

Michigan Law Review

Volume 6 | Issue 6

1908

Legal Ethics

Charles A. Kent

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Charles A. Kent, *Legal Ethics*, 6 MICH. L. REV. 468 (1908).

Available at: <https://repository.law.umich.edu/mlr/vol6/iss6/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

LEGAL ETHICS

LEGAL ethics is a branch of general ethics. Some consideration of the latter is necessary to an understanding of the former.

It is a fundamental fact that men generally, if not all sane men, distinguish certain courses of conduct as right and wrong; just as they say particular objects are beautiful and others ugly. They feel a duty to do some things and to refrain from others. If savages do not feel distinctly the sense of duty, at least they are indignant at certain conduct in their associates, and approve of other acts, on moral grounds. This sense of duty is based on a belief in freedom, or the power to choose one line of action rather than another. We have no feeling of obligation as to conduct which is felt to be impossible. But the sense of duty is imperative as to all moral conduct. There can be no justification for not doing the right. Circumstances may change our duty, but so long as an act remains a duty, there can be no full excuse for its non-performance.

The belief, that as to some things we are free and accountable for our conduct, is practically universal. All language on moral questions, all the rules of government and society, and all international law are based on this belief. It is more than doubtful whether any doctrine of determinism ever convinced any man of the contrary.

The right is clearly distinguishable from the pleasant or the useful. We often feel bound to conduct quite unpleasant, though its usefulness may be doubtful. Though the belief in some kind of morality appears universal, men differ greatly in their view of duty under like circumstances. The endless variety of human opinions reaches moral questions, perhaps as much as any. The sense of duty is based on opinion and varies as opinions differ. The strength of the impulse to do the right varies much among persons, who have the same general opinions of their duty. One feels a controlling impulse to act according to his sense of right; another may hold the same belief unmoved. Men get their opinions on moral questions as they get their opinions on other subjects, mainly from their education. The words *ethics* and *morals* are derived from Greek and Latin words, meaning the customary. We believe that which we have been accustomed to believe.

Children must accept the teachings of their parents or they can not live. As they grow older their teachers may change, but they continue to believe what is taught them by their school and religious instructors, their associates, their parties, political, religious, scientific, social, the books and newspapers they read, etc.

As the young grow to maturity, some develop tendencies which attach them to certain teachers and parties rather than others. In order to get on in life we have to join parties. What is called success is usually gained by the leadership of an old party or the organization of a new. The necessary union with others in order to the accomplishment of any considerable purpose modifies the opinions of everyone connected with the organization.

Habits are formed of thinking and acting which make change difficult. Then, in order to public confidence, there must be a stability in one's opinions. People must know where to find a man. The most able and upright men, who often change their opinions on fundamental questions, who go from party to party, from opinion to opinion, even though moved solely by the love of truth, soon lose all influence on practical questions. A few men develop a power of original investigation which enables them to form some opinions with considerable independence, but, generally, we get our beliefs from our environment. Those who are the most confident of their originality may be the most mistaken. And such is the complexity of life, and the immensity in number of the opinions on which we are called to act, that a man who could entirely detach himself from his environment, and act only on his own investigations, would soon find himself powerless to act at all. The greatest of us can rise but little above his surroundings. As our bodies have been formed by an inheritance from innumerable ancestors, so have our minds. Even in scientific departments, one must accept much from his predecessors, or he will make no progress. The sources of human opinions may be traced in outline by looking at society as it now exists, and has existed. The individual, whether animal or plant, struggles for continuance of existence, and for growth. This egoistic impulse is necessary to life. In the fully developed man there is added a struggle for property, for power, for fame, for everything which man desires; and each individual seeks superiority in all these things. The struggle for superiority appears almost universal among men and among the lower animals. We measure our good by comparison with that of others. The egoistic impulses with most men continue through life, the strongest motives to action. They are most necessary. If a man will not care for himself, he will fail. Society contributes to the undue development of these motives by the rewards it confers on success by whatever means obtained.

"In the corrupted currents of this world
Offense's gilded hand may shove by justice,
And oft 'tis seen the wicked prize itself
Buys out the law."

But no one can live by himself alone. Men desire posterity, and kindness to wife and children is necessary. And one early finds that he can obtain but little save in association with others. He must make common cause with his family, his tribe, his city, his country, his party, in society, in church and in state.

Men have rivals whom they can not subdue. Some arrangements must be made by which opponents can live in peace. The weak, by combination, may be too powerful for the strong. Hence come governments and the settlement of quarrels by the law.

So far there may be nothing but a more enlightened selfishness, but in time there come to, at least, some persons, altruistic motives. They learn to feel that it is better to give than to receive, that it is sweet to die for one's country, that the truth must be maintained, though martyrdom result. It is difficult to trace the source of such altruistic motives. Their origin may be too obscure for the notice of contemporary historians. Often they are based on religion, sometimes on patriotism or philanthropy. They may come from great men, who are the founders of religions and of states, and from poets and philosophers. Whatever their origin, it is hard to find it in that struggle for existence and superiority which has dominated society. It is hard to tell why altruistic opinions arise in one age or country, rather than in some other. Why did the enthusiasm for liberty, equality and fraternity spring up in France at the end of the 18th century? Why was the abolition of slavery among civilized nations reserved for our day?

Many have sought to find some principle on which our moral obligations can be based. Christian teachers have said that the command of God is the only sufficient rule of duty. And, though many object to the doctrine that the arbitrary command of the Almighty is the proper basis of right, yet, perhaps, all intelligent men would agree that it is wise to conform our actions to the will of God, where this is clearly revealed, whether we understand its grounds or not. But on many questions the Divine will does not seem to be clear, even to the believers in revelation, and there are some who believe neither in the Bible nor in God. Still the believers in Christian revelation have many principles of duty in which they can agree, and they may properly exhort each other to conformity to the common standard. And the New Testament injunction, "Do unto others as you would have others do unto you," properly understood, is a maxim of the widest and most useful application, solving many problems for those who wish to do right.

Another theory of ethics is that we have a moral sense which enables us to distinguish right and wrong; and that we do right

when we act according to this instinctive sense. It is true that men judge many moral questions intuitively, and that often such judgments are better than those more studied. This is true, also, of many questions not moral. Success in life requires an immediate judgment on the right course, in many emergencies. The man who hesitates too long loses his opportunity. How far do men's instinctive moral judgments agree? The question is an interesting one, but incapable of full solution by me. So far as I can judge, this agreement exists only so far as men have a like education, environments, interests and capacities. A teacher who feels acutely the moral impulses prevalent in his country, his generation, his class, can do much by vigorous appeals to such sentiments, but his admonitions would fall unheeded in another country, or to another class or generation.

The utilitarian theory of morals has been adopted by many able men, as Bentham, Austin and John Stuart Mill. It is that we should do that which is for the general good, for public utility. No one will question that we should seek to do good to the community, city, state and nation in which we live. And religious people believe that the observance of the highest moral rules will conduce to the ultimate happiness of the observer. But who shall tell what is for the highest good of any community or state? Our politicians all agree in advocating the public good, but they are in constant conflict as to the means. And the good of an individual, or of a class, may appear different from that of the public. And how shall any one be bound to sacrifice his own good to that of others, to die for his country, or for the truth? How can a man who believes in no future existence answer this question?

Some philosophers, seeing the difficulties in other theories, have taught that it is right that each person should do what is for his interest or pleasure. He is bound to contribute to the good of others, to individuals or the state, only so far as their good contributes to his advantage.

It may be said that men generally act on this doctrine. It is true that in all the ordinary business of life each individual is thinking mainly of himself. Self interest is the generally recognized and adequate motive for our conduct. All business is conducted on this basis. We choose our occupations in life, our homes and our associates, mainly for the personal good they appear likely to bring. No man, who knows his own thoughts, but must admit that they are mainly about himself, or, at most, about his family. Those who seek the good of their communities, cities, states and nations are expecting to find their own good in the pursuit.

And this close attention to one's own business is essential to success in life. We can seldom find anyone who will look after our interests if we neglect them. An enlightened self interest constitutes a pretty good guide. The love of pleasure may not be injurious, if it be pleasure of the highest and most enduring kind. Moralists do well to dwell on the intimate connection of virtue with the highest happiness. But, after all this has been truly said, I pity the individual who does not at times feel in his deepest nature emotions which transcend all self thought. I pity the nation which has not many citizens willing, if need be, to die for their country. I pity the religion whose devotees are not moved by a passion stronger than the fear of hell or love of heaven.

Man is, and must be, a selfish animal, but he is, also, capable of a love of his fellow men, a love of duty, or a love of the truth, surpassing all selfish motives. Herbert Spencer, in his data of ethics, says that a sense of duty and altruism are a development of the feeling of pleasure and pain found in the lowest animals. He thinks his theory a necessary one, and as complete and rational an explanation of the evolution of morals, as gravitation is of the motion of the planets. I am unable to trace the course of this evolution, or to see how the desire of pleasure can produce the willingness to sacrifice all pleasure, and even life itself, to a sense of duty. But, however this may be, Spencer's theory can afford little help to one who believes that he is free, and is seeking some standard by which he may choose the right.

In this absence of a generally accepted standard of the right how are we to judge men of different ages and nations or even the different classes in our own time and country? We may judge them by the highest standards and mark how they fall below these ideals. We may judge them by the results of their conduct, on the general good, and say whether or not they have been useful, or the contrary. But neither of these standards is always just to an individual. He must act according to his light, his opinions of his duty, and these are largely determined by his environment. And, as environments differ, so do opinions on moral questions. In all classes and in all ages there is a common desire for success, for superiority, and duty is generally made subordinate to this desire, or, at least, the individual thinks that right which is for his interest. Generally there is, also, a more ideal morality held by a few, and there is a constant conflict between the ideals of the best man and the practice of the many. We see this today. Our religion and our political institutions are based on the equality of men on their right to the same treatment politically and religiously, but forces of self interest, stronger than

our religion or our political ideals, are depriving the blacks and the nations of Asia of this equality.

Everywhere the ideal and the practical are in conflict, and the rules of morality are made by the practical, modified in some degree by the ideal. Every profession and every business has its special rules which have grown out of its circumstances. The moral theories of soldiers differ from those of civilians. Doctors have a different code from lawyers. Business men have their own rules, and these differ among different classes. There is, probably, no occupation whose followers do not have a code by which they justify their conduct. Thieves and prostitutes do not look on themselves as we look on them. In order to understand the morals of any business or profession we must look into its environment, and seek to see the forces which have produced its current code. If a business is necessary to a society, and cannot be abolished, we must be content with such a moral code as will permit its votaries to live and prosper. Men generally will not abandon their means of living in obedience to any ideal code. And even if a business appears wholly evil, and its abolition desirable, it may be so supported by the vices of mankind that the highest wisdom will aim only at reducing the evil.

I will try to apply these principles to legal ethics, and by these I mean the ethics proper to the members of the legal profession, not the moral code which should govern the making of laws. The latter would be too vast a subject.

The profession of the law is necessary. Nor is it likely to become obsolete. It exists in all civilized countries save China, and it is hard to see how society gets on without it there. The law seeks to determine and enforce the rights and duties of individuals among themselves, and in respect to the government. The wants and passions of men lead to perpetual conflicts, which must be settled by the government or by private war. The rules of law are very complicated, and all attempts to make them simple and easily understood have proven failures. Our statutory law is made and changed by legislators, seldom chosen for their knowledge of law, or of business requirements. The great body of our law is found in many thousand volumes of reports. Before the rules of law can be applied to a given case the facts must be ascertained. Judges and juries cannot, unaided, investigate and present the evidence of alleged facts. Neither can suitors, unaided, do this work. Courts and suitors need the constant assistance of lawyers in their work. There is no getting on without lawyers. It may be possible to improve them, but not to dispense with their services.

The practical legal code of the legal profession, like that of all

other occupations, is determined mainly by the nature of the business and its environment. The chief business of the lawyer is that of counsel as to legal rights, and the maintenance, through the courts, of such rights. The lawyer offers himself as an expert as to the legal rights of all who ask his assistance and as to their enforcement. He is not an expert as to moral as distinguished from legal rights. He may know less of these than his client. There is, too, such a difference of opinion as to mere moral rights that, generally, they do not constitute a basis for advice. Still in some cases there may be in a community a prevailing moral sentiment which will prevent the enforcement of plain legal rights. Such sentiment must be taken into account because likely to affect the result of a suit. In general, the lawyer advises as to legal rights, and considers moral questions only as they affect the result. This leads to an indifference to morality which is often made a reproach to the profession. The business of general advocacy has its dangers. The lawyer comes to ask of any given position, not so much whether it is just as whether it can be maintained. In this respect he does not differ from most other advocates. Many, perhaps most, politicians are watching the currents of public opinion, not to find out whether or not they are right, but to discern some popular wave on which they can ride into power. Our newspapers are aiming mainly to an increase of circulation, and so advocate whatever is likely to be popular. This moulding of one's views to suit his interests is seen almost everywhere. The men who love the truth above popularity are rare. The lawyer differs from other classes mainly in this, that his advocacy of a particular side has been secured by money. He might have been retained on the other side, and, if he had been, his advocacy of the opposite view might have been equally earnest.

It is hard for most people to believe that such openly purchased advocacy can be sincere. They will trust to the sincerity of a politician, in his profession of seeking only the public good; or, even, to that of the most sensational newspaper, rather than to that of the lawyer. The truth, probably, is that the majority of all classes of advocates are sincere. Nature is very kind in allowing us to believe almost anything which it is for our interest to advocate. The uncertainty of the law contributes to the freedom with which lawyers advocate any cause in which they are retained. The suitor is entitled to his legal rights. But, what are these? In many cases it is very hard, perhaps impossible, to tell save at the end of a suit. In giving advice a lawyer is compelled to take many chances. He can act only on probabilities. His interests impel him to advise suits, as otherwise he can get little pay and less reputation.

Perhaps the uncertainty of the law is not greater than that of other opinions, but it is made more manifest by the fact that legal opinions are brought to a decision. A man may cherish absurd views in theology, philosophy, medicine, or even science, all his lifetime, without fear of being compelled to yield his convictions; but a lawyer must justify his advice by results, or he loses his business. The conflict of opinion among even the most intelligent is one of the most marked characteristics of humanity. No view gains universal acceptance. The theory of gravitation is disputed. The most conflicting doctrines as to almost every question of interest to society are maintained by able men. Society is always in a ferment between new opinions and the old. It seems sometimes as though there was nothing fixed, no agreement on which men can act together. And yet union in action is often of far more consequence than the correctness of opinions.

Fortunately, there are in nations and communities deep prejudices inaccessible to the most plausible arguments, and union in these makes government and the rule of law possible, even where the more intelligent are waging endless conflicts on the most vital questions. The good of this conflict is not, as is often said, so much in the final triumph of the truth as in the conflict itself. The benefit is in the race, rather than in any goal. And, as this great war of opinions has always existed, so it is likely to continue to the end of time. The conflicts of the law are but a part of this universal conflict.

The lawyer is seeking a living, wealth and reputation. He can get these only through his clients. What do clients chiefly wish? Is it to get justice? Perhaps they will say this, but they mean by justice their own success; and their chief motive in employing a lawyer is to get one who will win. And they are not particular as to the means used to reach this end. A man charged with crime cares little as to the instruments used to keep him from state prison. In many civil cases clients have a desire to win so strong that they hesitate at no means. The interests of the lawyer lead to the greatest zeal in his clients's cause. His greatest temptation is to the use of improper means. It is hard for him, as, indeed, for all men, to have a morality much higher than that of their competitors. In general, he will think as those around him think, or, at the most, as the best men around him think. If he has a morality much higher he will be likely to lose all employment. Suitors will not retain attorneys who are unwilling to use all means for success generally thought reputable. We must be content with rules of legal ethics under which lawyers can live and prosper. We must find these rules in the necessities of the business, and not alone in an ideal morality.

These necessities of a business are different in different ages and countries, but the question is always what is the highest standard under which the business can prosper? And in practical life it may be difficult to apply a standard to the facts of a given case. Men must often act without time for reflection; and the instinctive judgment of one properly educated may be wiser than the studied rules of an abler man. Here, as everywhere, common sense may be the best sense.

The client must have absolute confidence in his lawyer. He must be able to tell him all the particulars of his case, things which are prejudicial as well as those which are in his favor. In order to this the lawyer must be bound to act only in the client's interest. He cannot be like the judge, solicitous only to do justice. The things which are said must be covered with a veil of absolute secrecy, never to be removed, save for the interests of the client. This rule of legal ethics is so necessary that its validity is never disputed, and it is never violated in practice, save by men who are a disgrace to their profession. Again, the lawyer is bound to make himself acquainted with a case, its facts, as well as its law, before he gives his advice. This is a rule hard to practice. The facts may have to be ascertained from many witnesses, a part of whom are in the interests of the opposing party and cannot be brought to testify save in court. Then a suitor often presents only his side of a case. The attorney must find out what will be the claim of his opponents. He ought to cross-examine his client and all his witnesses before giving advice. The study of legal questions involved should be most thorough. Lawyers claim to be experts in the law, and they should justify this claim by the most careful study before advising suit. This thorough preparation before beginning litigation is difficult. It is often hard to anticipate what questions of law may be raised. It is harder still to predict the facts which will be given in evidence. Then a client is seldom willing to pay adequately for work done to enable his attorney to advise as to a contemplated suit. This is especially true when the client is advised that he has no case. The uncertainties of the law should be fully pointed out to a client. He should be told of the risk in the plainest case, that the most the best lawyer can do is to advise, like our weather prophets, as to probabilities. Still, a lawyer should advise what to do, and take the responsibility of action. In giving advice he will be influenced by the character of the tribunal which must decide. If that tribunal is a jury, he may advise actions which would be foolish, if the decision was to be by judges. The sympathies of a jury in favor of the poor and against the rich and against corporations must be taken into account in bringing and defending

suits; and, doubtless, sometimes, the character of judges, singly or collectively, is weighed in considering the chances of success. And often lawyers avail themselves of legal rules, established by precedent, to maintain claims which appear morally unjust. The right to do this, the necessity, even, of doing it, arises from the fact that the lawyer must seek to enforce his client's legal and not merely his moral right. The suitor is entitled to be judged by the law, and by the tribunals, which the law prescribes.

In the maintenance of a suit in court the lawyer represents only the suitor. The court and the jury should represent justice. The lawyer may rightfully seek to enforce every legal rule which will enable his client to win, and he may, perhaps, be excused if, in the ardor of advocacy, he stretches these rules to their utmost limit. But it is the plain duty of the courts to see that these rules are not transgressed. The temptation to such transgression is found in cross-examination and in arguments to the jury.

The proper limits of cross-examination are difficult to state, and hard to enforce. But courts are bound to protect witnesses from attempts to confuse them and to make them state facts contrary to their intentions. And though the general prejudices of juries are well known, and constitute a factor in every jury trial, yet all appeals to such prejudices during the trial or in the arguments should be peremptorily stopped. The same is true of every plain perversion of the evidence. The law aims to put every suitor on an equality, subject only to the merits of each case.

If an attorney is guilty of devising false testimony, or of knowingly putting in evidence such testimony, he should be disbarred. The offense is hard to prove and is, therefore, the more unpardonable.

One of the hardest things for a conscientious lawyer to determine is his charges for services. Several considerations rightfully affect the amount, as the time properly taken, the difficulty of the questions, the sum involved and the result. The client can know little of the time his attorney should take, or has taken, in the preparation of a case. Nor can he know much of the difficulty of the questions involved. All must be left to the lawyer, and there is great opportunity for exaggeration. Again, there is no uniform standard for legal charges. For the same service one lawyer may charge three times what another would have done. Nor does the difference always arise out of greater ability or experience, or, even, reputation. One lawyer estimates himself more highly, and has the faculty of making his clients take him at his own estimation.

A test by which many attorneys determine their charges is,—

What will the client stand, and not withdraw his business, or what can we get without a fuss, or making a reputation for overcharging? Legal charges are somewhat like railroad freight charges, where the question is generally what the business will stand. The most conscientious lawyers wish to get all they deserve, and many wish to get all they can. Hence, we sometimes hear of legal charges which appear to those, who do not get them, very excessive.

But in this respect some medical men appear to excel the lawyers. They go on the theory that if they save a man's life or, even, try to save it, they may take a large part of his property, since life is worth more than money. If there could be some way devised by which the comparative capacity of lawyers and physicians could be measured, so that the public could judge each one correctly, competition would soon bring down the charges of many who now receive the highest fees.

But it is with these professions, as it is with business generally; purchasers who do not know the value of an article have to suffer therefor. The rich and the good-natured are apt to be overcharged. Perhaps the most a conscientious lawyer can do is not to charge more than is customary, if he can find what that is, and at any rate not to increase a bill because of the helplessness of a client to successfully dispute it. There is very little litigation about lawyers' fees. Respectable attorneys are loth to have the value of their services brought in question in public, and they know enough of the expense and uncertainty of suits to avoid them on their own account, unless the necessity is absolute.

The most scrupulous exactness in keeping their engagements with each other, in court and out, is most necessary among lawyers. They ought to treat each other as gentlemen. The personal squabbling between counsel, sometimes seen in court, is disgraceful.

A high degree of respect is due to the judges in consequence of their position, irrespective of their personal merits. They represent the law, whose protecting force alone binds society together, and makes civilization possible. Individual judges may be weak. They may have got their positions by the most persistent wire pulling; still, they are the organs of that justice without which neither life nor property is safe, and, except in extreme cases, their motives should not be assailed. It is the duty of a lawyer to maintain his views with persistence, and, if beaten in one court, to go to a higher, if the case is sufficiently important and there is a reasonable chance of success; but, if in the end he is beaten, he should submit uncomplainingly, though, of course, he is still privileged to believe and say that he thinks the court in error.

No honest lawyer will attempt to mislead a court as to the evidence, or as to the cases cited as precedents, though after stating the facts correctly he is justified in making the best argument he can to support his suit.

There is an ideal legal ethics, which should be made actual so far as possible. Lawyers have duties to the public, as well as to their clients. It may be said that the ethics of the profession should be such as will most promote the public good. Attorneys are the officers of the courts, instruments in carrying out the purposes for which courts are designed. The aim of the courts is to enforce the ideas of justice which have become embodied in the law. Justice requires that in criminal cases the guilty should be punished and only the innocent escape. It requires that in civil cases no litigant should suffer because he cannot employ the most skilful lawyer. Ought we to say, then, that every attorney is bound to seek only justice, however it affects his client; that he is bound to present to the court every pertinent fact, and every principle of law? Ought he to tell court and jury, when convinced, that his client has no case? An affirmative answer to these questions would make what might seem an ideal system, one to be aimed at. But it would be utterly impracticable under present conditions. No client would ever employ a lawyer whom he thought would disclose the weak points of his case to judge and jury, or abandon his cause when convinced that the merits were against him. And this is not a singular fact. Everywhere individuals and associations, in their struggle for success, are seeking to hide their weak points. There is very little willingness to disclose the truth, when its disclosure is injurious.

Banks and other corporations in which the public are specially interested are now compelled to submit to examinations by government officials, but it will be many years before individuals generally will be required to disclose the secrets of their business. The law has gone a long way in compelling litigants to testify, when requested by their adversaries, but it still carefully guards from disclosure communications between lawyer and client.

Not in our time is the lawyer likely to be other than the advocate of his client, bound to make the most of his case; perhaps, indifferent to the rights of his opponent. And it may be that this, the only practicable rule, may generally secure a greater degree of justice than a more ideal requirement.

C. A. KENT.

DETROIT, MICHIGAN.