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LAWYERS AND JUSTICE: THE UNEASY ETHICS OF PARTISANSHIP*

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I.

THE DONALD A. GIANNELLA MEMORIAL LECTURES are a unique foundation in American legal scholarship. Many law schools possess endowed lectureships named after the alumnus who put up the money, or named after some eminent outsider — judge or practicing lawyer — whom the donors wished to commemorate. My own law school, Columbia, has its renowned Carpentier Lectures, but I have no idea who Mr. Carpentier was, unless he was the gallant underweight Frenchman who once lasted four rounds with Jack Dempsey. Only at Villanova, as far as I know, is there a lectureship honoring the memory of one of the Law Faculty's own. At Villanova, it seems, a prophet — even one who died tragically young and just as he had come into the fullness of his powers — is not without honor in his own country. I am deeply honored to have been allowed to take part in the first of what will be, in future years at least, a distinguished series of lectures honoring a great law professor and superb human being.

Donald Giannella was much younger than I, which makes his loss harder to bear, but we had a whole bundle of shared interests and, I like to think, common values. We had planned one day to collaborate on a casebook on Church-State Relations in the United States; Giannella and Jones on Church and State had, we thought, a nice ecumenical ring to it. And we were both interested in problems of law and morality, not because either of us fancied himself as a lay preacher, but because we had both learned by experience that law cannot be seriously studied or taught without getting into difficult questions of morality, right conduct and justice.

Law and morality can be kept entirely and antiseptically separate only by a closet legal philosopher who is wilfully blind to

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legal reality. For law is not something to be contemplated from without, as one might study astronomy or primitive anthropology. What counts is not what a law student knows abstractly but what he can *do* with what he knows in the accomplishment of practical professional tasks. And one cannot ask a reflective student what he can do with a line of cases, a statute or a counseling situation without that student's asking, if only to himself, whether what he *can* do as a matter of positive law is an ethically *right* thing to do. The practice of law has many of the attributes of a contest, often a hard-fought contest, but there are some occasions when it has to be more than a game, when the lawyer must ask himself whether he is putting his knowledge and special professional skills to the service or disservice of justice in human affairs.

I hope that this lecture will not seem moralistic or gratuitously pious. If it does, it will be a very poor tribute to the memory of Donald Giannella, who was a profoundly good man with a sharp sense of humor and proportion and without a trace of self-righteousness or moral condescension in his make-up. I shall be serious, but I hope the going will not be too heavy, as lectures on legal ethics have a way of being. And why should I be unduly solemn on this occasion honoring Donald Giannella, whom I always found it a delight to be with and whom I remember with gratitude and joy? And now, as I must, I shift the theme from my friend to my subject, lawyers and Justice: The Uneasy Ethics of Partisanship.

II.

The Watergate affair was a painful moment of truth for the American legal profession. Never before in human history had so many accredited members of one learned profession been involved in a conspiracy to undermine a great nation's political institutions. The egregious picklock, Gordon Liddy, the ultimate informer, John Dean, the asinine prankster, Donald Segretti, and the heavy-handed attorney general, John Mitchell, were very different people and occupied vastly different positions in public life. But they had one thing in common. They were all — God help us — officers of the court, certified members of the bar.

This was a dreadful realization for those of us who have long believed, as Holmes did, that the study and practice of the law cannot but make a good man better and make even a bad man a little less awful than he would otherwise be. Something had gone wrong in the profession that had provided the ideological leadership of the American Revolution and had been hailed by de Toqueville as the truly aristocratic element of democracy in America. And,

something having gone gravely wrong, the organized bar concluded, as it usually does, that the fault must lie in the university law schools. I sometimes think that if a station wagon full of conventioning lawyers drove off a bridge and into the Schuylkill River, the bar associations would pass a resolution condemning Villanova and the other Pennsylvania law schools for not offering a required course in driver education.

In any event, in the post-Watergate summer of 1974, the American Bar Association (ABA) amended its legal education standards to add a mandatory provision that all accredited law schools must "offer and require for all students . . . instruction in the duties and responsibilities of the legal profession," which covers "the history, goals, structure and responsibility of the legal profession and its members, including the Code of Professional Responsibility of the American Bar Association"¹

As our profession's principal response to Watergate, the amended standard leaves a good bit to be desired. The political and social morality of John Ehrlichman or John Mitchell would have been improved by study of the *Code of Professional Responsibility* about as much, I fear, as study of Robert Louis Stevenson's *Essay on Sportsmanship* would improve the tennis court behavior of Ilye Nastase. But whether or not it was relevant to the occasion that brought it forth, I warmly welcome the insistence of the organized bar that the duties of the profession, and specifically the *Code of Professional Responsibility*, be required as an integral part of university law study.

I have two reasons for being happy about this 1974 intervention of the organized bar. The first reason is that it will put the emphasis in one course, at least, on lawyers' operations as distinguished from law in the books, on what lawyers do and can do with legal sources in courts and law offices as distinguished from what cases, statutes and other legal sources may mean in some universe of pure legal theory. We can stand a little less abstract theorizing in our law schools about the supposed "true" import of appellate decisions and can profit from a little more schooling in the realities of the lawyer's functioning. Whatever else may or may not be accomplished by law school instruction in "the duties and responsibilities of the legal profession," the byproduct cannot but be a clearer awareness on the part of law students that law is not only what courts and legislatures say, but also, in its retail phases, what lawyers *do*. Those of you who

1. See also Clark, *Teaching Professional Ethics*, 12 SAN DIEGO L. REV. 249, 259 (1975); Weinstein, *Educating Ethical Lawyers*, 47 N.Y.B.J. 260, 308 (1975).

ever took a course with him have heard this before, and better, from Donald Giannella.

There is a second gain, one perhaps not anticipated, nor even very much desired by the earnest practicing lawyers who brought in the 1974 amendment to the ABA educational standards: the new requirement has already caused, and will increasingly cause, the *Code of Professional Responsibility* itself to be examined more carefully and appraised more critically than could otherwise have possibly occurred. As every law teacher knows, there is nothing sacred to law students about the positive law. No legal or law-related text can be presented dogmatically — its policy assumptions taken for granted and dutifully accepted — to the bright and properly questioning members of a law school class. The *Code of Professional Responsibility* is now in for the kind of scrutiny and unbiased fundamental appraisal that university law study has given for years to the antitrust laws, the Federal Rules of Civil Procedure, the Internal Revenue Code, and even the Constitution of the United States and the decisions by which the Supreme Court has determined its meaning for our own day.

When so appraised by the critical complement of law students and their teachers, the *Code of Professional Responsibility* emerges, I think, with this rating: “A good try, but not really good enough.” It is a good try because the able and conscientious people who participated in the drafting of the *Code* between 1964 and 1969 came up with something far better than the antique document the *Code* replaced, the *Canons of Professional Ethics*, which had stood largely unchanged since 1908. The improvements are many and various: more sensitive and useful treatment of one of the lawyer’s most pervasive problems — avoiding conflicts of interest; far greater emphasis on the bar’s responsibility for the delivery of legal services to persons of limited or moderate means; and acceptance of the idea that competence and diligence, equally with fiscal honesty, are *ethical* obligations owed by lawyers to their clients.

Yet, and however reluctantly, we have to say “not really good enough,” because the *Code of Professional Responsibility* fails painfully in two major respects. First, it is still a barrister’s code, focused far too much on the ethical problems that arise in courtroom advocacy and giving much sketchier guidance on what matters more to most lawyers — the ethical problems that arise in a lawyer’s work as counselor, draftsman and engineer of transactions. And, second, the *Code* does not really come to grips with the deeper questions raised by what the profession has long taken for granted, the moral and social ambiguities, contradictions and strains of the ethics of partisanship, with whether the lawyer, as a moral man,

may — perhaps even is under an obligation to — do for his clients what he would not think it right and just to do in his own interest. It is to these two shortcomings of the *Code* that I shall address myself, not that I have final answers to offer — for that is not my way any more than it was Donald Giannella's — but because I believe the questions to be central and inevitable in the functioning of the legal profession, and so in the life of every thoughtful and morally responsible lawyer.

III.

This is a university lecture, not a prayer breakfast. If it were a prayer breakfast, the odds are pretty good that our speaker would be another Watergate law alumnus — now happily and evangelistically rehabilitated — Mr. Charles Colson. Mr. Colson, before he saw the burning bush somewhere on his way to or from 1600 Pennsylvania Avenue, liked to say that he would run over his grandmother if that would insure the reelection of Richard Nixon. I do not know Mr. Colson's grandmother, who may be a fussy old party and may even have been a secret admirer of Edmund Muskie or Nelson Rockefeller. Nor do I presume to question the completeness of Mr. Colson's moral rebirth, although there are those who have a certain lingering feeling that Grandmother Colson would still be well advised to stay strictly indoors when Mr. Colson is at the wheel of his car. But Mr. Colson's preconversion remark, however hyperbolic and wryly intended, reflects the creed of the absolute partisan, who knows but one loyalty — to his employer — and the devil with everything and everybody else. This, we can all readily agree, is too much. And what we deplore in Mr. Colson we can certainly not applaud in the advocate or counselor, whatever the controversy or cause in which he is engaged. There must be some limit on the adversary obligation; absolute partisanship is the ethic of a fanatic. Even trial by battle was never waged on the principle, or antiprinciple, of no-holds-barred.

We have, then, narrowed our area of possible disagreement. Let us see if we can narrow it a little more. Mr. Colson is or was an accredited member of the legal profession, but — unlike Mr. St. Clair later on — Mr. Colson was not acting in his capacity as a lawyer in his relations with Mr. Nixon. Nevertheless, a disquieting question comes to mind: Was Mr. Colson's unbridled zeal for his political superior essentially an unreflective carry-over of the traditionally political context of the legal profession to the partisan ethos? Suppose that Mr. Colson had been acting, not as a White House operative, but as a lawyer and that Mr. Nixon had not been President but an ordinary client — even an extraordinary client like

Howard Hughes or Emily Harris or Lockheed Aircraft. To what lengths would Mr. Colson have been justified in going, by the accepted ethics of the profession, to secure that client's success in litigation or to guarantee the achievement — out of court — of some commercial or social end strongly sought by the client but of manifest disadvantage to society? If unbridled partisanship, single-minded and no-(or few-) holds-barred, is unacceptable in the other affairs of life, is it acceptable in the context of the lawyer's professional functioning?

IV.

I have called this lecture "The *Uneasy Ethics of Partisanship*," so we shall now part company with Mr. Colson. Mr. Colson, before he saw the light, seems not to have been a very good man, and there are few moments of ethical uneasiness in the life of a morally insensitive person. It is better for our purposes that we take a good man as our example. I will take one of the best men I have ever known, my Sunday School teacher of many years ago, who was at once a vastly successful practicing lawyer and a person of stiffly uncompromising personal rectitude, whom I admired and whose memory I still revere. His initials were J.M.L., and I shall so refer to him for the rest of this lecture. How would he have accommodated his keen sense of justice to the partisan ethics of the profession he thought of as his life's vocation? Now we get down to cases:

Case One

A longtime client of J.M.L.'s asks him to undertake the defense of the client's black-sheep son, who has been indicted for commission of a brutal and violent crime. J.M.L. knows to a moral certainty — no matter how he knows — that the son is guilty and is, moreover, a menace to society as long as he remains at large. Will J.M.L. take the case? Of course he will — and should. But, having taken the case, will he try to get the defendant off even if this involves the concealment of incriminating evidence or casting the shadow of guilt on someone else? If there is an easy answer to this, I do not know what it is.

Case Two

One of J.M.L.'s clients is sued for nonpayment of a just debt that happens to be barred by the statute of limitations, the Statute of Frauds or some intricacy of the Parole Evidence Rule. If this were J.M.L.'s own debt, he would pay it without the slightest hesitation.

Is his course to be different in his client's interest?² A lawyer may, as J.M.L. certainly would, urge his client to honor the unenforceable obligation; the *Code of Professional Responsibility* suggests this as a possible course of action,³ although not as enthusiastically as it might. But if the client insists that the technical defense be raised, is the lawyer under a *duty* to raise it? It would seem that he is. The *Code of Professional Responsibility* says that "the lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors [like justice and honor and fair play?] is ultimately for the client and not for himself."⁴ This is the adversary ethic at work; if the client is deaf to the plea of justice, he is entitled to all the law will give him, and the advocate is obliged to help him get it. I think this is probably the correct answer, but still I wonder. And I hope that some of you are wondering, too.

Case Three

This problem takes J.M.L., fine lawyer and truly good man, out of the adversary context and places him behind his office desk as counselor and advisor. A major corporate client, whom he serves on retainer, is concerned about possible claims from its distributors and customers and wants something put into its standard form contracts to insulate the company from possible liability, even for losses caused by the company's own negligence, default or neglect. The corporation is a big fellow in its industry; the standard form contract will be offered on a take-it-or-leave-it basis, and the smaller distributors and consumers will have no alternative but to take it. J.M.L. would never for a moment think of putting such an oppressive clause into a contract of his own. Do the accepted ethical standards of the legal profession instruct or authorize him to do for his client what he would never do for himself? Should he be troubled in conscience if he drafts the requested insulation clause with technical precision, so as to make it legally enforceable, and, by

2. I used to think of this as a simple problem in professional obligation, but discussions with generations of first-year Contracts students have shown me how hard a problem it actually is.

3. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-8 (1976) [hereinafter cited as C.P.R.]. Ethical Consideration 7-8 provides in part:

In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions.

Id. (footnote omitted).

4. *Id.*

including it in the client's standard contract, imposes it on every small businessman with whom the client deals?

This case is, for me at least, the hardest one of the three. Is the postulated situation fanciful, something beyond the counselor's likely experience with the sharp practice of clients? Writing of the "ruthless practices" of the first John D. Rockefeller, of his "use of threats, his ability to make competitors 'sweat,' and his willingness to employ strong arm tactics," the eminent historian, Daniel J. Boorstin, made this observation: "The best lawyers of his day, men of the highest legal ethics, were employed by Rockefeller to devise his most dubious tactics."⁵ "Men of the highest legal ethics?" If so — and it may be so — legal ethics is an exotic and very different plant in the garden of morality. There must be some point, short of running over one's grandmother, at which the lawyer's own personal and social morality will rebel against his traditional allegiance to his client. My revered mentor, J.M.L., unquestionably drew the line somewhere. Where is it drawn in the code of Professional Responsibility? Search that *Code* as I have, I have not come up with an acceptable answer.

Given equal time for rebuttal, a thoughtful practicing lawyer would undoubtedly point out that these three hypothetical cases put the issues more bleakly, with less shading, than they are likely to be on most occasions in the life of the lawyer. This I readily concede. For one thing, I have been speculating as to the probable ethical uneasiness of my onetime teacher, J.M.L., who was an extraordinarily good man. Most lawyers, I think, are certainly more sensitive in their personal ethics and perceptions of justice than the mine-run of humanity, but even most lawyers are not as truly virtuous as J.M.L. and, therefore, not likely to feel the pangs of ethical uneasiness as sharply as he. You will also have noted that *Case One* assumes J.M.L.'s actual knowledge that his client was guilty of the violent crime of which he was accused. Lawyers in reality are unlikely to have such certain knowledge — in fact, they do their best to avoid having it thrust upon them — and a lawyer's impression of his client's guilt or innocence can change in the course of case preparation and even at trial. And in *Case Two* and *Case Three*, I have assumed that the justice of the matter is all on the opposing side, whereas in most litigation and counseling situations, the shading is subtler and the line between right and wrong less clear, particularly after the lawyer begins to identify with his client and the psychology of partisanship sets in. But the problems I have

5. D. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 51 (1973).

given, although not characteristic of all the lawyer's ethical situations, are characteristic of some of them. And, these are the cases that challenge the traditional ethics of the profession, certainly in the minds of outsiders and, I think, even more significantly in the minds and consciences of lawyers themselves.

In our profession, we have for too long taken the partisan ethic as something given and beyond question, as if it were revealed or self-evident truth. It is time to rethink this ethic, at least in some of its applications. My quarrel with the *Code of Professional Responsibility* is not at all that it does not abandon the partisan ethic — it may or not be time for that — but that it reaffirms that ethic, both for advocacy and for counseling, without ever reexamining it on its merits. Some “zero budgeting” was in order when the *Code* was drawn up, but professional organizations, like government agencies, are slow to question what has long been taken for granted.

V.

One always has to be selective in a short lecture. In the remainder of this lecture, I have decided to put less emphasis on the ethics of advocacy, with which ninety-five percent of the relevant literature deals, and concentrate on the relatively neglected subject of the ethics of counseling, particularly the work the lawyer does in his office as advisor to men of affairs.

This is not to say that the all-out partisan ethic is not being questioned today even on its traditional home grounds, courtroom advocacy. Thus, there was a stir a few years ago when a writer on legal ethics suggested that counsel for the defense in a criminal case may, on occasion, be under an obligation to put a witness on the stand even though he knows the witness will commit perjury, and may have a professional duty to cross-examine a prosecution witness whom he knows to be accurate and truthful in such a way as to make the witness appear to be mistaken or lying.⁶ This view was at once sharply criticized by many judges and lawyers, including Chief Justice Burger, as an extremist position that pushes the partisan ethics of advocacy entirely too far.⁷ Is it simply that we lawyers are less comfortable than we used to be with the public perception of the advocate as a hired gun? Or is it, perhaps, that the profession is beginning to have some long second thoughts about the realities of

6. M.H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 27, 45 (1975).

7. See, e.g., Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 12 (1966). But see *id.* at 14-15.

the adversary system as it operates in the trial courts of the United States?

Marvin Frankel, one of the most esteemed of United States district judges, has recently questioned the ethics of advocacy embodied in the *Code of Professional Responsibility* as “too much committed to contentiousness as a good in itself and too little devoted to truth”⁸ In this vein, Judge Frankel urges that the bar “consider whether the paramount commitment of counsel concerning matters of fact should be to the discovery of truth rather than the advancement of the client’s interest,”⁹ and recommends that “[t]he rules of professional responsibility should compel disclosures of material facts [even if adverse to the client’s interest] and forbid material omissions rather than merely proscribe positive frauds”¹⁰ — as does the *Code of Professional Responsibility*.¹¹

I happen to share Judge Frankel’s conviction that a far better accommodation is possible, with no serious danger to the adversary tradition of the common law, between the courtroom lawyer’s partisan loyalty to his client and his responsibilities, as an officer of the court, to the objectives of truth and justice. But that is not the subject of this lecture; we are considering not the ethics of advocacy but the ethical responsibilities of the lawyer in his role as counselor. So let us assume, for the moment, that the morality of largely unmitigated partisanship is acceptable in courtroom advocacy and, on this provisional assumption, move on to the largely neglected question of the applicability of the lawyer’s traditional partisan ethic to his work outside the courtroom as legal advisor and designer of transactional structures.

Long before work began on the present *Code of Professional Responsibility*, it was already a widely held view in the profession that the old Canons of Ethics of the American Bar Association¹²

8. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1052 (1975).

9. *Id.* at 1055.

10. *Id.* at 1057.

11. C.P.R., *supra* note 3, DR 7-102(B). This Disciplinary Rule provides: A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

Id. (footnotes omitted).

12. The original *Canons of Professional Ethics*, 32 in number, were adopted by the ABA in 1908. With amendments and substantial additions (32 supplemental canons were adopted in 1928), the Canons served as the best available statement of the standards of the American legal profession until replaced in 1970 by the *Code of Professional Responsibility*.

were unduly focused on the ethics of advocacy and, even more important for most lawyers, gave little help on the moral problem of office counseling. This was one of the causes that led to the creation, in the spring of 1952, of a committee called the Joint Conference on Professional Responsibility of the American Bar Association and the Association of American Law Schools. Ten members, five representing the American Bar Association and five representing university law schools, were appointed to the Joint Conference;¹³ and, in time, the Joint Conference submitted a final report,¹⁴ which was approved by the Association of American Law Schools in December, 1958 and by the House of Delegates of the American Bar Association in February, 1959.

Let us note in passing that the Joint Conference, with quite minor reservations, put its stamp of approval on the ethics of partisanship in courtroom advocacy. For example, the final report of the Joint Conference includes such statements as these:

The lawyer appearing as an advocate before a tribunal presents, as persuasively as he can, the facts and the law of the case as seen from the standpoint of his client's interest

In a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate

. . . .
 . . . [P]artisan advocacy plays a vital and essential role in one of the most fundamental procedures of a democratic society

. . . .
 Viewed in this light, the role of the lawyer as a partisan advocate appears not as a regrettable necessity, but as an indispensable part of a larger ordering of affairs.¹⁵

What I have quoted is certainly enough to demonstrate that the members of the Joint Conference, practicing lawyers and professors alike, had no ingrained prejudice against the adversary system and

13. The Co-Chairmen of the Joint Conference were John D. Randall, Esquire, of Cedar Rapids, Iowa, an outstanding leader of the organized bar, and Professor Lon L. Fuller of the Harvard Law School. Professor Fuller was the principal draftsman of the Joint Conference's final report. In the interests of full disclosure, I must record that I was a member of the Joint Conference and, so, perhaps unduly disappointed that its report, although well-received at the time, had less influence than it might have had on the essential contents of the *Code of Professional Responsibility*.

14. Joint Conference on Professional Responsibility of the American Bar Association and the Association of American Law Schools, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958) [hereinafter cited as *Joint Conference Report*].

15. *Id.* at 1160-61.

its correlative — the partisan ethics of advocacy. As concerns the lawyer in court, the report of the Joint Conference is quite consistent with the *Code of Professional Responsibility* formulated ten years later and, indeed, is frequently quoted at length in the Notes to the advocacy-related provisions of the *Code*.¹⁶

But a quite different tone emerges when the report of the Joint Conference on Professional Responsibility moves from “The Lawyer’s Role as Advocate in Open Court” to “The Lawyer’s Role as Counselor.” Bear with me as I quote at length from the *Joint Conference Report*, because the point we are getting to is, I believe, of momentous importance:

Although the lawyer serves the administration of justice indispensably both as advocate and as office counselor, *the demands imposed on him by these two roles must be sharply distinguished* The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is *immoral, unfair, or of doubtful legality*. In saving himself from this *unworthy involvement*, the lawyer cannot be guided solely by an unreflective inner sense of good faith; he must be at pains to preserve a sufficient detachment from his client’s interests so that he remains capable of a sound and objective appraisal of the *propriety* of what his client proposes to do.¹⁷

With an audience like this, I hardly need to go into the reasons why the lawyer-members and professor-members of the Joint Conference on Professional Responsibility were agreed that the all-out partisanship acceptable in courtroom advocacy is not to be carried over lock, stock and barrel in the performance of the lawyer’s role as counselor. As an advocate in open court, the lawyer faces the opposition of a presumably equally able and well-prepared advocate whose counter-partisanship will offset his own. And the proof of facts and issues of law are contested by the two partisans in the presence and under the surveillance of an unbiased and presumably competent judge. Truth, the common law has long believed, best emerges from the fires of controversy. But when the lawyer is in his office devising a course of business conduct, a standard form contract, or a complex scheme of land acquisition and development, no opposing lawyer is there to represent the equities of the many persons who may be affected by the lawyer’s plans, no judge is

16. See, e.g., C.P.R., *supra* note 3, Canon 7 nn.5, 24 & 33.

17. *Joint Conference Report*, *supra* note 14, at 1161 (emphasis added).

present to monitor the fairness of the arrangements, and there are no fires of controversy to keep the counselor honest and purge his client's specifications of overreaching self-interest. Is there a lawyer anywhere who has not felt the twinges of ethical uneasiness in so hidden and *ex parte* a professional context? It was, many of us thought, a quantum leap in the ethical perceptions of the profession when the organized bar, as well as the law schools, approved the Joint Conference's distinction between the ethics of advocacy and the ethics of counseling.

But funny things can happen on the way to the Forum, and something did on the journey from the *Joint Conference Report* of 1958 to the *Code of Professional Responsibility* of 1969. The members of the Special Committee on Evaluation of Ethical Standards who prepared the *Code of Professional Responsibility* had the report of the Joint Conference before them.¹⁸ It is evident from the drafting of the *Code* itself that they knew of the section on "The Lawyer's Role as Counselor" from which I have just quoted.¹⁹ The inescapable inference is that the able people who drew up the *Code of Professional Responsibility* considered but rejected the Joint Conference's carefully stated position that the ethical obligations of the counselor are quite different from those of the lawyer in open court and that the lawyer as counselor is under a duty to appraise the moral propriety, as well as the legality, of his client's proposed course of action. The lawyer as counselor, the Joint Conference had said, must not "participate as legal adviser in a line of conduct that

18. One of the Special Committee's members, Professor A. James Casner of the Harvard Law School, had been an ABA representative to the Joint Conference on Professional Responsibility and had participated actively and very usefully in the Joint Conference's deliberations.

19. This section of the report is quoted at length in a footnote to the *Code*. See C.P.R., *supra* note 3, Canon 7 n.9. And, in fact, one of the Ethical Considerations begins as if it were going to adopt the Joint Conference distinction between courtroom lawyers and office counselors, stating: "Where the bounds of the law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser . . . [T]he two roles are essentially different." *Id.* EC 7-3. But this distinction has no ethical consequences in the *Code of Professional Responsibility*, for Ethical Consideration 7-3 merely says that the advocate "should resolve in favor of his client doubts as to the bounds of the law," whereas the adviser "should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law." *Id.* This is not an ethical injunction but a caution of prudence in the use of legal sources for counseling purposes. Every first-year law student learns that statutes and precedents are to be used differently in advocacy and counseling, *i.e.*, that doubtful interpretations are resolved in favor of a client's contention in litigation, but usually resolved against the client's interest when the counselor is planning a safe course of conduct for the future. Does Ethical Consideration 7-3 say more than that? On the legal method point generally, see N. DOWLING, E. PATTERSON & R. POWELL, *MATERIALS FOR LEGAL METHOD* 14 (2d. ed. 1952).

is immoral, unfair, or of doubtful legality.”²⁰ The lawyer as counselor, says the *Code of Professional Responsibility*, may help his client achieve any objective that is “within the bounds of the law.”²¹

You will see at once the vast difference between these two versions of the counselor’s moral accountability. Anyone who is not a super-Austinian positivist knows that there is much immoral and unfair commercial and social behavior that can be engaged in without going beyond “the bounds of the law.” The first Mr. Rockefeller’s most oppressive tactics were, by and large, within the bounds of the law; their legality, as carefully tailored by Mr. Rockefeller’s lawyers-advisers, was the very attribute that gave them their efficacy as instruments of intimidation and oppression. A land developer undermining the ecology of a wilderness region, a corporation or labor union setting up a pension plan with only illusory benefits, or a company management enriching insiders at the expense of its stockholders does not necessarily engage in illegal or legally “fraudulent” conduct,²² certainly not if the legal advisers

20. See text accompanying note 17 *supra*.

21. C.P.R., *supra* note 3, EC 7-1. This Ethical Consideration states: “[T]he duty of a lawyer . . . is to represent his client zealously within the bounds of the law.” *Id.* (footnote omitted). Does the *Code of Professional Responsibility* suggest anywhere that a lawyer acts unethically if he helps a client achieve an objective which, although “within the bounds of the law,” strikes the lawyer as unjust, immoral, or unfair? If there is any such suggestion, I have been unable to find it. Ethical Consideration 7-8 may come the closest. For the pertinent text of this Ethical Consideration, see note 3 *supra*. But the rather lukewarm language used there — “often desirable” and “may,” rather than “imperative” and “should” — are largely cancelled out by the next sentence of Ethical Consideration 7-8: “In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.” C.P.R., *supra* note 3, EC 7-8. If the client insists on a legal but unjust course of action, the counselor, according to Ethical Consideration 7-8, “may withdraw from the employment,” but there is no suggestion that he has an ethical obligation to withdraw. *Id.* (emphasis added). And to the same effect is Ethical Consideration 7-9, which states: “when an action in the best interest of his client seems to him to be unjust,” a lawyer “may ask his client for permission to forego such action.” *Id.* EC 7-9 (emphasis added).

It is, I think, a proper reading of the several Ethical Considerations just cited that the counselor has discretion (“may”) to refuse to assist his client in an immoral or unjust line of conduct but is under a professional *duty* to refuse only when the client’s objectives or methods are not “within the bounds of the law.” On this reading, which seems inescapable, the Ethical Considerations, even when taken together, impose no greater ethical duty on the counselor than is imposed by Disciplinary Rule 7-102(A)(7), which forbids a lawyer to “counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.” *Id.* DR 7-102(A)(7). Textual comparison confirms this interpretation. When the able draftsmen of the *Code of Professional Responsibility* intended to make the *justice* or *fairness* of action, rather than the *legality* of action, the measure of a lawyer’s professional duty, they expressed the idea clearly and unambiguously. See, e.g., *id.* EC 7-13 (professional responsibility of a public prosecutor); *id.* EC 7-14 (professional responsibility of government lawyers).

22. See C.P.R., *supra* note 3, DR 7-102(A)(7). For the pertinent text of this Disciplinary Rule, see note 21 *supra*.

are ingenious enough to find weaknesses in the pattern of existing legal regulation. But who would deny that such conduct, legal or illegal, is "immoral or unfair" by any definition and so, by the standards of the Joint Conference, an "unworthy involvement" to be shunned by a lawyer of conscience?

The contrast in the two competing versions of the counselor's moral obligation is sharp and clear if we turn again to *Case Three*, where the counselor is asked by his client to prepare an oppressive and inequitable standard form contract. The standard form is manifestly "unfair" but, as such clauses typically are, "within the bounds of the law." The lawyer, says the *Joint Conference Report*, is not to draft it, even at the risk of losing a financially rewarding client. The lawyer, says the *Code of Professional Responsibility* "may continue in the representation of his client . . . so long as he does not thereby assist the client to engage in illegal conduct or to take a frivolous legal position."²³ The *Code of Professional Responsibility* is sketchy and incomplete in its treatment of the ethics of counseling, but its essential message, as I read it, is this: the lawyer as counselor is answerable only for the positive legality, and not for the fairness and moral propriety, of what he accomplishes for the clients he serves.

If this amounts to a backward step, and a very significant one, in the developing ethics of the legal profession, how are we to account for it? The members of the Special Committee who drew up the *Code of Professional Responsibility* — and in the course of that project rejected the Joint Conference's distinction in ethical position between courtroom lawyers and office counselors — were not shady or crafty people; indeed, I doubt whether the organized bar has ever in its history assembled a more representative committee or one of greater professional integrity and distinction.²⁴ How could they, in effect, take a position that the lawyer may, without offending the ethical standards of the profession, put his great skills to the accomplishment of an immoral or unfair design, provided only that it does not transgress the existing positive law? The explanation, I believe, is in something I suggested earlier: that lawyers, even the ablest and most experienced of them, do not fully realize that the ethics of all-out partisanship are rooted in adversary courtroom

23. C.P.R., *supra* note 3, EC 7-5.

24. The Special Committee on Evaluation of Ethical Standards included in its membership a former Justice of the Supreme Court, three former presidents of the ABA, three members of the ABA Standing Committee on Professional Ethics, and two of the most highly regarded of American law professors. Throughout the more than three years of its work, the Special Committee had the assistance of a talented and scholarly Reporter, Assistant Reporter, and Staff Director.

procedures and simply cannot be carried over into other contexts where adversary safeguards — the opposing lawyer and the overseeing judge — do not exist. When the all-out partisan model is carried over into the nonadversary aspects of the lawyer's life, it is as if an offensive lineman of the Pittsburgh Steelers were to use the strong-arm tactics appropriate in his gridiron employment to get his family on board a commuter train at a crowded suburban station.

Is it fair to suggest, as I have doing for years, that the lawyer as counselor must answer in conscience for the social worth as well as the formal legality of the results he accomplishes in his clients' service and on their behalf?²⁵ "A lawyer is unduly moralistic, unbearably self-righteous," some will contend, "if he tries to impose his different ethical standards on the client he is advising." I am entirely unpersuaded by this familiar argument. The issue is not whether the counselor is to thrust his morality gratuitously upon another person, but whether the counselor is to participate, take an active and often indispensable part, in the carrying out of what he considers another's unjust design. The distinction between officiousness and nonparticipation is surely clear enough. Suppose, as an analogy, that a physician has deeply felt moral convictions against abortion. Many would disagree with his views on the question, but would anyone consider him gratuitously moralistic, a meddler in another's moral universe, if he refuses to perform a requested abortion himself? I do not go about carrying picket signs denouncing hard-core pornography, but I would not finance a pornographic picture or share in the profits of its distribution. Would my participation be different in kind, my ethical uneasiness less, if I accepted employment as a pornographer's out-of-court legal adviser?

In discussions of professional ethics, as in other disputations, slogans sometimes masquerade as arguments. One formulation often heard nowadays is that the lawyer, even when acting not as advocate but as out-of-court adviser, may and should think of himself as if he were "my client with a law degree." The point of this, as I understand it, is that every person in society has a "right" to choose his own objectives, whatever they may be; and so has a "right" to have the aid of the lawyer of his choice in devising plans to accomplish these sought objectives "within the bounds of the law." From this it follows, or is supposed to, that lawyers, by the accepted standards of their profession, are socially neutral techni-

25. See, e.g., Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 805-07 (1961).

cians who need not and really should not concern themselves about the justice of the legal structures they create to their clients' specifications. But the formula, "my client with a law degree," misses what may be the point of it all. The client might be a very different person in his sensitivity to the perceptions of fairness and justice in human affairs if he had gone through the long course of study necessary to win him that postulated law degree. If there is an external moral standard for the counselor, it is not "my client with a law degree" but "my client as his values would be if he had studied law." This is not a quibble; the two standards are profoundly different. If I did not think them profoundly different, I would have to conclude that I had wasted my life in the study and teaching of law.

More pragmatic arguments have been advanced from time to time in defense of the proposition that the lawyer, even when acting as counselor and not as advocate in open court, is bound by his client's judgments of fairness and social desirability rather than by his own. One contention which has to be taken account of is, in substance, this: if the moral counselor refuses to do the immoral or unfair legal job, an immoral lawyer will quickly be found to do it, and will do it far more unjustly. This argument is hardly flattering to the bar, but there is, I suppose, something to it; the restraining influence that good lawyers have had on even their most avaricious clients is a significant story that should be told far more often than it is. I know of many instances in which fine lawyers — in Wall Street, in country practices and in precincts in between — have by example and force of character dissuaded grasping or insensitive clients from pursuing technically legal but socially inequitable courses of action. But the argument that ethically callous lawyers are always lurking in the wings proves too much; it would also justify a counselor's aiding a client to violate the law, which even the present *Code of Professional Responsibility* forbids.

Does the question of the counselor's ethical accountability come down, then, to a matter of economics and professional survival? I have been skirting this issue so far, so let me state it plainly and with the bark off. If the counselor refuses "unworthy involvements," his clients — so the unexpressed argument runs — will at once leave him for other less scrupulous legal advisers, and he will soon be starving to death, or looking for employment in a legal services office. I doubt this very, very much. Men of large affairs do not select their legal advisers entirely or principally for ethical insensitivity. And the argument of survival, if acceptable at all, comes with a little more grace from a struggling beginning lawyer, or from a fringe professional like those characterized by Jerome Carlin as *Lawyers*

on their Own²⁶ than from a partner in a top-flight law firm. No lawyer is hurt very much if his refusal to participate in ethically unworthy involvements causes his income to drop from \$100,000 to \$50,000 dollars a year — this, you see, is one of the advantages of being a university law teacher; we can be objective about such variations above our highest conceivable income ceiling.

Serious discussion of the moral dimensions of counseling is impossible if one blinds oneself to the plain fact that the ethic of all-out partisanship is a wonderfully convenient arrangement for lawyers generally. So long as the counselor is thought of, and thinks of himself, as a pure legal technician, bound by a kind of irrefutable presumption that whatever his client wants done “within the bounds of the law” is an ethically justifiable thing to do, the counselor can undertake many professional tasks, often quite profitable ones, that he might otherwise hesitate to accept. The circumstance that the partisan ethic makes it easier for lawyers to justify their choices of employment to others and to themselves is, of course, no proof whatever that the partisan model is wrong. The material interest of physicians is certainly served by the medical ethic that preservation and prolongation of human life is an ultimate good, but no one would suggest for a moment that his is a reason for abandoning the standards of Hippocrates. In law as in medicine, an intraprofessional ethical standard is to be appraised not by its convenience or inconvenience for practitioners but in terms of the moral and social justification of the standard itself. If the *Code of Professional Responsibility* is to retain the idea of partisanship as the measure of the counselor’s legal obligation, it should be for some far better reason than that the all-out partisan model enables lawyers to participate as advisers in morally dubious enterprises without being criticized for it and without feeling uneasy about it themselves.

VI.

The sands of my lecture time are running out, so what shall we say now about J.M.L., my revered Sunday School teacher? He of all men would certainly have felt the strains of the ethics of partisanship, particularly when he was engaged, as he was most of the time, in the counselor’s role. Did he on occasion give his superb professional skills to designs he thought of as unworthy? If he did — and I have no reason to believe that he did — such involvements would have been bearable for him only because the partisan ethic

26. J. CARLIN, *LAWYERS ON THEIR OWN: A STORY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* (1962).

was an unquestioned “given,” something taken for granted, in the profession of his day. If the professional standard had been stated differently, as proposed almost two decades ago by the Joint Conference on Professional Responsibility, J.M.L., whatever others might have done, would have adhered to it faithfully and, I suspect, with very considerable emotional relief.

Am I saying, then, that J.M.L. should have practiced law as he taught Sunday School? As to the intellectual rigor and inescapable interpersonal toughness of top-flight law practice, of course not. But in his essential ethical standards, those he proclaimed as a churchman and by which he governed his own personal affairs, why should J.M.L.’s practical working morality be higher anywhere else than in the vocation to which he gave his long life? The word “vocation” had literal religious significance for people of J.M.L.’s quality and generation; it was in the profession to which he was called that a good man had to be at his best. We should not settle for much less in the Ethical Considerations of the *Code of Professional Responsibility*, which are set out not as minimum standards but as statements of the aspirations of the bar.²⁷

The materials of the law — cases, statutes, regulations and the like — are for the advocate and counselor what pigments and canvas are for the artist, something to be used for the accomplishment of a design. Sooner or later the lawyer is answerable, if only to himself, for the worth of that design. It may be, or so we have assumed for this lecture, that justice in the settlement of disputes is best served by preservation of the all-out adversary ethic for courtroom litigation, although there are grounds for uneasiness even there. But in the counseling context, where the adversary safeguards are wholly lacking, the case for the ethics of partisanship becomes very thin indeed.

The *Code of Professional Responsibility*, notwithstanding the hard work of the distinguished committee that produced it, furnishes far less guidance than it should on the complex and thorny ethical problems of the out-of-court legal adviser. The ethical considerations of which the counselor must take account will never be easy to state, and controversy will surely attend every suggestion that the lawyer as counselor has moral responsibilities beyond those assigned to him by the conventional technician-partisan model. But hard as the task of rethinking and restatement may be, it must be undertaken in the

27. See C.P.R., *supra* note 3, Preliminary Statement. The Preliminary Statement declares that “[t]he Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive.” *Id.*

interest of our increasingly lawyer-managed society and in the interest of the bar itself. It is simply not good enough to declare, as the *Code of Professional Responsibility* seems to do, that the only bounds on what a lawyer can do for his client are "the bounds of the law." Somehow it must be made plain that the lawyer's moral judgment is not for hire, that there are occasions when the lawyer as counselor is under a duty to act as a person of independent ethical concern with obligations not only to his client's interest but also to fairness and justice in the management of affairs.

The stated aspirations of the bar should be a step ahead of prevailing practice. In this instance, the *Code of Professional Responsibility* sets the standard far lower than that to which many lawyers of honor have long and faithfully adhered. There should have been protest from the bar that the profession was setting its ethical sights too low, and insistence that the counseling-related provisions of the *Code* be reopened for thorough-going reexamination and far more comprehensive statement. Perhaps, just conceivably, this expression of regret will, in time, help get some such motion for reconsideration under way. Only that would make this inaugural lecture in Villanova's new series worthy of the memory of Donald Giannella.