such a design, and to whose prescriptions his attorney implicitly subscribes, requires that the gift be taxed more heavily than if it were made otherwise than in contemplation of death. By assisting the client to dissimulate his actual motivations, the attorney is consciously distorting one of the factors which determine the legal consequences resulting from the property's transfer.

Freedman acknowledges that in answering the client's question "the lawyer might well appear to have prompted his client to deceive the Internal Revenue Service and the courts."¹⁰ The appearance is, indeed, the reality. The lawyer who answers the client's question is in intimate complicity with the client to deny the IRS that which the law accords it. This constitutes a betrayal of a social institution by one who has sworn to uphold the law and to maintain its operational integrity. The conclusion that such activity "should not be unethical," and an estimation that virtually every tax attorney in the country would answer the client's question without feeling that the answer is unethical, bespeaks an intense need to stress that the task of the legal profession is to facilitate the conduct of legitimate social and economic activities rather than to carry on a game in which the player sharpest at subverting the rules gains the largest garland.¹¹

IV. Conclusion

A lawyer's own moral commitment cannot be ignored in the interest of exercising functional expertise.¹² Before deciding to dissemble before a judge,

⁹ See text accompanying note 3, *supra*.

¹⁰ See note 4, *supra*.

¹¹ It also is important to assess the impact of an important function played by attorneys—that of a social catalyst. Through their expertise, attorneys often facilitate and energize diverse and essential social activities. If an attorney acts on behalf of his client in a less than candid manner, realizing that he is not assisting a court in its task of determining the truth of a matter, will not his efficacy as a social catalyst be impaired?

¹² A further ethical problem which proceeds from the considerations discussed above may be illustrated by the dilemma faced by attorneys, employed by large utility companies, who are

and thereby thwart the search for truth, an attorney must consider precisely what it is that his client thereby gains and how important that gain really is. It must be understood that the benefit a client thereby obtains is at the expense of both the lawyer's personal integrity and the efficacy of the system of justice. The result is that both the legal profession and the legal system operate without a view towards the moral and human dimensions of their functions.

The difficulty with this proposition, however, is that it finds no direct support in the Code of Professional Responsibility, that document which is intended to express "the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession."¹³ Whereas the Code sets forth the "Duty of the Lawyer to a Client"¹⁴ and the "Duty of the Lawyer to the Adversary System of Justice,"¹⁵ it does not contain an explicit description of the lawyer's obligation to justice and his duty to assist the resolution of controversies, and the conduct of legal affairs, in a manner which comports with the truth.

The lawyer's obligation to truth and the ends of justice should be paramount to his devotion to a client's interests. The goal of the legal profession, *i.e.*, to facilitate the harmonious conduct of human affairs, points to a need of forbidding lawyers to engage in the type of conduct described in the hypothetical situations. Specific provisions should be included within the Code of Professional Responsibility to compel disclosure of material facts and law known by an attorney to the court, and to forbid an attorney to advise a client to assume insincere postures in order to avoid the consequences of a law which clearly applies to the client's situation. Such steps to establish the lawyer's obligation to justice as paramount to concerns of loyalty to a client may be useful in initiating an effort to help the legal system achieve a "justice" which more nearly comports with the truth.

required to defend the construction of nuclear power plants which present hazards to the health, safety and welfare of neighboring communities and the surrounding environment. A juxtaposition of moral and professional responsibility might thus be posed to attorneys for the utility company charged by superiors to challenge a state's stringent regulations on radioactive discharges into the environment. Absent compliance with state standards, further construction of the company's nuclear power plant is dependent upon convincing the district court that the federal government has pre-empted nuclear plant regulation and therefore that the state's regulatory scheme must fail. Should an attorney, who is convinced that state regulation offers better safeguards for the public welfare than the standards of the Atomic Energy Commission, nevertheless feel obligated to vigorously assert the utility company's position?

It is submitted, simply, that if an attorney who finds himself in such situations carries in his consciousness an appreciation for the ecological or human price of such enterprises, he is justified, he acts justly vis-à-vis his professional responsibilities, in refusing to employ legal grounds to the end of environmental exploitation.

13 ABA CODE OF PROFESSIONAL ETHICS, PRELIMINARY STATEMENT.

14 ABA CANONS OF PROFESSIONAL ETHICS, ETHICAL CONSIDERATION 7-4.

15 ABA CANONS OF PROFESSIONAL ETHICS, ETHICAL CONSIDERATION 7-19.