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Toward an Ecclesiastical Professional Ethic: Lessons from the Legal Profession

Daniel R. Coquillette and Judith A. McMorrow

The sexual abuse crisis in the America Catholic Church has thrust us into a social drama. Where social drama occurs in the United States, lawyers are sure to be present. Adding a few dozen lawyers to any stressful situation inevitably has interesting consequences. The advocacy ethic of lawyers, which is captured in our *Rules of Professional Conduct*, not only encourages but compels the lawyer to function as a zealous advocate for the client. That assures that the client's point of view is strongly presented. From the perspective of some observers, that adversarial ethic encourages distortion and elevation of the interests of the individual over that of the collective. Whatever the challenges of having the legal system – and lawyers – involved in the current crisis, it has had the benefit of identifying individual, and to a lesser extent institutional, failures.

The experience of lawyers may offer assistance beyond the representation of both the victims and the Catholic Church. Lawyers, like clergy, are professionals with professional norms and ethical requirements. There are obviously huge differences in these two professions. But as priests to our secular religion of law, lawyers are “called forth and mandated by a competent authority” to function in a specific and defined role, the specifics of which are reflected in part in *Rules of Professional Conduct* (cf., Gula). Lawyers' long and storied history with professional codes offers a cautionary tale to those exploring an ecclesiastical code of ethics

The rules of the legal profession were originally designed to encourage good conduct. The first set of rules, *The ABA Canons of Ethics*, promulgated in 1908, was largely aspirational, and spoke generally of loyalty and character. As aspirational guides, the Canons were available for review if a lawyer happened to know of their existence. But many of the aspirational provisions were part of the culture of lawyering and did not need a formal code for weight or credibility.

The second effort to codify lawyer conduct occurred in 1969, when the American Bar Association passed the *Model Code of Professional Responsibility* (1969). The *Model Code* contained nine broad canons, such as “A lawyer should assist in maintaining the integrity and competence of the legal profession” (Canon 1) and “A lawyer should exercise independent professional judgment on behalf of the client” (Canon 5). These broad canons were followed by somewhat more specific, but still heavily aspirational, *Ethical Considerations* (which became known colloquially as “ECs”) and very specific *Disciplinary Rules* (“DRs”). The *Ethical Considerations* offered somewhat more guidance, but maintained an aspirational focus. For example, “A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct.” (EC 1-5). The *Disciplinary Rules* were designed to be enforced in disciplinary contexts and provided the bottom-line requirements, violation of which could subject the lawyer to professional discipline by the state body authorized to control the admission and expulsion of lawyers. For example, DR 1-102(A)(4) states that “A lawyer shall not engage in conduct involving dishonest, fraud, deceit, or misrepresentation.”

The 1969 *Code of Professional Responsibility* did not work well in its dual role of offering both broad ethical pronouncements and specific prohibitions. Some of the *Ethical Considerations* appeared to be inconsistent with the *Disciplinary Rules*, important non-litigation issues that affect the day-to-day life of lawyers were not addressed and the code continued to contain provisions, such as limitations on advertising, that were seen as advancing the economic interests of the profession.

The 1969 Code of Professional Responsibility was in existence a bare 10 years before the lawyers reevaluated the Code. Like the current crisis in the Catholic Church, moral and professional failures of lawyers, including Watergate, inspired the return to the drafting table. In 1983 the American Bar Association promulgated the *Model Rules of Professional Conduct*. The *Model Rules* presented, as its name indicates, specific rules of conduct, designed to be clearer and more easily enforced in disciplinary contexts. The natural tendency when crafting a code during a time of crisis is to offer more guidance and direction, rather than less. After all, moral failures arose because the prior guidance was, by definition, insufficient to stop the lapses (cf. Nielsen). As with the current discussions of an ecclesiastical code, using the code as a vehicle to build public trust is an understandable and potentially positive use of a code. That goal, however, also pushes the code in the direction of setting baselines for behavior.

The evolution in the names of the lawyer codes over the last 100 years reflects this more directive trend. Lawyers moved from broad canons (1908), to a code (1969), to rules (1983). And the focus of these codifications similarly changed from a broad articulation of ethics (1908), to responsibility (1969), to a specific focus on conduct (1983). While the *Rules of Professional Conduct*, recently refined in 2000, are somewhat

better vehicles to punish through a disciplinary system, no one suggests that they capture the normative whole of what it means to be lawyer. Indeed, the Chair of the 2000 revisions panel, was quite open that “Our objective [in Ethics 2000 revision of Model Rules of Professional Conduct] was also to resist the temptation to preach aspirationally about ‘best practices’ or professionalism concepts. Valuable as the profession might find such guidance, sermonizing about best practices would not have--and should not be misperceived as having--a regulatory dimension.” (Veazy). As St. Thomas Aquinas observed, punishment does not create high character and virtue, it merely deters evil conduct. (Coquillette). Codes, particularly when drawn during times of crisis with an eye to deterring wrongful conduct, have a very specific utility – a vehicle for control and punishment. Presumably an ecclesiastical code would be more receptive to “sermonizing” and a tone that might “preach,” but the hydraulic pressure of crisis-inspired codes will be toward specificity.

As codes tend to move to greater level of specificity, the language of values and the broader norms that undergird the specific prohibition often get subsumed into the specific prohibitions. For example, the *Model Rules of Professional Conduct* for lawyers starts out with a preamble that invokes the larger values of the profession. But the weight of the lawyer code focuses on the specifics of prohibited conduct. For example, the importance of the fiduciary relationship, the value of which infuses so many specific provisions, is rarely mentioned in the *Rules* themselves.

Accepting for purposes of discussion that there will be a pressure toward specificity in any ecclesiastical code, with a corresponding danger of losing sight of the fundamental values that drive the code, we can identify some additional challenges and

opportunities to a code of conduct. Based on the experience of lawyers, we would predict that the challenges to an ecclesiastical code fall into five broad areas. First, who gets to craft the first draft, quite apart from the complex question of adoption, will reveal much about the goals and likely success of a code. Second, such a code must acknowledge and confront the inherent limitations of all rules: identifying the optimum level of discretion and understanding the role of fact-finding within a code. Third, drafters must understand – as they inevitably do – the necessity of ethical awareness as a precondition for the effectiveness of any code. Fourth, as a code articulates the contours of the role-differentiated behavior of the professional, it must be sufficiently flexible to reflect the challenges of role-differentiated behavior. Finally, and perhaps most importantly, a code of conduct by its nature focuses on the function of the individual professional and can be an awkward, and often ineffective, vehicle for addressing the need for changes in the institutional structures within which the professional functions. Against these challenges sits a huge and incredibly important benefit -- education.

Who Gets to Draft the Code

Who crafts the first draft of a code reveals who is entitled to sit at the table, whose input is important, and what points of view are most likely to be reflected in the code. Lawyers are regulated at the state level, and these model versions of the lawyer Code and Rules also reflect the challenge of who should have the power of shaping the first draft. By a process largely of default, the “model” versions of the lawyer codes have been crafted by the American Bar Association (ABA). Since the ABA is a voluntary trade association, it has no meaningful power to regulate lawyers. (Violating the code would only get you ousted from the ABA. For most lawyers, that would mean only losing your

subscription to the *ABA Journal*.) The real power of the Rules of Conduct is infused when the rules were sent to the state courts, which then could take the first draft and shape it to reflect the values of the state. This process has come under increasing scrutiny. Some question whether the ABA is sufficiently representative of all who are affected by the lawyer codes. (Wolfram; Kaufman) There is concern about capture by the more elitist members of the bar. There is always the lurking suspicion that the fox is guarding the chicken coop. As other authors have noted, the same credibility challenges face the drafters of an ecclesiastical code.

As the *Rules of Professional Conduct* moved from aspirational to regulatory, the states increasingly have modified the specific rules to make changes in the text on issues such as the duty of confidentiality, candor required to a court, whether lawyers should be mandatory reporters of professional wrongdoing and the like. Changes sharpened the differences between those who proposed the first draft and those who have the power to adopt the final version. This process can provide a vehicle for shared discussion, or highlight the differences and tensions between the competing perspectives.

The Inherent Limitation of Rules

Professional Codes and Rules also share the inherent limitation of all rules. Rules typically have as their goal to identify clear lines of conduct. Their function is to limit discretion and increase perceived consistency. To achieve that goal, they must become more specific. But the more specific the rule, the less the ability to tailor the rule to new circumstances, and this increases the possibility of unfairness in application. (Shauer)

Even assuming the rule is crafted with an optimum level of specificity, there is still inevitable discretion required. The application of any code or rule requires a

decision-maker to analyze what rule applies, engage in fact-finding to see if the circumstances of the case are covered by the rule, and make a decision about remedies. (Alexander & Sherwin). Fact-finding (or self-assessment about facts) is a huge challenge in any ethical deliberation. How many actors in the Church crisis did not take aggressive action because they were not sure that wrongdoing was taking place, were hesitant about their competence to find facts, or were uncertain about whether someone else – more properly placed to take action – had intervened? In many cases the factual uncertainty and requisite fact-finding can appear benign. For example, lawyers who are required by both our fiduciary obligations and our *Rules of Professional Conduct* to avoid representing conflicting interests must make factual determinations, such as whether the interest of two clients are “directly adverse” or whether the lawyer’s judgment will be “materially limited.” The focus on these precise questions can cause the lawyer to lose sight of the important values at stake in this fact-finding.

Rules also tend, over time, to encourage those bound by the rules to take a legalistic approach to their interpretation. The ethical rules for lawyers have become, in many instances, just another tool in the arsenal of lawyers in litigation with an opposing side. (Wilkins). There is also a tendency, over time, to see that everything not forbidden is allowed. We are not surprised that lawyers might take a legalistic approach to their own code of conduct. But this tendency is not unique to lawyers. Since accountability is likely to be a goal of an ecclesiastical code (Gula), those whose conduct is held up to scrutiny under the code will quite naturally be put in a defensive posture.

All these concerns about the limits of codes are not startling new insights. The Catholic Church has a rich and impressive legal system, including canon law scholars

who understand the complexity of doctrinal interpretation and the challenge of words as a constraining force. An ecclesiastical code will not be exempt from these same challenges.

Ethical Awareness and the Values behind the Rules

Rules also require initial cognitive awareness of their possible application. Those bound by the rules need ethical awareness to understand when they are moving into conduct that encroaches on a value behind the rules. But that ethical awareness flows not from the rules themselves, but from the underlying moral values or principles that presumably serve as the foundation for the specific code or rule. Kohlberg's theory of moral development is illustrative. Kohlberg hypothesized six stages of moral development. Choosing to act according to rules because of a concern for punishment reflects a low stage of moral development. Choosing to act according to rules in order to do one's duty, respect authority and maintain social order rates higher on the scale, but still reflects what Kohlberg characterized as "conventional" approach. More complex moral development requires the person making decisions to understand the values behind the rules and recognize the need to thoughtfully consider the competing claims to right behavior. (Dallas)

Enron is a classic example. With a relentless corporate culture of profit maximization, individual professionals became caught up in the corporate goals. In house lawyers, who were asked to prepare the paper work for questionable transactions, often went through the formal process of receiving appropriate corporate approval. They often acted with formal compliance with the rules. But the essence of the transactions was highly questionable. Why didn't more lawyers within the corporation speak out?

From what we have gleaned from that experience, they became caught up in a corporate culture that saw legal questioning of a transaction as an indication that the individual lawyer was just not sufficiently clever to figure out how to get the transaction done. That same corporate culture gave tangible rewards to those clever folks who worked around obstacles. There was a slow stretching of what was seen as tolerable. That last clever deal became the median point, not the outer bounds, of what was appropriate.

The corporate culture blunted the ethical awareness of many, but not all, of the lawyers. This was a process of seduction, not a conscious embracing of wrongdoing. It is quite telling that the two high profile in-house professionals who most strongly questioned Enron's activities were a lawyer and an accountant who had transferred into a division known for questionable activities. The lawyer and accountant had come from outside that "20th floor." They were able to recognize that something was seriously amiss. Because they had not been part of the slow deadening of professional judgment, they could see what was obvious, including what was obvious to outside reviewers during the post-mortem of Enron: *i.e.*, a few individuals were engaged in serious wrongdoing, and a large number of other individuals acquiesced, either through active assistance or a decision to stay silent.

The parallels between Enron and the crisis in the Catholic Church are striking. Both the executives at Enron and the abusive clergy were engaged in clear wrongdoing. Both criminal and corporate law had ample provisions to prohibit the worst of the activities in Enron. Similarly, both criminal law and canon law provided ample support to censure the wrongdoing of the individual church actors. No code of ethics will prevent such knowing wrongdoing. As we are well aware, in both Enron and within the Catholic

Church, the most painful failures were systematic failures that flowed from tunnel vision of many of those around the wrongdoers. A culture of silence impaired ethical decision-making. A code of conduct does not magically create ethical awareness. Education is required to achieve that goal.

Role-Differentiated Behavior

Professional codes purport to identify rules of conduct that are specific, that cannot be derived from general moral principles applicable to all. Often called *role-differentiated behavior*, the notion is that lawyers and priests and others who function in a professional role have specific obligations that flow from their professional roles.

(Wasserstrom) For example, the strong obligation of confidentiality shared by both priests and lawyers derives from the professional role. We expect both priests and lawyers to maintain confidentiality, even in the face of competing claims that right behavior for non-priests and non-lawyers would require disclosure. The professional obligation is grounded in an assessment that the greater good is achieved by maintaining confidentiality. While the duty of confidentiality is often the subject of dramatic television shows, the reality of the life of most lawyers – and priests – is that the duty of loyalty and ethic of care that flow from the fiduciary obligation causes the greatest ethical challenges.

We all engage in role-differentiated behavior, whether as a spouse, parent, lawyer, doctor, or minister. The challenge comes when the individual sees the role (like compliance with rules) as a complete identification of how they should behave. Role-differentiated behavior was a significant culprit in both Enron and the Catholic Church crises. Many individuals saw questioning as outside their role, sometimes

understandably so. There was, in both cases, an assumption that others were in a superior position of both power and fact-finding.

Role-differentiated behavior is an endemic challenge. For example, one of our students was standing on a station platform of the “T,” the public subway, in Boston. To his surprise, a 12 year old kid grabbed the purse of an old lady. There were fifty people on the platform, but no one intervened. The student reported that, inspired by a class discussion about Aristotelian responsibility, he unsuccessfully rushed after the purse-snatcher. When the student finally found a policeman at the top of the station stairs, the officer pointed out that he was a City of Boston policeman, and that the student would have to call the MBTA police. Too many rules, too much occupational specialization, as Max Weber observed, can get in the way of seeing your true responsibility in a clear way.

The Relationship between Codes and the Systems within Which They Function

An ecclesiastical code of conduct may have an important role in sharpening values important in professional functioning. But codes of professional conduct are directed toward *individual* misconduct, and their utility can drown under conflicting signals sent by the institutions and structures within which the professional functions. As Professor Richard Nielsen notes, “external environments and internal organization systems and traditions can support and encourage unethical behavior.” (Nielsen)

Again, the lawyer codes are illustrative. They prohibit the individual lawyer from overbilling, lying to the court, fabricating evidence, representing conflicting interests, and the like. But all the punishment is directed at the individual lawyer. A few jurisdictions have flirted with the 800 pound gorilla in the room: structural systems, such as law firm policies and the adversary system itself, that tolerate and sometimes even encourage

unethical behavior. For example, it is a violation of the lawyer's code to state to your client that you have put in 100 hours when, in fact, you have worked only 50. That false statement involves both lying to, and stealing from, your client. Lawyers are occasionally sanctioned, some quite seriously, for such misconduct. But law firms that require 2200 hours per year by associates – a work level that strongly pushes toward padding of time sheets – receive no disciplinary scrutiny.

The problems of the American Catholic church demonstrate, as so many chapters in this volume attest, that the systems within which the professional functions can have a huge impact on professional choices. Certainly we do not want a defense that “the system made me do it.” Such defenses have been decried since Nuremberg. But the systems within which both lawyers and clergy function can blunt ethical awareness or, more often, create a sense of powerlessness on the part of the individual professional. (Nielsen) And many aspects of the system are not addressed in the professional codes.

This problem is shared by all professionals. Physicians, nurses and other health care professionals struggle with the tension between their professional ethic and the reality of managed care and limited resources. Teachers struggle with professional obligations, in the face of increasing expectation of schools to solve complex social issues with inadequate resources. Business managers must confront the relentless pressure of profit maximization. A code of conduct can highlight norms and values, but as all authors who have touched on this subject recognize, it cannot cure institutional failures.

The *Rules of Professional Conduct* for lawyers could not function against the corporate culture in Enron. It is difficult to envision rules, certainly more specific rules,

that would have stopped the professional failures. Similarly, an ecclesiastical code could not have corrected the numbing of ethical awareness, the discounting of the possibility of recurrence, and the awareness of the effects on victims.

Professional codes cannot function in isolation. To be effective, a code must interact and be harmonious with the aspirational goals of the systems in which the professional functions. As Robert Hinings has shown, organizational structure, such as the adversary system of justice, can either facilitate or prevent moral failure. Specialization by function and occupational hierarchies can be both highly desirable and dangerous. In Professor Hinings's words, "our form of social organization [may] prevent us from recognizing our moral responsibility in the first place." (Hinings) This is great danger.

The Value of Codes

Codification of ethical norms can offer some advantages. To achieve those advantages, drafters must approach the process with great humility and caution. The process of crafting the rules, if inclusive, can facilitate a conversation about shared norms. Rules can help clarify best practices in recurring situations. If reinforced by the corporate culture, rules can be part of the norm setting within the institutions. Rules can be one part of a larger educational process.

But we must recognize that rules can, as many of the essays in this volume suggest, occasionally get in the way of virtue. Here is an example we use in class. It is an ethical dilemma drawn from life, not a sterile hypothetical. A corporate client authorized \$800,000 to settle a terrible accident in which it was clearly at fault. The victims, a poor immigrant family, could not speak English. The victim's lawyer

demanded “\$400,000, and not a penny less.” He was incompetent and did not know the value of his own case. What should the client’s lawyer have done? The usual answer, in light of the confidentiality and zealousness rules, is to offer “\$250,000, and not a penny more!” Now our students are good young men and women. Many are religious devout, and know well the Sermon on the Mount and the Talmud. But occupational rules, which enforce professional minimums, get in the way of their better intuitions. For them law school is like a bramble bush. As Karl Llewellyn observed, they jump in “and scratched out both [their] eyes.” (Llewellyn).

We often take that blindness, the role, as inevitable. But we forget the rest of the poem that inspired Karl Llewellyn’s famous book. “[A]nd when he saw that he was blind, with all his might and main he jumped into another one and scratched them in again.” A professional may be guided by a code of conduct, even sanctioned for failure to comply with it. But such a code must be constantly examined in light of larger moral principles. Those larger principles have been developed, under the inspiration of the Church, by some of the greatest philosophical minds. Hopefully, efforts to develop an ecclesiastical profession will be more successful than the legal profession in fully embracing this moral foundation.

The Value of Education

The dominant theme of this collection of essays is that the root of effective reform is cultural, not technical or legal. And culture is about education, both for the clergy and the laity. We are not experts on seminary education, but our hope for the legal profession is that, through education, we can improve the professional culture. We spend much of our professional lives working with the lawyer codes and can appreciate the important,

but limited, utility of rules. We have no faith in rules alone. They are a small part of the much larger question of the exercise of discretion.

Formal education within a law school, seminary or for the laity is one part of the educational process. That education must include not simply analysis of the norms, but much more rigorous and thoughtful education about how to facilitate conversation and exercise discretion. Too often formal education treats the professional with an ethical dilemma as an autonomous individual with no communal support in assessing right behavior. We must teach students the skills of outreach in ethical discussions. We must constantly remind ourselves that the greatest risk comes from cultures that silence discussion about right behavior.

We also need education in context. This is the case for casuistry – a context-driven decision-making that brings moral theory to life. (Tremblay) Education in context recognizes a role for deductive decisions from larger moral theory and virtue ethics, but validates the messiness of real-life decisions. We need to be constantly teaching each other how deal with the real-life pressures to stay in role, ignore uncomfortable facts, and embrace deliberate ignorance. This education does not end when the diploma is granted. It is a life-long necessity. A final example might bring this into sharper focus. One of the authors of this essay adheres to a religious tradition of pacifism, yet actively supports the education of commanding officers at the Naval War College in Newport through the Naval War College Foundation, and participate in its programs. Why? Because in an era of terrorism, where there are no neat uniforms to mark combatants, the first line of defense against evil conduct, genocide, or war crimes is, at least on our part, the culture of our professional military. That culture is based on their professional education. The

War College teaches its graduates critical judgment, the judgment necessary to abstain from evil conduct and not to tolerate it in others, regardless of the provocation or justification. The same should be true of lawyers and for the church as well.

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