Protecting Lawyers From Their Profession: Redefining the Lawyer's Role

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Traditionally, the attorney is viewed as an advocate for a client. The lawyer's task is to zealously represent the client, and it is not for the attorney to decide which side is right or deserves to triumph. It is assumed that the conflict of arguments in the court will ensure that justice is done.[1]

This view of the lawyer's role ignores the question of whether, and to what extent, an attorney's personal beliefs should influence his or her professional conduct. Seldom discussed are the consequences to the attorney of arguing against his or her prior beliefs. Recent social psychological research has revealed that such behavior may have the unintended consequence of altering the attitudes of the advocate. If so, what are the attorney's obligations to protect his or her values and beliefs? How do they relate to his or her professional commitments and responsibilities?

In attempting to answer these questions, this article analyzes the implications psychological studies have for defining the proper role of the attorney. Part one describes the theory of counter attitudinal advocacy and the research which has supported it. Section two presents my conclusions of the ramifications of this research in determining what the role of the lawyer should be. It considers the criteria which should govern the attorney's power to withdraw or refuse representation. Finally, traditional role definitions for the attorney are examined and contrasted to the model presented in part two. The Canons of Ethics and Ethical Considerations of the American Bar Association's Code of Professional Responsibility are specifically considered. Throughout this article emphasis is placed on identifying the assumptions underlying each alternative role

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1. Many have challenged the assumptions of the adversary system, contending that no real adversary system exists because of the tremendous imbalance in the allocation of legal talent and resources. *See, e.g.*, J. AUERBACH, UNEQUAL JUSTICE (1977).

conception.

I. THE THEORY OF COUNTER ATTITUDINAL ADVOCACY

"Counter attitudinal advocacy" is a theory developed by social psychologists to explain the unintended effects on the beliefs of a person engaged in trying to persuade others. Simply stated, if a speaker delivers a message at odds with his prior views, the "belief discrepant communication behavior will trigger a change in his beliefs or attitudes . . . . He will become more favorably disposed toward the position advocated in the message."[2] This theory has been consistently confirmed by experimental research.[3] Many explanations have been advanced to account for this phenomenon. Among the most prominent are dissonance, incentive, and self-persuasion interpretations. Consideration of them is important to understanding the effects of advocacy on the attorney.

Dissonance theory assumes that people will attempt to achieve consistency among all their views and opinions.[4] When there is an inconsistent thought, a person experiences an unpleasant psychological state called cognitive dissonance. To avoid this discomfort, the individual will behave so as to reduce the dissonance and restore balance. Applied to situations involving counter attitudinal advocacy, dissonance is created by the conflict between, "I believe X," but "I am advocating not-X."[5] In attempting to reduce the dissonance caused by this behavior the speaker may change his attitudes, so that his "private belief becomes consistent with his public behavior."[6]

In refining dissonance theory, psychologists have identified many variables which effect the likelihood of attitude changes. Perhaps most importantly for the lawyer, it has been discovered that, if an advocate has opinions which would lead him to believe

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2. G. MILLER & M. BURGOON, NEW TECHNIQUES OF PERSUASION 59 (1973).

3. Bem, *An Experimental Analysis of Self Persuasion*, 1 J. EXPERIMENTAL SOC. PSYCH. 199 (1965); Berger, *The Effect of Influence Feedback and Need Influence Between Incentive Magnitude and Attitude Change*, 36 SPEECH MONOGRAPHS 435 (1969); Festinger, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL SOC. PSYCH. 203 (1959); Zimbardo, *The Effect of Effort and Improvisation on Self Persuasion Produced by Role Playing*, J. EXPERIMENTAL SOC. PSYCH. 103 (1965).

4. L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

5. Festinger, *supra* note 3.

6. G. MILLER & M. BURGOON, *supra* note 2, at 61.

that his advocacy could do harm, there is a greater probability that his prior views will be changed.[7] Thus, an attorney who believed in preserving the environment, but represented industry in opposing pollution controls, would risk having his original convictions modified. Another important variable for the attorney is effort. The more "effort expended in counter attitudinal advocacy, the greater the dissonance and subsequent self-persuasion."[8]

The second explanation for counter attitudinal advocacy is an incentive interpretation. A person advocating a position will try to find all of the arguments supporting it, and either suppress or find answers to all of the opposing points. This process serves to persuade the individual of the position espoused. As Irving Janis explains:

> When a person accepts the task of improvising arguments in favor of a point of view at variance with his own personal convictions, he becomes temporarily motivated to think up all the positive arguments he can, and at the same time, suppresses thoughts about the negative arguments. . . . This 'biased scanning' increases the salience of the positive arguments and therefore increases the chances of acceptance of the new attitude position.[9]

From the lawyer's perspective this theory is important because it stresses that the greater the justification for counter attitudinal advocacy, the greater the effort to develop a strong supporting position and find answers to opposing arguments, and thus the greater the likelihood of attitude change.[10]

A final interpretation is based on behaviorism and emphasizes self-perceptions. Simply stated, it argues that "people often make inferences about their attitudes by observing their own behavior."[11] As Professor Bem, the originator of the theory, explains:

> Individuals come to 'know' their attitudes and other internal states partially by inferring them from observations of their

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7. Aronson, *Dissonance Theory: Progress and Problems,* in THEORIES OF COGNITIVE CONSISTENCY: A SOURCEBOOK 24 (Abelson ed. 1968).

8. G. MILLER & M. BURGOON, *supra* note 2, at 63.

9. Janis, *The Influence of Incentive Conditions on the Success of Role Playing in Modifying Attitudes,* J. PERSONALITY SOC. PSYCH. 17 (1965).

10. Zimbardo, *supra* note 3. *See also* G. MILLER & M. BURGOON, *supra* note 2, at 70.

11. G. MILLER & M. BURGOON, *supra* note 2, at 71.

> own overt behavior and the circumstances in which it occurs.[12]

Traditionally, it is thought that attitudes govern behavior. Bem argues that the reciprocal is also true. Thus, an attorney is likely to derive his personal beliefs from his professional behavior.

All of these theories have experimental support.[13] Their cumulative impact is to establish a frightening proposition: if a lawyer argues a position at odds with his beliefs, his or her views will change. As Mark Green observes:

> Psychologists note that it is difficult for people to act one way and believe another. Ultimately, either action conforms to belief, or belief to action. After years of representing a client's position, it is not unexpected that a lawyer begins to agree with, if not act like, his business retainers.[14]

Section two attempts to relate this conclusion to defining the role of the lawyer.

II. IMPLICATIONS: DEFINING A NEW ROLE FOR THE LAWYER

I would argue that the above research requires that the attorney's role be redefined. The consequences of arguing against one's beliefs are so substantial that a lawyer has every obligation to avoid doing so. A lawyer should not argue positions which are at odds with views important to him or herself. It is to be expected that in any form of practice, on most issues, a person will have no strong feelings one way or another. In these cases no limitations on advocacy need exist. Each person must decide which beliefs are important enough that they should not be jeopardized. It is my position that when these core beliefs are at stake the individual should not argue against them. Moreover, a person should choose a form of practice which minimizes his likelihood of having clients who will require engaging in counter attitudinal advocacy.

Three assumptions underlie this thesis. The first assumption is that the lawyer's obligation to himself and his views should be dominant. Few decisions are as important as each individual's definition of what kind of person to be. This choice shapes most of

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12. Bem, *Testing the Self Perception Explanation of Dissonance Phenomena*, 74 J. PERSONALITY SOC. PSYCH. 23 (1970).

13. *See* Bem, *supra* note 3; Festinger, *supra* note 3; Janis, *supra* note 9.

14. M. GREEN, THE OTHER GOVERNMENT 273-89 (1975).

what will be experienced throughout life. One's beliefs are integral to that self-definition. It should not be arrived at inadvertently or by accident. If a lawyer's role is seen as representing any client, unintended belief changes will alter personal and professional behavior. Only by making the attorney's obligation to self dominant can it be assured that such choices will be, as much as possible, intentional.

The motive is not entirely a selfish one. The attorney is not just preserving his views. He is also insuring that he will not work against his concept of what society should be. As Charles Rembar points out in the context of representing Richard Nixon,

> [B]elieving I'm a good lawyer, I must assume that if I'm in the case I'll be contributing to his winning. The case described has to do with his continuing in office. And if I think his continuing in office is bad for the country, then I think I'm doing a rotten thing to help him continue in office.[15]

Refusing to argue for a variance of an occupational health standard, or against restrictions of unsafe cars, not only helps maintain the advocate's beliefs; it also helps society. Each attorney is helping to preserve his or her notion of what society should be.

The second assumption is that a person's views should be decided before taking a position, rather than in the process of arguing out an issue. This is not to say that a lawyer should not consider both sides of a controversy; he or she should, and must do so. Both sides, however, should be evaluated by carefully appraising the arguments made by others against the views held. The alternative—arguing the discrepant position and then assessing its merits—is unsatisfactory because the evaluation will not be unbiased. Instead, it will be unintentionally affected by the very process of arguing it.

It is, of course, possible to respond that the appraisal of arguments made by others will likewise not be objective. One is apt to be defensive in upholding his or her views. Nonetheless, I would place a presumption in favor of my beliefs rather than against them. It is a choice in favor of deciding what views to hold by contemplation and appraisal of both sides, and not via inadvertent influence.

This entails the further assumption that one's beliefs are

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15. C. Rembar, Perspectives 214 (1975).

worth preserving. If it were presumed that all views were the product of unintentional influences, then there would be little reason to reject opinions unconsciously molded in this way. Our legal system and our entire society are premised on the idea that a person does have freedom to choose among values and beliefs after considering alternatives. This is not to say that environmental influences are unimportant factors in shaping ideas and behavior. Rather, they must be taken as a given, with each decision made anew, on criteria most comfortable for the person. My values may be a product of my upbringing and surroundings, but that does not mean I should allow all of my future values to be completely controlled by my environment. Instead, I should take what I am now and do my best to choose what I want to be in the future, even though those choices may very well be a product of my past.

Applying this position raises a number of questions. Who will represent unpopular views? Is there no obligation to the client or the system? In criminal cases is the lawyer placed in the role of judge rather than advocate? Each of these problems requires separate consideration.

One objection to my position is that if all lawyers subscribed to this view, no one would be available to represent unpopular causes. A number of factors answer this criticism. Initially, it is likely that each cause will have among its followers advocates who will represent it in court. Therefore, most of the time there will be no problem with legal representation. In those instances in which there is no available counsel who is also a believer, it is likely that there will be attorneys with no strong views who can be retained. A company arguing its right to pollute could find attorneys not preoccupied with the environment, or not committed to one side or the other in the controversy. This reasoning could carry over to most issues, since it is to be expected that different people have varying topics about which they feel strongly.

Attorneys must carefully decide what they are representing. It is possible in some instances to represent a cause without arguing for it. For example, it would be possible to defend the Nazi party's right to free speech without defending Naziism. The lawyer need not argue against his beliefs. The right of expression, not the message, is defended. The proscription is against arguing in opposition to one's beliefs. The nature of the arguments possible must be carefully examined to be sure that they do require counter attitudinal advocacy.

It is highly unlikely that there would ever be a situation where an unpopular view could not be defended on grounds consistent with *any* advocate's beliefs. Still, this possibility must be dealt with. The lawyer has conflicting duties. I believe that the obligation to clients is outweighed by responsibilities to self and society. Joining a profession should not entail sacrificing duties as a citizen—a person should not be compelled to work to change society for the worse, just because he is an attorney. Though it can be argued that society is better off in the long term by insuring that all causes have legal representation, I believe that "a lawyer can also simply conclude the certain business defenses can harm society more than any conceptual contribution made to the adversary process."[16]

What will go potentially unrepresented is not the unpopular criminal defendant, the Sacco and Vanzetti, or the political prisioners, such as the Smith Act defendants. These cases hopefully will always find a civil liberties attorney anxious to defend on principle. If anything would go without counsel it would be the company trying to escape liability for poisoning a river by dumping Kepone into it, or by producing flammable sleepwear for infants. Even then, representation is likely. As Professor Green points out, "[m]ost lawyers agree with their clients. Others laboring in a capitalist economy where money buys talent, may find their ethical qualms soothed by large legal fees."[17]

If, however, a lawyer was absolutely sure that no one else would represent the client, the need to assure every person a day in court justifies accepting a counter attitudinal assignment. This is far different, however, from a "knee-jerk" reaction whenever a client walks in the door to accept the case because that client must have representation, when counsel likely may be available elsewhere.

The second problem with my position deals with the lawyer's obligations to defend his or her client's interests. The proscription against counter attitudinal advocacy should shape the clients an attorney accepts. However, once counsel's services are engaged, what obligations does he or she have to that client? It is clear that his or her responsibilities are not absolute. He or she need not continue representation if it will involve suborning perjury or violating

16. M. GREEN, *supra* note 14.
17. *Id.*

serious ethical commands.[18] Similarly, he or she should be able to disengage him or herself if following the client's wishes, or the nature of the case, requires arguing against important personal beliefs. The traditional difficulty is whether failure to continue representation would prejudice the client's interests. However, that problem should not exist in this area. It is hard to imagine a case where the attorney would not know in advance what he or she would argue. There would thus be time to withdraw from the case and secure other counsel, preventing prejudice to the client.

Finally, there is the problem of applying this role conception to the criminal arena. If the same principles apply, that a lawyer should not argue a postion with which he disagrees, would lawyers be forced to appraise their client's guilt or innocence, and choose not to represent those they believe are guilty? Would not such a view place the attorney in the role of judge and not advocate? Would not the constitutional guarantee of counsel be undermined? A number of factors distinguish the criminal case.

First, the nature of the beliefs involved is different. In most criminal cases the belief involved is the culpability of a specific defendant. Even if this view is changed in the process of defense, there is little consequence to the attorney's overall value structure. Such is not the case in arguing a company's right to pollute. A person's conception of the importance of the environment is at stake. Believing John Doe is innocent seems much different than believing that clean air and water are unimportant.[19] Of course, in criminal cases where fundamental beliefs are involved—for example, questions concerning capital punishment or the state's power to use certain investigative techniques—the issue transcends the determination of guilt or innocence. In these instances representa-

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18. *See* ABA Code of Professional Responsibility, DR 7-102(B)(1). *See also* ABA Comm. on Professional Ethics, Opinions, No. 341 (1975).

19. This is, of course, not to say that representing a business in a pollution case inevitably forces an attorney to argue against preserving the environment. In many cases the issue is a technical one dealing with legislative interpretation and not environmental degradation. *See, e.g.*, Alabama Power Co. v. Costle, No. 78-1006 (D.C. Cir. 1979). The above analysis concerning when an attorney should refuse to represent a business only applies to cases where the attorney must argue against his beliefs about the enviroment.

This does not mean that a polluting company is not entitled to due process of law. Rather, the point is that no single attorney can be charged with having the personal professional responsibility of representing that company if such representation would entail counter-attitudinal advocacy.

tion should be left to those who agree with the cause they are supporting *or are ambivalent*. In most criminal cases, however, the lawyer can represent the defendant without worrying about sacrificing his beliefs.

Second, the advocacy is different in criminal cases. The attorney can focus on forcing the state to prove its case beyond a reasonable doubt. The lawyer is helping to preserve the defendant's constitutional rights in assuring that there is no conviction without such proof. Thus, there need be little restriction on attorneys in accepting or representing criminal defendants.

The overall principle which emerges is not unlike Green's. An attorney should evaluate whether representing a client will require advancing arguments at odds with his personal beliefs. If so, counsel must assess the salience of the opinions involved. If they are important to the attorney—and each person must decide which values he deems inviolate—he should not represent the client. Section three of this paper contrasts this view with the traditional descriptions of the attorney's role.

III. TRADITIONAL DESCRIPTIONS OF THE LAWYER'S ROLE: A COMPARISON

The role described above can be compared to two other models for the attorney. One is embodied in the concept of the English barrister. The other is contained in the American Bar Association's Code of Professional Responsibility.

The English barrister presents a model whereby the lawyer is available to all, regardless of the client or the cause he espouses. As David Melinkoff explains: "Within the limits of his competence and the pressure of other commitments, he is bound to serve all comers who pay his fee."[20] The lawyer is not to appraise those who seek his services. "Conflicts of interest which will justify a refusal to accept a case are also explicit; personal predilections are not among them."[21] Though other aspects of the barrister's practice differ from those of an American attorney, this role description is one accepted by many attorneys in the United States. Matthews and Weiss articulate this view:

> [I]t is not for the lawyer to pass judgment on the client's

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20. D. MELLINKOFF, THE CONSCIENCE OF A LAWYER 164-65 (1973).
21. *Id.*

> personal worth or the social value of the client's project unless such advice is solicited or expected. The lawyer is there to serve the client's desires. A lawyer chooses not his cases, causes, or clients with complete freedom. . . . The lawyer's duty is to be his client's advocate.[22]

This model is based on three assumptions. First, that the lawyer's personal and professional lives must be separate. Professionally the lawyer is to be ideologically neutral. The lawyer should be committed to the skills of advocacy and the legal process, not his or her subjective preferences or social designs. I believe that this argument depends on the feasibility of a separation of advocacy and personal preferences. The theory of counter attitudinal advocacy dictates that professional behavior will alter values which shape the lawyer's personal life. People are not equipped with two minds, each capable of being turned on and off at will. Moreover, even if such separation were possible it would lead to a schizoid existence. Attorneys would be forced to spend their office hours working against what they believe the rest of the time. This doesn't seem like an approach which will foster mental health or happiness.

The second assumption of the barrister model is that the profession's foremost duty is to the legal system. The notion is that society will benefit most from insuring that everyone can obtain an attorney's services. As such, it is the obligation of the profession to represent all who wish counsel. This argument contains a hidden paradox. Though the lawyer is said to have a duty to help anyone who wants to engage him, he can only be retained by those who can pay the fee. As Green points out: "Nor is it a neutral principle that lawyers will represent those who can pay and not represent those who cannot. This means test effectively excludes a large class of Americans from access to legal services; it is very much a value choice."[23] The barrister model must assume either that money is the proper determinant of who deserves counsel or that each attorney will provide free legal services. The former is unacceptable, and the latter is, unfortunately, far from reality.

The barrister model's final assumption is that it is up to the adversary system and not the lawyer to discover the truth. The

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22. Mathews & Weiss, *What Can Be Done: A Neighborhood Lawyer's Credo*, 47 B.U.L. Rev. 231, 231-33 (1967).

23. M. Green, *supra* note 14.

lawyer can best help society by insuring that both sides are presented, for then the truth will emerge. As Dr. Johnson would say, "You do not know it to be good or bad till the judge determines it."[24] This argument forces the attorney to pretend that he has no views on a subject, and that his skills matter little to the outcome of a controversy. Dr. Johnson's view would assume that judicial decisions are somehow divinely inspired. It seems much more reasonable to assume that a lawyer has views about a subject, opinions which are not wrong just because a judge rules against them. All lawyers believe that their work and skills do matter in determining the results of a case. As such, they should not be dedicated to a result which the lawyer believes is wrong. It is for the lawyer to decide what he or she believes, and not pursue contradictory policies in the name of the adversary system.

An alternative model is embodied in the ABA Code of Professional Responsibility [hereinafter referred to as the Code]. This approach provides the attorney with broad discretion in choosing who to represent. It limits the lawyer's options only in so far as it is necessary to insure representation for unpopular clients and protection of clients once the attorney is retained.

In general, the Code provides the lawyer with complete freedom to decide what work he will do. Unlike the barrister model, there is no requirement that the attorney provide services to anyone who can afford to hire him. Ethical Consideration (hereinafter referred to as EC) 2-26 provides that "a lawyer is under no obligation to act as advisor for every person who may wish to become his client." Each member of the bar is able to choose the areas he or she wants to work in, and the clients he or she is willing to represent. A lawyer could, consistent with this provision of the Code, refuse employment to the extent it involved counter attitudinal advocacy.

The Code limits the attorney's discretion in choosing clients only in so far as it is necessary to ensure representation for unpopular individuals and causes. A number of provisions in the Code emphasize the lawyer's obligation to disregard his beliefs and help those who would otherwise go unrepresented. EC 2-26 states that "a lawyer [is required to accept] his share of employment which may be unattractive to him and the bar generally." EC 2-27 provides that "regardless of his personal beliefs a lawyer should not

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24. BOSWELL'S LIFE OF JOHNSON 47 (G. Hill ed. 1887).

decline a client because a cause is unpopular or community reaction is adverse." EC 2-29 requires an attorney appointed by the court to represent the client regardless of the lawyer's personal beliefs about the merits of the case or the nature of the subject matter.

All of these provisions emphasize the responsibility of the legal profession to provide counsel for the unpopular. Most definitely there is a professional obligation on the part of all lawyers to ensure that no one goes without assistance solely because of community preferences. Allowing attorneys to deny representation because of those sentiments would effectively deny people their right to appear in court. It is especially the unpopular who should be able to rely on the protection of the law. Denying them counsel eliminates a necessary check against social persecution and makes the legal process a sham.

In a sense, these provisions also exist to protect the attorney. Without them there would be harassment, and pressure to withdraw, on those attorneys who decided to represent outcasts. The Code allows lawyers to defend their actions as professional obligations. A lawyer who represents communists is not to be branded a "fellow traveler" solely because he is their attorney.

It is impossible to refute these goals. I believe that lawyers must represent the unpopular. The only qualification is that they should not be forced to do so when it requires arguing against important personal beliefs. It is to be hoped that a lawyer will be able to represent many clients with whom he disagrees, because the grounds of argument can be drawn so as to obviate the need for counter attitudinal advocacy. As explained in section two, Nazis can be defended on their right to speak; protestors on their right to demonstrate; axe murderers on their right to due process. If the subject cannot be redefined, and the attorney is required to argue against his beliefs, it is likely that legal representation by others will still be possible. Not everyone has beliefs on the same subject, so many attorneys should be available to represent all who need assistance. Even the Code recognizes a basis for declining representation when the motive is the attorney's personal beliefs and not social pressure. EC 2-30 states: "Likewise a lawyer should decline employment if the intensity of his personal beliefs, as distinguished from community attitudes, may impair his effective representation of a client."

In addition to emphasizing the obligation to represent the un-

popular, the Code protects clients once a lawyer is hired. EC 2-32 requires that an attorney withdraw in such a way as to minimize prejudice to the client. I strongly agree, and as explained in part two, the lawyer can virtually always know what his arguments will be in advance of the proceedings, allowing him ample time to withdraw in such a way as to not prejudice the client's interests.

Thus, the model drawn by the Code is flexible, and generally not inconsistent with the role advocated in this paper.

Conclusion

The traditional role of the attorney emphasizes obligations to clients and the legal system. Omitted from consideration is the lawyer's responsibilities to his or her own beliefs. It is assumed that at worst arguing against one's views is an unpleasant but noble duty of the professional. Social psychologists have discovered, however, that this behavior has the unintended consequence of changing the attitudes of the advocate. This paper defines a role for the lawyer based on an obligation to maintain one's convictions and beliefs.

I believe that this redefined role of the attorney will force attorneys to consider the social effects of their actions. At the very least, the legal profession may come to realize that lawyers are people too.