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Heroes for Our Time: Going Beyond Ethical Codes

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For the last 25 years, the legal profession has been experimenting to learn whether requiring lawyers to follow detailed rules would improve professional conduct. I describe the effort as an experiment because we so quickly forget that rule-oriented legal ethics are really a recent development.

Most of today's graduates were born before 1969, the year the ABA published its first Model Code of Professional Responsibility. That code was widely adopted by the states, but it proved so problematic that by 1983, when most of you were at least in high school, the ABA had adopted a new set of standards, the Model Rules of Professional Conduct.

At least two-thirds of lawyers now in practice received their ethics training under these sets of standards, so we tend to think they have governed us forever. A century ago, however, only Alabama had codified even general requirements for lawyer behavior, the "canons" of lawyer ethics. It was not until 1908 that the ABA proposed such "Canons of Ethics" for wider use.

Before that time, and in some states much later, lawyers were licensed based on "I know it when I see it" tests of character. They lost their licenses forever based on standards as vague as "conduct unbecoming a lawyer."

We changed that approach in 1969 for some good reasons. Unstated standards presuppose there is a universal consensus about appropriate behavior. We are in a period of our nation's history where that is not so. Also, application of non-reviewable standards can foster prejudices masquerading as principles. Women, members of racial and religious minorities, and defenders of unpopular causes were often victims of that problem.

Yet the period before rule-oriented ethics had a quality that is lost today. ABA Canon 32 states:

> No client . . . , however powerful, nor any cause, civil or political, however important, is entitled to receive . . . any lawyer['s] . . . service . . . involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person . . . exercising a public office or private trust, or deception or betrayal of the public. . . . [A]bove all a lawyer will find . . . highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest [person] and as a patriotic and loyal citizen.

My purpose in these remarks is not to call for resistance to the rules of legal ethics. However, if we ignore calls to the traditions of lawyering at its best, we do so at real cost. Ask yourself whether the bar you are entering is more humane and more just than the one that existed before 1970. We certainly had problems then, but think about the viciousness and cost of litigation today. Think about the lack of ability to trust another lawyer's word—the loss of loyalty many lawyers feel even to others in their own firms. Think about lawyer blindness even to criminal and fraudulent conduct of their clients, particularly clients that pay promptly and pay well.

You have all studied the ABA Code and Model Rules. One does not find there, for the most part, calls to public responsibility—or to loyalty that transcends client service. And one does not find central there a call to the highest standards of personal character.

While it was not a time immune from moral blindness, the pre-code period was a time when individual lawyers took personal pride in their reputations for integrity, not simply in their technical skill. It was a time when the bar was more a community, one that could engage in serious self-evaluation, not merely create ethical standards that look for all the world like a criminal code.

Part of the problem with rule ethics is we tend to think that once we have defined a problem, the solution will come easily. It is important to learn that problems are usually more complex than they seem, and regulatory solutions are likely to miss their target as often as not. Also, Americans—and especially lawyers—tend to be lured to loopholes as moths to a bright light. For example, we say in our standards that lawyers must tell a court about legal precedent contrary to their client's interest, but I find that many more lawyers can quote the language about when the rule does not apply than when it does.

Ethical rules are often just window dressing we use to pretend we have dealt with a problem. We flatly prohibit "knowingly making a false statement of law or fact," for example, but we make no pretense of enforcing it with respect to negotiating behavior.

Make no mistake, of course, our "experiment" with rules is likely to be permanent. It should be. At their best, the rules governing lawyers go much deeper than what I have suggested. At their best, they describe a network of shared understandings that permit lawyers to deal with others they do not know, without assuming the worst about them.

It is important that lawyers from this graduating class—from this institution with its historic sense and religious commitment—retain a sense of personal responsibility for, and toughening of, the ethical standards governing our whole profession. Pressures *not* to do so have never been greater. All over the country today, lawyers are under pressure to affirm and facilitate client misconduct.

In the demise of important savings and loan associations, for example, it is often charged that lawyers assisted dishonest managers in exchange for a piece of the action. While charges are a long way from proof, I am concerned that in many of those cases—as in other cases in which lawyers are accused of falling short—honest lawyers may have been caught in situations where the rules were not helpful. The ABA Model Rules of Professional Conduct, for example, affirmatively prohibit a lawyer from disclosing a client's intention to commit a major, criminal financial fraud. The bar is only now learning that, in spite of compliance with ABA-approved standards of professional conduct, lawyers may be asked to pay millions of dollars in damages to the victims of their clients' actions.

The professional liability cases further remind us of another truth. To most lawyers, most of the time, there is little likelihood that their behavior will be scrutinized. Occasionally you may have a case that will attract public attention, but most often, you will labor in obscurity. If fear of prosecution is your only compass, you will surely lose your way.

What can we as modern lawyers do to keep our perspective when decisions are tough and only we will know the choices we have made? I believe a big part of today's answer should be one prior generations would have recognized. One way the profession kept its bearings in the days before codes and rules was to focus attention on the lawyers who behaved well—those we might call heroes and heroines of the bar.

I am frustrated by my use of the terms hero and heroine, but I was not able to come up with better ones. The counsel to look for heroes sounds anachronistic today; after all, we live in an age largely without heroic figures. If a public official ever makes a mistake, be it a careless remark or worse, we are reminded of it endlessly. That moment tends to be made the defining moment of our potential hero or heroine's life, and we are encouraged to feel cynical and superior.

It is always easier to see the speck in another's eye than the log in our own. Professional life is a constant struggle with uncertain facts, mixed motives, and ambiguous law. None of us has much to feel superior about.

The best we have to guide us are not perfect people, but men and women of character, doing their best to live their own lives with integrity.

We cannot shift the responsibility for our own action to such people, but focusing on men and women we admire can give the sterile pages of an ethical code a human face. Asking yourself what these people would do in a given situation—or asking whether you could satisfactorily explain to such a person what you plan to do—can bring a clarity to the right answer that parsing the case law will not.

Who are the heroes and heroines you can turn to? Today, lawyers tend to lack the mentors that they once had—men and women who worked closely with beginning lawyers and affected their personalities and understanding for a lifetime.

If you are struggling with the question of whom to admire, you might begin by asking whose example made you want to become a lawyer. In my case it was clearly my dad, a man who successfully practiced law in downstate Illinois yet who took important time away from his practice to give of himself to community service at a time when our city desperately needed honest leadership.

This morning I had the chance to spend some time with the man who gave me my first job in law teaching. It was a critical time of career decision for me, and he was someone whose own character and enthusiasm showed that teaching could be a career with satisfaction and value. You will understand what I mean because he has continued to demonstrate those qualities in all of the subsequent roles he has filled. Many of you know him much better than I; he is Elder Dallin Oaks.

Whoever your heroes or heroines may be, try to remind yourself regularly what drew you to them in the first place. And keep your eyes out for others to admire and emulate. Heroes of your 30s and 40s may be different from those in your 20s; don't freeze your ideals at one moment in your life. If you keep this focus, you just may find that even a profession now approaching a million practitioners can be an enriching community.

Follow the ethical rules—better yet, help improve them. But recognize that it is still true that lawyers are hired as much for the wisdom they are thought to have as for their technical skills—for who they are as much as for what they know.

Like it or not—resist it or not—in less time than you can imagine, you will be heroes and heroines for the lawyers who follow you. Some of you already are today. Your conduct—your life—is something that will affect for good or ill the way law is practiced in future generations. Your influence will exceed your knowing. Resolve to make yours an influence of which you and your family—and this law school—can be proud.

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