THE LAWYER'S CONSCIENCE: A HISTORY OF AMERICAN LAWYER ETHICS

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I. INTRODUCTION

A. The Divided Lawyer

1. 1701 Massachusetts attorney oath of office: Lawyers pledge "all good fidelity as well to the courts as to your clients."

2. Echoed by Judge George Sharswood, an important legal ethics writer, in 1860: A lawyer was "not merely the agent of the party," but "an officer of the Court."

3. Similar conclusions are declared by lawyers throughout the twentieth century.

B. How do lawyers meet these dual obligations to client and public?

1. Lawyers must adopt standards higher than the marketplace.

a. Lawyer independence from clients.

b. Lawyers were *in* the marketplace, they were not *of* the marketplace.

C. Constrain lawyer misbehavior by reference honor, conscience, and rules.

II. HONOR

A. The Standard of Honor

1. An exterior standard: others decided whether the lawyer was honorable.

2. Practice of law is local and lawyers are well acquainted.

3. Disbarment of Levi Burr as led by Francis Scott Key.

4. Baltimore lawyer David Hoffman, *A Course of Legal Study* (2d ed. 1836), concludes with Fifty Rules of Professional Deportment. It is the last gasp of an honor-based profession. Key demands: no honorable lawyer will plead the statute of limitations, or represent a party with a "bad cause."

III. THE RISE OF CONSCIENCE

A. Timothy Walker 1839 Address to Law Graduates

1. Lawyers are to act in the light of their conscience, and then, with integrity and dignity.

2. Distinguishes the professional from the pettifogger.

3. Can a lawyer prosecute a "bad cause?" Yes, for "a lawyer is not accountable for the moral character of the cause he prosecutes, but only for the manner in which he conducts it."

4. If the lawyer could satisfy his conscience, even if the matter was a "bad cause," representing a client in such a case was immune from criticism.

B. The Zealous Rufus Choate

1. Wendell Phillips remarked in 1859, "This is Choate, who made it safe to murder, and of whose health thieves inquired before they began to steal."

2. "Why he told us there was a man in Boston named Choate and he'd get us off *if they caught us with the money in our boots*."

3. Albert J. Tirrell, accused of murdering his mistress Maria Bickford, defended by Choate. Choate's two inconsistent defenses were 1) Bickford slashed her own throat, for "suicide is the natural death of her class," and 2) Tirrell had killed Bickford while sleepwalking. Tirrell was acquitted of murder.

4. Representation defended as 1) zealously representing one's clients, and 2) within bounds of his conscience (Parson's Jr.).

C. David Dudley Field and the Limits of Conscience

1. Pre- and Post-Civil War Field

2. Representing "robber barons"

3. Anonymous quote of a young, unnamed New York lawyer declaring Field had "destroyed his reputation as a high-toned lawyer with the public." "[L]awyers disliked him for his avarice and meanness," and the late and "revered New York lawyer James T. Brady had once accused Field of being "'the king of the pettifoggers,' which title has stuck to Field ever since."

4. The Erie “wars,” corrupt judges (George Barnard and Albert Cardozo) and arresting opposing counsel through a “fraudulently procured an order.”

5. The Association of the Bar of the City of New York (ABCNY) investigates Field and judges.

6. Field’s death and ABCNY’s shame.

IV. THE ADVENT OF ETHICS RULES

A. *The Alabama Star Bar Association’s code of ethics (1887).*

1. Thomas Goode Jones

2. The bandwagon effect.

B. *The American Bar Association’s (ABA) Canons of Professional Ethics (1908).*

1. The oath and the canons.

2. Transformations of the American legal profession, 1890-1910.

a. Pettifoggers, shysters, ambulance chasers (coined at the end of the nineteenth century) and, on the corporate side, “corporation tricksters”

b. Changes in composition of profession

3. “[I]deals of some kind, lawyers, like other men, necessarily must have.”

C. *The “Stickiness” of the 1908 Code*

1. Supplementing and supplanting canons

2. Stasis and the canons

D. *The Post-World War II Rise of the American Legal Profession*

1. Lon L. Fuller and *Professional Responsibility: A Statement*

2. Failed reform amid economic prosperity

E. *The Code of Professional Responsibility (1969)*

1. The structure of the Code

a. Canons “axiomatic”

b. Ethical Considerations “aspirational in character”

c. Disciplinary Rules "mandatory in character"

2. Adoption of the Code

3. Watergate and its effects

4. Economic decline

F. *The Model Rules of Professional Conduct (1983)*

1. The Kutak Commission

2. The Fractured American Legal Profession

a. Sorting

b. Specialization

3. The "basic posture of 'my client, first, last and always.'"

4. The inward turn of lawyers

G. The Professionalism Crisis and "Core Values"

1. Professionalism v. Commercialism

2. Chief Justice Warren Burger's compliants

3. Creeds and Pledges of professionalism

4. Core Values and the Model Rules

a. client confidences

b. independent lawyers

5. Ethics 2000 and the fall of Enron

6. ABA Committee About Research on the Future of the Legal Profession

V. CONCLUSION

Joseph Bangs Warner and the divided lawyer. Whether the lawyer was "demanding justice," or ready to "to take any case of any man who will pay him for it, and to do his best to make that case prevail," was "done only under a strain of conscience." At end of day, lawyers could not avoid "responsibility for results"; lawyers were "unsheltered by any professional immunity, and answerable to public judgment for whatever he does or tries to do, for his client."