

# MORALITY AND





# PROFESSIONAL ETHICS

BY ELDER DALLIN H. OAKS

My dear  
brothers and  
sisters, I feel very  
privileged to  
have been invited  
to address this  
Founders Day  
observance of BYU's  
J. Reuben Clark  
Law School.

# My interest in doing this is obvious.

Less obvious is how I have found time to prepare these remarks. It could not have been done without the valuable research assistance of Pamela B. Hunsaker and Marianne M. Jennings, as well as a helpful reading by Dean H. Reese Hansen and his associates. I am grateful to each of them and show my gratitude by the obvious disclaimer: They are not responsible for what I have done with the material and suggestions they provided me.

In preparing for these remarks, I reread what I said over 20 years ago at the dedication of the building that houses the J. Reuben Clark Law School. I used that occasion to add what I called “one additional charge” to the formal charges given to the Law School at the ceremony commemorating its opening two years earlier. This additional charge concerned what I called “the J. Reuben Clark Law School’s special challenges and opportunities for leadership in teaching ethics, morality, and professional responsibility” (“Ethics, Morality and Professional Responsibility,” Proceedings at the Convocation and Dedication of the J. Reuben Clark Law School, Brigham Young University, Sept. 5, 1975, pp. 27–28).

I approached this subject from the standpoint of what I called “the deeper values from which we obtain our commitments to law, morality, ethics, and professional responsibility” (ibid.). I asserted that “the J. Reuben Clark Law School has the most promising ideals and circumstances to be a leader in this important area” (id., 34–35). I presented my case for that assertion in these words:

*We have no diffidence in talking about religious commitment at Brigham Young University, and we will have none in the J. Reuben Clark Law School. Religious commitment, religious values, and concern with ethics and morality are part of the reason for this school’s existence, and will be in the atmosphere of its study. As President Marion G. Romney . . . noted in our opening ceremonies, this law school was established to provide an institution in which students could “obtain a knowledge of the laws of man in the light of the laws of God.”*

*If it is true that law students cannot be taught ethics and morality in law school because those value commitments are fixed before they enroll, then that fact, an excuse for other law schools, becomes a unique opportunity for this one. Most of the students and faculty at this law school are rooted in the same religious tradition, and that tradition more than any other fact accounts for their choosing this setting to pursue their professional goals. The common ideals, principles, and commitments of that tradition should make this institution superbly effective in strengthening the moral, ethical, and professional foundations that compose the finest heritage of our profession.*

*Because of our reliance on these common ideals, principles, and commitments, the new building being dedicated today should . . . be looked on as . . . a monument to our determination that the fairness, decency, integrity, virtue, and love of truth taught at the hearthstones of thousands of homes throughout the land shall have a concentrated impact on the legal profession and the nation’s laws. It is in these homes, by God-fearing parents, that the young men and women who will be our graduates have already gained that intangible moral instinct that will bear its fruits in the legislative halls, the courtrooms, the offices, and other private and public places in the years to come. [Id., 35–36]*

As I look back on that occasion, I feel to reaffirm the substance of what I said over 20 years ago, but I wish to use different words to express it. The meanings of words change with time, and so does the emphasis we wish to give to various elements of our charge to excel in this vital area.

My objective in these remarks is not to discuss the details of the relationship between personal morality and professional ethics or the application of either morality or ethics in the multitude of complex circumstances encountered in the practice of law. The J. Reuben Clark Law School has ample faculty resources for that task, far beyond my experience and abilities even to supplement. What I can try to do is to view these forests from afar and suggest some general limits or broad distinctions to be made, within which our sensitive experts will outline the principles, paint the appropriate patterns, and fill in the details.

The morality to which I referred in our Law School dedication—morality based on religious values, in our case—is the foundation undergirding all of our conduct, personal and professional. Professional ethics must be grounded upon our personal moral foundation and, whatever its source, should not be in conflict with it.

A moral foundation is, of course, broader than the structure of professional ethics that should be built upon it. Stated otherwise, laws and rules other than professional ethics are also built upon our moral foundations. There are innumerable examples of personal conduct that violate commandments based on our religious/moral foundations that are not prohibited by the professional codes regulating the conduct of lawyers. For Latter-day Saints, these examples include such deviations as violating temple covenants, breaking the Sabbath, and viewing pornography. Similarly, we look to commandments and principles based on our moral foundation—not to the rules of professional responsibility—to regulate our relationships with our spouses, our children, our extended families, and our fellowmen. Our personal moral foundation is also the source that regulates our relationships with the various organizations—religious, charitable, and community—through which we render the service obligations imposed upon us by those foundation principles.

I was sensitized to the importance of distinguishing between what I have called the “moral foundation” and the professional ethics “structure” by my recent reading of something written almost 25

years ago by Professor John J. Flynn, now Hugh B. Brown Professor of Law at the University of Utah College of Law. His commentary, written in the 1970s following issuance of the ABA’s Code of Professional Responsibility, was titled “Professional Ethics and the Lawyer’s Duty to Self” (*Washington University Law Quarterly*, 1976:429–436).

Flynn’s thesis was that “although much attention has been paid to immoral conduct and the means to prevent it, the greater hazard to lawyers generally is that of amoral conduct” (id., 29). He explains:

*The conventional distinction between amorality and immorality is particularly cogent for the lawyer. Amoral conduct implies that the actor has no standard of right and wrong by which to judge conduct. . . . Immoral conduct, on the other hand, implies that the actor is aware of moral standards but has consciously chosen to violate them.* [Id., 429–30]

For reasons having to do with the lawyer’s role in the adversary system, which I will not elaborate here, Flynn concludes that “the legal profession, while no more or less vulnerable to immorality than others, seems to be in considerable danger of a profound amorality” (id., 434).

That conclusion may or may not be correct. Either way, what stimulated me most were Professor Flynn’s comments about the role of the Code of Professional Responsibility in all of this. He begins:

*The [C]ode assumes that universal ethical responsibilities for lawyers are to be defined in terms of the lawyer’s duties to the profession, his client, the courts, and society at large.* [Id., 434]

The “fundamental difficulty of the Code,” he maintains, is that while it “begins on the correct path by defining the roles lawyers must play in a legal system . . . it simply does not go far enough” (id., 434–35). I quote:

*The Code prescribes duties the lawyer owes to others—to society, to his profession, to his client—but says nothing of the lawyer’s duty to self. The internal guidelines that must limit one’s obedience to orders or external duties are unmentioned and unexamined.* [Id., 435–36]

So what? we might ask. Flynn explains:

*[I]n failing to make the ethical limitations of the Code more explicit, the Code may, in fact, be counterproductive to developing and reinforcing an ethical profession of the highest order. By ignoring the lawyer’s relation to himself and instead of emphasizing only the lawyer’s relation to others and the profession, the Code allows lawyers to rationalize many forms of conduct which would otherwise transgress their duties to self and, consequently, widely held moral values. The emphasis on duty to others leads naturally and dangerously to the “hired-gun” model for deciding ethical questions. The rules that define immorality may reinforce the dangers of amorality, and allow an attorney to justify almost any conduct that promotes the interests of the client.* [Id., 436]

These words of Professor Flynn challenged me to think about the contrast between a code that defines professional “morality” on the one hand, and the lawyer’s moral foundation that provides the basis for his or her personal morality (or amorality) on the other. Of course, we who are trained as advocates can defend the Code’s explicit decision to limit its subject matter to *professional* responsibilities. But we could also make a case for the proposition that a code of professional responsibility should not be entirely silent about the existence of other responsibilities. Its failure to put the professional responsibilities it specifies into the larger context of public or personal morality could be understood as implying that the professional code is a comprehensive list of all of the responsibilities of lawyers and thus, as Flynn says, “allow an attorney to justify almost any conduct that promotes the interest of the client” (id., 436).

Professor Flynn’s writings on this subject are basically a voice from the 1970s. Other voices have taken up the same cry in the two decades since then. Writing in the *Catholic Lawyer*, 32:337 (1989), Simon Y. Balian, a member of St. John’s University’s St. Thomas More Institute for Legal Research, maintains that the legal profession’s “morally neutral” codified rules have the effect of providing an “ethical code” to govern professional actions, in contrast to



the general moral framework that governs a lawyer's actions in his or her personal life. Balian asserts that this dual system of roles encourages members of the legal profession to "leave behind their common moral framework and enclose themselves [in their professional activities] in a world which is at best amoral" (id., 337–38).

Balian calls this concept "dual morality" or "role-differentiated behavior" (id., 3446). He concludes:

*The concept of dual morality for professionals suggests a false dichotomy in the life of a person. . . . The idea of [a separate morality for the professional] role involves both self-deception and abdication from responsibility and invites immoral conduct. . . . The inevitable result of the dominance which the principle of separate ethics holds over the legal profession is pervasive moral failure. [Id., 353]*

Here I pause to thank the spouses of lawyers and other non-lawyer guests whose patience must have been tried by the past 10 minutes of talk about obscure concepts that can only be of interest to lawyers and not to all of them. In appreciation for your patience, I will now try to clarify the subject of "dual morality" or conflict between moral requirements and professional ethics by giving an example from a case decided by the Minnesota Supreme Court.

David Spaulding, a teenager, was injured in an auto accident. His father sued for the damages the defendant caused to his minor son. The injured boy was examined by his own doctor and also by the defendant's doctor. David's doctor did not find anything unusual in the boy's chest, but the defendant's doctor advised the defendant's lawyer that David now had an aneurysm in his aorta, which could rupture at any time and cause his death.

The lawyers for the defendant realized that neither David nor his father nor their lawyers were aware of David's aneurysm and the lethal threat it posed if not corrected. Common morality would seem to require notification of this danger, but the

defendant's lawyer thought professional ethics forbade notifying the adversary. Defense counsel proceeded to settle the case (for a relatively insignificant sum) and neither before nor after the settlement advised David or his father or their lawyer of the threat to David's life. There is your example of conflict between morality and professional ethics. Fortunately, a trial judge later vacated the settlement agreement on the basis that the defense lawyer's failure to make full disclosure to the court

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when the parties applied for approval of a settlement in the case of a minor fell short of the lawyer's obligation as an officer of the court. The Minnesota Supreme Court unanimously affirmed. (*Spaulding v. Zimmerman*, 116 N.W. 2d 704, Minn., 1962.)

This homely example from a routine damage case illustrates one of the public's grievances against the legal profession. If a lawyer fails to take an action the public considers required by common morality and then uses legal rules or lawyer ethics to justify his failure, this alienates the public from lawyers. Citizens in this country do not like to be told that some special group has exclusive rules that excuse them from the civilized conduct that is expected of others.

The potential conflict between personal morality and professional ethics continued to be debated in the 1990s. My first example is from Professor Joseph Allegretti of Creighton University Law School. His book *The Lawyer's Calling* (Mahwa, NJ: Paulist Press, 1996) praises Sir Thomas More as "an authentic Christian hero" (id., 118) and decries lawyers "whose sense of moral obligation comes not from themselves and their conscience but from what others tell them—their profession, their client, their codes of conduct" (id., 119). Allegretti explains:

*One of the great temptations for lawyers is to see ourselves in the third person, as the mere instrument of our client. If we do so, of course, moral issues disappear because we compartmentalize our lives and relegate our moral and religious values to the private realm of family and friends. There is never any risk of having to say "no" to a client or the system because only a moral agent, an I, can stand for something—a lawyer in the third person has nothing to stand up for or against.*

*We see in Thomas More someone who was willing to be an I, to see himself in the first person. More knew that what he said and did mattered, that his soul was implicated in his work. While the precise issue—the taking of an oath—may seem quaint and far-fetched to us, the larger question of what we stand for and whom we owe allegiance to is as contemporary as this morning's deposition or opinion letter. [Id., 119]*

As a second voice from the current decade, I offer the words of our colleague Marianne M. Jennings, professor of legal and ethical studies at Arizona State University's College of Business. Her recent article in the *Wisconsin Law Review*, 1996:1223, as you would expect, is a lively and persuasive criticism of the way professional ethics can deaden our sense of personal morality. She declares:

*What has occurred in the legal profession is typical of any organization or society that becomes addicted to codes or statements of*



positive law. Rules are made, interpreted and modified on a regular basis to fit situations with complex nuances. Once the complexity becomes overwhelming, the original purpose of the rules is lost or ignored.

*Lawyers are practicing craft ethics. If the code, rules, or an opinion sanction an activity, we separate our own consciences from the behavior, label the behavior ethical, and march forward with the full confidence of Professor Harold Hill.* [Id., 1226]

I don't like to quote footnotes, but Jennings's footnote referenced to the mention of Professor Harold Hill is irresistible:

*You may remember that Professor Hill, of The Music Man, was a graduate of the Gary Indiana Conservatory of Music and hornswoggled the entire town of River City, Iowa, into supporting a marching band, its uniforms, and its instruments. . . . Professor Hill was a flimflam man who couldn't play a note. . . . [He] would have been a great lawyer. The man committed fraud in the inducement, but still captured a town's heart as well as that of Marian, the librarian. We still had trouble in River City, but no one ever realized it.* [Ibid.]

A few pages later Jennings writes:

*Slowly but surely, with this fatal combination of the newly defined role of winning for the advocate and reliance solely on written rules to govern conduct and choices, lawyers have shaped a profession governed by rules and devoid of morality. If it ain't written down, it can and will be done. The motto of the trial as a quest for the truth has become a quest for a verdict.* [Id., 1238]

Enlightened by the insights and advocacy of Flynn, Balian, Allegetti, and Jennings, I have reexamined some prior ethical preachments I have given to the students and alumni of the J. Reuben Clark Law School. In doing so I have realized that, whatever I have called it, what I have talked about on almost every occasion I have addressed this audience is the personal moral foundation of lawyers. In effect, I have said that whatever the content of professional ethics, and even if it is silent on a subject, lawyers should be gov-

erned by their religious/moral foundation in all of their professional activities.

In 1988 I spoke to a fireside of students and faculty of the Law School. I referred to Cornell Dean Roger Crampton's article "The Ordinary Religion of the Law School Classroom," 29 *J. Legal Educ.* 247 (1978), in which he discussed the value assumptions in the law school classroom. As I look back on the three value assumptions I quoted on that occasion, I realize that each one of them is illustrative of the thesis I pursue this evening—that our professional codes and rules are only a partial list of the behavioral requirements that must guide men and women in the practice of law.

With the benefit of hindsight, I see that Crampton's questions clearly illustrate that our professional conduct must be based on a moral foundation drawn from values larger than the legal profession but of profound importance to it. Without reliance on this moral foundation, a lawyer can be ethical (or moral) in terms of adherence to the narrow requirements of professional ethics, but amoral in those relationships and that conduct not regulated by professional codes or rules.

Crampton's list of the value assumptions of the law school classroom include these three: (1) Under the "instrumental approach to law and lawyering," "the law is nothing more than an instrument for achieving" the goals of the client, and the "lawyer need not be concerned with . . . the value questions associated with them" because the lawyer is simply "the skilled craftsman who works out the means by which predetermined goals are achieved." (2) The skepticism encouraged in legal study "inclines the student toward concluding that principles are meaningless and values are relative." (3) The steady diet of borderline cases served up in the law school classroom, with relatively little attention to routine legal problems of easy solution, encourages students "to generalize that there are no right answers, just winning arguments."

After quoting these questions, I asked: "Does training in the law dull one's sense of justice or one's moral and ethical sensibilities? Does it matter what clients and causes we serve with the skills that we have devel-

oped?" ("Bridges," *Clark Memorandum*, Fall 1988, p. 13). Some who are present here this evening will remember that I then used the story of *The Bridge over the River Kwai* to illustrate my concerns "for the fundamental integrity of those who study and practice law" (id., 13). I concluded my summary with these words:

*I do not know of a better example of the glories of a technical job well done—craftsmanship in the face of enormous adversity—and the hazards of ignoring whose cause you are serving by your blind craftsmanship—than this homely little adventure play. . . . All of this has a lot to do with legal ethics. It has a lot to do with morality. It has a lot to do with what I hope is a suitable antidote for the worthy but distorting concentration on craftsmanship that is part of what Dean Crampton called the "ordinary religion of the law school classroom."* [Id., 14]

I then quoted Alexander Solzhenitsyn's notable commencement address delivered at Harvard University in June 1978. As I have reread those words, I think they are also an excellent illustration of the difference between the formal structure of professional ethics and the important underlying moral foundation.

Solzhenitsyn described our Western society as wholly dependent upon laws.

*Any conflict is solved according to the letter of the law and this is considered to be the ultimate solution. If one is right from a legal point of view, nothing more is required, nobody may mention that one could still not be entirely right. . . . I have spent my life under a communist regime and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society with no other scale but the legal one is not quite worthy of man either. A society which is based on the letter of the law and never reaches any higher is taking very scarce advantage of the high level of human possibilities (Alexander Solzhenitsyn, "A World Split Apart," commencement address delivered at Harvard University, June 8, 1978). [Id., 14–15]*

Similarly, some of you may be familiar with my book *The Lord's Way* (1991). In the chapter on litigation, I discussed the princi-

ples that seem to me to govern whether a Latter-day Saint or any other Christian should participate in litigation as a client. Those principles are obviously based on the foundations of Christian morality, rather than on the more technical and more permissive provisions on the same subject in codifications of professional ethics.

I wish to share one more voice from the 1990s, that of Professor Maura Strassberg, assistant professor of law at Drake University, writing in the *Iowa Law Review* (80 *Iowa L. Rev.* 901 [1995]). In her criticism of what she calls the “modern articulation of legal ethics as positive law, in the form of governmentally approved ethical rules” (id., 901), Strassberg draws freely on philosophical writings and historical allusions. As to the latter, she cites three instances where morally repugnant but legally required decisions were rendered by well-meaning judges who “viewed law and morality as analytically distinct” (id., 901). Her three illustrations are pre-Civil War u.s. decisions applying the fugitive slave law, Nazi Germany, and apartheid South Africa.

Strassberg also discusses the origin of legal professional ethics. She says that during the 19th century the legal profession’s view of legal ethics was “inextricably connected to morality” (id., 906). (That is the connection I am advocating a century later.) In 1905 the American Bar Association charged a committee of prominent attorneys to frame a code of ethics. In context it appears that this code of ethics was intended to supplement the moral standards that were previously the only restraint on a lawyer’s professional conduct. The resulting Canons, adopted by the ABA in 1908, were not cast in the form of legally enforceable rules.

Looking back from nearly a century later, we see that the Code of Professional Responsibility and the successor Model Rules of Professional Conduct, as their names suggest, have been written like statutes to define the lawyer’s role and to specify rules for the lawyer’s behavior. So viewed, they constitute positive law in their own right and have the potential to preempt moral rules to the contrary. From this I conclude that in less than a century we have moved from the point where per-

sonal morality was not a *sufficient* guide for lawyers to a point where it may not be a *permissible* one.

Thus far I have cited only those professional voices who deplore so-called dual morality. I have read that some lawyers try to justify one moral standard for professional activities and another for the lawyer’s personal life. I doubt that this idea of dual morality is advocated or defended as a matter of principle. Rather, it seems to me to be a rationalization—a seeming justification for behavior contrary to common morality by persons who either lack a moral foundation or choose to ignore their moral foundation when it interferes with their quest for power, prestige, or pecuniary gain.

In my view, the difficult issue for lawyers is not whether professional conduct is governed by moral standards as well as professional ethics. Clearly it is. The real issue arises when our personal religious/moral standards *forbid* conduct that is required by professional rules or by our employer or where our personal standards *require* conduct that is forbidden by professional rules or by our employer. In other words, the difficult issue arises when there is a clear conflict between the foundation moral standard and the professional rule or direction. (Parenthetically, this is not an issue for those who advocate dual morality. All they ask is whether the conduct is professional and therefore governed by the professional rule, or personal and therefore governed by personal morality. The difficult conflict only occurs for those like us who believe that personal morality should trump professional rules.)

Note also that the difficult issue I have described does not arise unless the conflict between personal morality and professional ethics is clear. For example, where professional ethics require particular conduct and moral standards are silent or obscure on the subject, we have an easy case. The same is true when personal morality forbids particular behavior, and the ethical rule is obscure.

A clear conflict raises the interesting question of how the institutions that discipline lawyers will react to a conflict between personal moral and legal ethics.

Strassberg treats this question, asking, “How would a bar committee or state supreme court respond to a clear, but morally desirable, violation of the ethical rules?” (id., 903). Happily, she observes:

*An analysis of bar association advisory opinion shows that adjudicators do flex and bend the [professional] rules in order to accommodate moral concerns. Advisory opinions on the confidentiality of client suicide threats and on information on child abuse have avoided formalism. Instead, these opinions reveal an unusually broad reading of language or even an unexplained deviation from the positive language of the rules altogether. This non-formalistic approach may be better understood as a moderation of the contemporary conversation of legal ethics into positive law. [Id., 903]*

I fervently hope that leniency will be followed wherever morally committed lawyers violate legal ethics in direct opposition to clear and compelling moral rules to the contrary.

The prophet Micah seems to have been commenting on a similar contrast between formal roles and underlying moral principles when he declared to ancient Israel:

*Wherewith shall I come before the Lord, and bow myself before the high God? shall I come before him with burnt offerings, with calves of a year old?*

*Will the Lord be pleased with thousands of rams, or with ten thousands of rivers of oil? shall I give my firstborn for my transgression, the fruit of my body for the sin of my soul?*

*He hath shewed thee, O man, what is good; and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God? [Micah 6:6–8]*

I pray that such fundamental moral principles will ever be your ultimate guide in resolving all of the multitude of moral/ethical questions that confront you in your employment and practice of law.

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