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Successful Artist Management by Xavier M. Frascogna and H. Lee Hetherington

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BOOK REVIEW

ETHICS AND THE LEGAL PROFESSION

Crisis at the Bar. Jethro K. Lieberman.* New York: W. W. Norton and Company, 1978, Pp. 246. $10.95

Ethics in the Practice of Law. Geoffrey C. Hazard, Jr.** New Haven: Yale University Press, 1978, Pp. 198. $10.00

*Reviewed by W. Glenn Watts****

The current public mood in the United States reflects disillusionment with the traditional professions, particularly with the professions of law and medicine. This scepticism toward lawyers has been attributed to their claims to being dedicated to public service and to the reaction of the public to Watergate. The prevarications of Richard Nixon and his staff, most of whom were members of the legal establishment, were viewed by many not only as having brought discredit upon them, but also upon the profession to which most, if not all, of them belonged.

Watergate and other more recent government scandals have revealed to the public just how prominent the legal profession has been not only in providing needed legal services for the businesses and communities of which they are a part, but also for providing governmental services at the local, state, and federal levels. When attorneys are convicted of wrongdoing, one of the questions is whether the culprits should be allowed to practice law if they have failed in such obvious ways to live up to their professional responsibilities. Likewise, the public wants to know if the legal establishment is capable of policing itself to maintain adequate controls over entrance into and exit from the profession.

Recently two books have appeared which deal with these and other issues which are currently affecting the legal profession. The books were written by two well qualified authors, both of whom are educated and trained in the practice of law: Geoffrey C. Hazard, Jr., a professor at Yale Law School, and Jethro K. Lieberman, a graduate of Harvard Law School and the legal affairs editor of *Business Week* magazine.

Hazard's *Ethics in the Practice of Law* grew out of a two part symposium held at Yale's Seven Springs Conference Center which dealt with the problems involved in specifying standards for professional propriety. The discussions were held on a wide range of topics, some of which are covered by the *Code of Professional Responsibility* (the

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CPR), to which all members of the American bar supposedly subscribe.

Lieberman's book, *Crisis at the Bar*, deals with what he refers to as "the lawyer's unethical code of conduct" and what to do about it. His work is sensationalistic and highly critical of the legal establishment. He takes the profession to task for being hopelessly self-serving. Likewise, he believes the *CPR* is a wholly inadequate approach for preventing future episodes of unethical conduct from occurring.

Hazard's book is less strident and more temperate, showing a balanced presentation of the issues raised by some of the legal matters he analyzes. He thinks the disciplinary rules of the *CPR* do not offer much guidance in several areas. But he does not conclude from this, as does Lieberman, that the Code itself is to be blamed for the waywardness of some members of the profession. According to Lieberman, the Code is ambiguous in important areas because the legal establishment has purposely drafted the rules to be open-ended enough to allow for selective interpretation and application of the rules.

Lieberman begins his book with an ethics quiz in which he asks questions such as whether an attorney representing a buyer of real property may receive a "commission" for bringing business to a title insurance company? He answers this and other questions affirmatively, and in so doing tries to show that the legal profession is inviting "public contempt." And they are inviting this contempt, according to him, because the *CPR* is really more a license for dishonest behavior than a way of preventing it.

Both Lieberman and Hazard review some of the history of the American bar's quest for an adequate code of ethics. Lieberman delights in pointing out that the original code of legal ethics was drafted by three ex-Confederate officers. This *ad hominem* argument on his part implies that any ethical statements developed by the three ex-Confederate officers would obviously be faulty. The original ethical statements, which were to serve as a guide to practitioners, were little more than a series of platitudes, such as "be punctual" and "uphold the honor of the profession." Such principles, according to Lieberman, are still present in the recently up-dated canons of the *CPR*, which are equally incapable of providing practical guidance in a wide variety of areas of concern for contemporary practitioners.

Lieberman believes that the bar associations around the country have been and still are more concerned with preserving their monopoly over legal services than they are with seeing that the growing legal needs of the public are being met. He cites as evidence for this charge the vigorous opposition of the local and state bars to recent innovations which have resulted in cheaper services for consumers: advertising, pre-paid legal assistance plans, low cost legal aid clinics, the abolition of minimum fee schedules, and books explaining to the

public how they can perform certain legal functions for themselves, such as filing for an uncontested divorce.

He believes that recent cases dealing with legal clinics, advertising and minimum fee schedules reveal the over-reaction and over-kill of which bar associations are capable when their privileged positions are threatened. For example, if advertising or solicitation can be abused, then all such activities must be banned; and if this banishment has the unfortunate result of denying consumers adequate information on which to rationally choose legal counsel, then the public be damned!

Lieberman also analyzes some of the unfortunate results that follow from the bar's unquestioned acceptance of "the rule of privileged communication." He believes that such a policy has the effect of promoting not only an official policy of being indifferent to truth, but also of encouraging unnecessary and expensive law suits. And furthermore, by allowing vital information to be withheld from evidence, justice is often denied: hardly a minor matter for a profession supposedly dedicated to seeing that justice is done.

However, Hazard argues that "the privileged communication rule" is part of the price we must pay for having an adversarial system of court procedure. He notes that the problem with the inquisitorial continental system is that what is gained in allowing the judge to probe witnesses for the truth is lost in not being able to eliminate the influence the judge's initial mind set has over the outcome of the case. He believes that by having the two best hypotheses compatible with the admissible evidence presented by the opponents in a law suit, the truth more often than not will be discovered. And finally he concludes that there is no way an attorney can adequately represent a client unless he first knows as much about the issues involved as does his client.

Both Lieberman and Hazard deal with conflict of interest issues, which are dealt with in Canon 5 of the *CPR*. This area is one of concern because some attorneys have taken advantage of their positions of public trust by using them for their own financial and political good. Of special interest to both authors is the so-called "revolving door phenomenon." As they indicate in their books, ethical consideration 9-3 of the *CPR* states that a former government employee in private practice will be barred from work on a case only where his prior involvement with that client was "substantial." Lieberman uses Dean Burch, former chairman of the Federal Communication Commission and ex-counsel to Richard Nixon, as a concrete example of ethical impropriety: Pierson, Ball and Dowd, the prominent Washington law firm that Burch joined upon leaving government service, was allowed to handle a case involving RKO General, a firm which had come before Burch on a related matter during his tenure as Chairman of the FCC. The ethics committee that investigated the case stated that such representation was acceptable as long as Burch

was disqualified and screened from any participation in this case. Lieberman asks whether a firm can screen its partners both from conversations relating to the case and from sharing in the fees the firm collects for representing such a client, and also whether it is not only conceivable but highly probable that an attorney's knowledge that he could be offered a prestigious partnership upon leaving government service influences his judgment in a given case.

Hazard devotes an entire chapter to this same issue. He points out that conflict of interest is a problem because of our system of political patronage. Experienced political professionals are attracted to upper echelon government positions partly because they share hopes of accomplishing something while in office. Younger politicos are attracted to lower positions by prospects of demonstrating their skills and gaining valuable knowledge which could be used elsewhere should they choose to leave the public for the private sector.

He agrees with Lieberman that "walling off" a former government attorney from a firm representing a client the attorney had previously dealt with in his official governmental capacity is the "epitome of naive legalism." He states that " '[w]alling off' is thus like the alleged New England practice of bundling, having neither the credibility of real prophylaxis nor the dignity of real self control."

He also feels that another proposed solution is not realistic: the practice of granting a waiver where there is a potential conflict of interest. Waivers are regularly provided upon a satisfactory showing that the client has consented to this arrangement, knowing that the former government attorney can not represent him in any matter having to do with his previous work with the government. But, concludes Hazard, since these waivers are granted by lawyers still in the government, these lawyers are going to be naturally predisposed to liberally interpret their guidelines because they know that it will be to their advantage to keep these exits open for themselves.

However, Hazard thinks that Lieberman's solution would introduce consequences which most of us would find unacceptable. If we take seriously a strict disqualification of government attorneys from private practice, the only attorneys who could afford government service would be those who are independently wealthy, indifferent to financial rewards, or employable in the academic marketplace. This policy would harm both professionaly and intellectually an attorney who wanted to leave government service. His prospects for employment in the private sector would be dim, and he probably would not be able to develop the intellectual capital in which he had invested so much of his time and energy over many long years. The result would also be to destroy the incentives which attract ambitious young people to government service. Consequently, talented young attorneys would remain in the private sector and the public sector would be dominated by overly-cautious, mediocre bureaucrats.

If anything, Hazard thinks our present policies should be more strictly enforced to prevent obvious abuses from occurring. However, he thinks that it is a mistake to assume that the primary reason lawyers now enter government employment is to feather their nests with future clients. For all its faults, the present system does enable and even encourage bright and dedicated attorneys to take responsibility for enforcing the law, and to participate at least temporarily in the shaping of public policies.

In concluding his book, Lieberman offers numerous practical suggestions for improving the administration of justice in the United States. Among his proposals are the following: 1) allow for public membership or actual public control over state legal disciplinary committees, eliminating the "old boy" system of closing ranks and protecting fellow attorneys charged with impropriety; 2) establish committees that would turn over routine legal procedures such as title searches, uncontested divorces, etc. to para-professionals who would do an adequate job at a lower cost for the consumer; 3) draft lawyers to do their fair share of public interest work as part of the price they must pay for their privilege of serving at the bar; 4) revamp law school curricula so that ethics is taught thoroughly and well, not as indoctrination but as a genuine understanding of how ethical decisions must involve an accepting of responsibility for the effects of one's actions on other persons, regardless of whether or not they are clients; 5) strictly enforce disciplinary rules with fines, suspensions and disbarments for serious offenses so that the bar will have fair warning that high standards of professional integrity are going to be maintained and that wrong-doers will pay a stiff price for their indiscretions and probably be disbarred for premeditated wrongdoing; 6) restore to the legal profession the sense of pride and purpose that goes with a recognition that an attorney is serving in a position of public trust rather than viewing law, as many do, as a quick way to become wealthy.

Both the tone and the conclusions which Hazard reaches differ considerably from those of Lieberman. He does not think, as Lieberman seems to, that the legal establishment is morally bankrupt and incapable of providing effective leadership. He recognizes the serious implications for the bar if the public and the President lose their confidence in the integrity and independence of the legal profession. Yet he thinks that the way out of this dilemma will not be found in some new form of "moral legalism," consisting of longer and longer lists of professional offenses warranting disciplinary measures. For as the world changes, so will business and other cultural practices which will make yesterday's sins obsolete. He feels that a more open-ended set of principles is needed, such as the professional canons. In addition, attorneys must be more willing to accept full responsibility for their actions and some of the actions which their clients may take subsequent to receiving their advice. For to advise, to represent, to

negotiate, or to bargain on someone's behalf is to be an active moral agent whose words and deeds can and often do have good or bad effects upon others.