ON LAWYER COMPETENCY

Arlin M. Adams

Arlin M. Adams served as a judge on the Court of Appeals for the Third Circuit from 1969-1987. He is presently counsel to the firm Schnader, Harrison, Segal & Lewis in Philadelphia, Pennsylvania. He delivered the following remarks at the Regional Conference on Lawyer Competence of the American Bar Association on November 4, 1988.

I welcome the opportunity to address the issue of lawyer competence. I say this because I believe that the legal profession is in the midst of critical change, and if we are to live comfortably and meaningfully with the results of that change, we must direct its course to a considerable degree.

The recent fast-paced alterations experienced by the profession threaten to erode the standards of professionalism that define our traditional views. Young lawyers are perceived as entering our calling for money instead of the ideals that inspired entrants of ten or twenty years ago. The attractiveness of pro bono work is on the wane. The brightest students are relentlessly recruited by big firms and corporations whose bottom lines rest on the number of hours on a time sheet or profits earned. Computerized law offices threaten to price legal services out of the reach of the middle class, and sharply increasing fees are causing corporations to perform more work in house.

Suddenly, law firms are finding themselves in competition for clients, and in response are acting more like commercial businesses than professional organizations.

Lawyers, like everyone else, are affected by the mores of the time, and during the "Me Generation" of the 1980s, the profession appears to many to have abandoned principle for profit and professionalism for commercialism.

It would be facile to blame the decline of traditional values on the great influx of young attorneys in the last decade, but this cannot explain the corruption exposed during Operation Graylord or the maneuverings of experienced trial counsel that have spawned the dramatic rise in Rule 11 sanctions.

All segments of the profession—students, professors, the judiciary, the organized bar, and the practitioners—must share responsibility for the public's changing perception of lawyers and the role of legal practitioners.

The ABA Task Force on Lawyer Competence has identified three elements of lawyer competence: (1) knowledge of the law, (2) the ability to perform basic legal skills, and (3) the diligence and ethical responsibility to apply both the knowledge and the skills to a practical task. Because of the changing nature of the practice, these three components do not coalesce as well as they might.

I would like to discuss each one and then consider how the various segments of our legal society can act to improve them.

Law schools are turning out new lawyers in record numbers, and the press of business has eliminated the traditional apprenticeship period. As a result, young lawyers no longer have the same opportunities to learn professionalism from experienced lawyers. Law students who enter smaller firms or public practice frequently receive no mentoring at all.

As important as knowledge of legal doctrines, is the concept of professionalism. The definition of a professional is one who identifies with the public good, beyond personal gain. At its heart is the Model Code of Professional Conduct. It sets the profession apart from business and defines it as an entity dedicated to public service, so that no lawyer should practice simply for financial reward. Despite this distinction, many firms are being operated more and more like businesses today, with an overriding emphasis on productivity and a reduced commitment to service.

Many attorneys identify required billable hours and the drive for increased revenue per attorney as major causes of decreased professionalism. In the face of sharply increased costs and stiffening economic competition, the concentration on the financial aspects of practice has left the lawyer with little time to continue professional education by discussing cases with colleagues or keeping up with publications.

Although these activities are not fee-generating, they are necessary to insure that lawyers stay abreast of developments. Formerly, this obligation could be discharged by attending periodic bar association meetings and keeping in contact with other members of the profession. But today's lawyers derive much of their information through private study of the masses of publications. Thus an activity that formerly was a basis for discussion among attorneys has largely been transformed into a solitary exercise, devoid of the interaction that distills workable principles from theoretical precepts.

In addition to becoming more isolated from other members of the bar because of the press of producing billable hours, the young attorney also experiences less client contact. The increasing con-

centration on the commercial and transactional aspects has depersonalized the practice. Specialization has replaced many small, general purpose firms with large-scale departmentalized firms that concentrate on corporate clients. The satisfaction of guiding an individual client through the intricacies of the legal system has been replaced by the desire to mastermind large transactions involving multitudes of corporate entities.

In the highly specialized world of current practice, the role of the lawyer as a public servant is often lost. The attorney who pursues every ephemeral avenue of relief to postpone the day of reckoning or employs strategies to exhaust the financial resources of an opponent has, in some respects, sold out to the client and is neglecting the interest of society in the orderly operation of the system.

Lawyers must be able to exercise independent judgment precisely because of the type of service the law offers to society: namely, making our legal system accessible to everyone. The unique nature of the practice is that the lawyer's duties to a client may conflict with duties owed to others. The attorney's personal values may produce further conflict, and all of this may take place while he or she is providing the client with access to the system.

Our obligation is to achieve the best outcome for a client within the bounds of law and conscience. These goals are not necessarily in conflict. Rather, our obligation to society is simply a limit on how zealously we can represent a client.

The client also has an interest in the efficient operation of the system, and any service the lawyer provides to the client contributes to the system and so affects all of society. The client's trust presupposes that the lawyer's self-interest is counterbalanced by a devotion to serving both the client's concerns as well as the public good.

Lawyers serve the public interest by exercising independence—not only from their clients but also from the business community, political groups, and government. This independence in the past has served as a focus of reform; as a stabilizing force in troubling times; as a support for democratic government; and as a shield against tyranny.

The increasing commercialization of law threatens to undermine this independence by tying law firms more closely to business and political concerns. The fear is that if law firms practice in other fields besides law—for example, real estate or business consulting—they tend to behave more like other business conglomerates than like law firms. As a consequence, the attorney's duty to society may soon be subordinated to the demands of the marketplace.

The existence of these separate interests will also serve to further erode society's perception of the independence of the profession. Our practice is more public than that of other professionals because our operating arena is society's legal system. As a result, our duties are seen as public or quasi-public, and our activities inevitably contribute to the evolution of the system. Any identification of our profession with business, government, or other entities can only confirm society's growing perception that lawyers are no longer the independent guardians of the system.

A major complaint of recent graduates is that their analytic knowledge has not prepared them to practice. Despite the introduction of clinical courses, law schools still are not teaching young lawyers what they need to know to perform everyday work as counselors.

A grasp of the technical aspects of practice can be gained only through experience, but the disproportionate focus on appellate cases means that students spend the first three years of their career with little understanding of fundamentals—client interviewing and counseling, negotiating and settlement, pretrial discovery and motion practice, and, equally important, the daily interaction with other attorneys. This lack of familiarity with practical aspects means that young lawyers will be inexperienced at recognizing the kinds of ethical problems and conflicts that are associated with daily practice.

The skill of lawyering has become much more difficult for the experienced attorney as well, because of alterations in the nature of law. Twenty-five years ago, the common law was the basis of the practice. Recognized doctrines originated from historic precedent, and were gradually shaped by lawyers and judges as society advanced and matured.

The more recent proliferation of statutory and regulatory law has changed both the fashioning of rules of conduct as well as the practice. Law now has become not just a vehicle to settle private disputes but a means of redressing societal wrongs. The advent of the "public plaintiff" has accompanied the increase of legislation in the areas of public health, environment, products liability, industrial safety, and civil rights. Issues that formerly would have been dealt with solely by the legislature now find their resolution in court. Attorneys working in these areas are grappling with relatively unfamiliar aspects of the law, including the scope of their duty to society when a statute defines that duty more specifically.

This multiplication of fields of practice also means that attorneys are working in areas in which the profession has less experi-

ence in spotting conflicts. The greater encroachment of statutory law into all aspects of commerce renders conflicts more far-reaching than formerly, and they become more complex when public issues are implicated. The increased participation of lawyers and law firms in business activities also renders the area of conflicts more problematic as well as more apparent to the public.

Moreover, a lawyer may be able to perform a task in an acceptable manner but still fall short of the standards of professionalism because of external or internal circumstances. Skillful performance can be undermined by such practical considerations as overwork, mistake, or inattention. Personal impairment can also account for inadequate performance.

A recent survey of Washington state lawyers declared that lawyers reported twice the rate of alcohol abuse as the normal population. Lawyers also exhibited higher scores for anxiety, depression, and social alienation.

Competent professional performance encompasses not just legal knowledge and skillful performance of basic tasks, but also ethical responsibility in the application of that knowledge and skill. The component of professionalism, the most difficult to identify because it rests on ideals, subsumes not only the duty of loyalty to client and court, but also the duty to society.

As we explore the elements of professionalism that have brought us together for this conference, we must not neglect the more undefinable traits of character, personal ethics, and public service that have distinguished the profession for so long.

The ideal of loyalty to the client may require us to spend time, energy, and resources in ways that fail to maximize good to the greatest number of people. Lawyers who advise their clients how to avoid a tax or a regulation, even though they are fair and reasonable, face a dilemma because their acts deplete society's resources. The public defender who takes a marginal case to trial may be squandering scarce judicial capital.

The immorality of wasting the best legal talent to do the bidding of whoever can pay is compounded when the client uses these resources to avoid social obligations to those groups whose greater needs these lawyers should be meeting. The public thus sees the legal system not only as failing to confer benefits wisely and efficiently but as actually harming society.

Because more and more cases involve "public interest" statutes or large classes or plaintiffs, lawyers are more often in the limelight than they have been historically. The question whether a law ap-

plies to certain defendants becomes merged in the public's eye with whether the law *should* apply. The transition from a legal to a moral question inevitably finds some attorneys on the losing side of the moral issue, because one of the fundaments of our code of professional responsibility is the adage that all sides should be represented with maximum skill and vigor.

Thus we come to a question frequently asked of lawyers by both the public and the profession itself: can a good lawyer be a good person? Or the corollary, can a good person be a good lawyer?

Whether a lawyer who uses only legal means can nevertheless be accused of immoral conduct is the issue that underlies the question of conflict of interest, zealous representation of clients, and professional conduct in general.

As Professor Gillers of New York University Law School points out, "legal" and "moral" are not necessarily congruent terms. What society may tolerate as legal behavior may be condemned as immoral, and morally necessary behavior may require that its proponents act illegally. Some of the behavior that society has been quick to condemn is a result of a system that has chosen legal goals above strictly moral ones.

Let me elaborate a little on Professor Gillers' distinction between legal and moral as a useful tool in discussing the changing climate in which we practice today. Gillers argues that when a lawyer is fulfilling a public assignment—that is, a task that society has determined to be socially beneficial, regardless of the outcome in any particular case—the public should not characterize the lawyer's conduct as immoral.

An obvious example is in the area of criminal defense. The goal of our criminal system is to convict the greatest number of guilty defendants, while minimizing inaccurate convictions. As part of this system, we have charged criminal defense attorneys with safeguarding individual rights that may be more precious than the goal of convicting the guilty. If society requires the profession to defend its members' rights against government intervention, those members must not then criticize the profession when it succeeds in safeguarding such rights. Here the criticism of the lawyer as a hired gun is accurate only in that lawyers are society's hired guns, and as such they must be able to act freely in pursuit of this task.

The area of civil practice is a bit murkier. But here too, the profession has been charged with affording society access to its legal system. When lawyers act in this capacity, to define or adjudicate rights, they should be immune from moral criticism because society

as a whole benefits from their actions. The distinction between legal and moral arises from the separation of the client's ends from the means used to achieve them. Professor Gillers notes that "[i]t is the capacity of litigation as an inquiring process to reveal factual, moral, legal, and contextual truths, not the certainty that it will, that provides its value."[1]

Litigation functions as an inquiring process, providing society with facts that otherwise might not come to light. It also serves as a form of public education; activities that normally might not be revealed may now become news. As a result, litigation may spark debate about the practice in question or the underlying statutes.

Despite litigation's arguable public benefits, one may still insist that a lawyer who challenges public interest legislation cannot be fulfilling the profession's obligation to benefit society while at the same time attacking laws designed to protect society's interests.

We now have public welfare programs, comprehensive environmental laws, and a form of national health system. Attorneys who find themselves in the traditional rights-adjudicating posture against any one of these public interest programs face the problem of service to society while challenging laws that were enacted to benefit the public.

The solution, if there is one, lies at least partly in the realization that the practice has become quite complicated. The media will find it difficult to reconcile the idea of a profession dedicated to upholding the ends of justice, on one hand, and a lawyer who represents a corporation in its challenge to a new environmental regulation on the other hand.

The matter is further confounded by Gillers' distinction between rights adjudication, which he believes should insulate a lawyer from moral criticism, and rights implementation, which he argues should subject a lawyer to the same moral scrutiny directed toward any agent who provides a client with a service or product. This distinction may be a useful one in considering the moral component of professionalism, but how well can it serve our profession as we struggle to reconcile our duties to clients and to society in the press of daily practice?

Fortunately for me, my task has been only to identify some of the issues we should consider in addressing the problem of lawyer competence. I will leave to you consideration of how to design and

[1] Gillers, *Can A Good Lawyer Be A Bad Person?* (Book Review), 84 MICH. L. REV. 1011, 1026 (1986).

implement solutions. But accurate identification of the problem is a necessary first step to any meaningful solution.

Consequently, the last thing I would like to do is to point out some areas in which solutions should be considered.

Against the threat that the practice of law will survive not to serve society but only as a commercial business, lawyers should be prepared to call for changes in law school curricula, in demanding controls on admission to the bar, and in requiring continuing legal education in all areas of competence, including ethics. In seeking to understand the changes the profession is undergoing and to preserve the principles of professionalism, each segment of our community must be willing to participate in identifying the problems and striving for solutions.

In designing responsive courses in professional responsibility, the organized bar is in a unique position to take advantage of the trickle-down effect.

Thus, Penn Law School Center on Professionalism has proposed a program that will offer continuing legal education courses to partners assigned to implement their firms' professional responsibility programs. Besides receiving information on the issue of professional responsibility itself, these representatives will also pick up ideas on how to run their own professional responsibility program. These programs should concentrate on the development of new teaching techniques, such as panel discussions, debates, videotapes, role playing, and even taking advantage of current events and current television offerings.

Law schools must take a fresh look at both their curriculum and their teaching methodology. Reliance on the case method of teaching often precludes consideration of fundamental questions about the law. The failure to devote time to a discussion of the circumstances underlying an opinion conveys the message that political and cultural values, emotional dynamics, and the complexities of life are irrelevant. The study of law should not encourage students to put on blinders while sharpening their minds. From their first days in law school, students should be encouraged to explore the norms of the profession and grapple with the difficult issues that arise in practice.

Faculty members should be aware that they have a significant part to play as role models. Students should see faculty spending time on pro bono work, not concentrating exclusively on research. To that end, law schools should review their practices of appointment and promotion to focus as much on a professor's commitment

to teaching and professionalism as to scholarship. Law school should give students a sense of justice and an understanding of their societal responsibilities.

Law school professors should train students to be competent practitioners by teaching them how to make their legal knowledge operational. Emphasis should be on increased training in advocacy and preparation of drafting assignments. To the extent that inadequate preparation and inattention are the causes of lawyer incompetence, law schools can remedy this by giving positive reinforcement to high professional standards and constructive work habits. Perhaps course work should include less emphasis on writing one final exam, on which quality of expression and advocacy style are not heavily weighted, and more emphasis on writing assignments critiqued by faculty and redone until an acceptable level of performance is reached.

Law firms and individual practitioners have an important role to play in continuing to teach professionalism and ethics by example. A young lawyer's appreciation of the requirements of professionalism and ethics will be lost if he or she does not observe them being implemented in everyday practice.

The first few years of a young lawyer's practice are critical to a successful transition from student to professional. Where the medical profession has residencies to train its newly graduated practitioners, the law must accomplish this transition by the process of mentoring. This is especially important for new lawyers who are not beginning their practice in a firm that has such a program. Local, state, and national bar associations could play a vital role in the mentoring process by encouraging and expanding programs that bring together law students, young lawyers, judges, and professors to discuss ethical issues and the quality of advocacy.

A recent survey revealed that junior attorneys were largely unaware whether their firms had policies in place to address such issues as attorney investment in client business transactions or involvement on the board of directors of a client company. Although the senior lawyers were aware of the existence of these policies, this knowledge had not been communicated to the younger lawyers. Awareness of these policies should be part of the professional responsibility program by which firms ensure that their new lawyers are familiar with the day-by-day application of the Code.

Disciplinary committees can contribute to an increased knowledge of professionalism and ethical issues by implementing tough but fair sanctions for infractions. Once enough information has

been gathered to begin formal proceedings, these proceedings should not be kept from the public; an aura of secrecy only fosters public mistrust of a self-regulated body. More effective follow-up of disciplined lawyers would enhance the image of the practice as self-regulating.

These suggestions are merely a starting point for your discussions. We must each address the problem from our perspective as members of the bench, the bar, or academic circles. A concerted effort is needed to ensure that our profession continues in the tradition of service to society, not to ourselves.