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By Stephen E. Kalish*

The Attorney's Role in the Private Organization¹

What should be the ethical posture of the professional in the modern organization? This essay explores the plausibility of one tentative answer for one class of professionals—the attorneys. It is put forward to shock the law profession with its extremism, and then to temper the blow with its possibility. It is meant to generate discussion, and the search for solutions to the problems described; it is not offered as necessarily the best solution. It is furthermore hoped that the paper will stimulate professional groups other than attorneys.

I. THE DILEMMA

In the last quarter of the twentieth century, the attorney faces a crisis. In many senses it is a crisis of his own making. At the turn of the century, the lawyer's role in society was understandable and workable. Since then, the role has become unworkable; social and professional factors have changed while role concepts have remained constant. The result is the dilemma discussed in this essay.

American society at the turn of the century is often referred to as individualistic, chaotic and anarchistic. This misplaces the emphasis. Instead, society of that time perceived itself as a machine, and individuals were expected to subordinate their private consciences in order to promote the public good. Individuals were seen as mere cogs in the social machine.

In the world of private business, production was systemized. The modern corporation, with all its demands, became the major force of production. Scientific management became a guiding watchword. Underlying this social and economic development was the notion that employees ought to be loyal to their employers. Employees were to sacrifice their personal, political and moral in-

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1. This paper was delivered to the University of Nebraska-Lincoln, Phi Beta Kappa Chapter, on November 28, 1978. It has since undergone a slight revision.

clinations in order to be productive "team-players." Insubordination became the leading corporate sin.

The organization model, which I will call this regime, required loyalty in order to achieve efficiency. The law reflected these needs. Most employees were said to be employees at will. This meant that an employer could fire an employee for any reason, or for no reason. Of course, the individual worker might have had a private conscience, but she was to leave it at home. If she exercised her private conscience on the job in a manner which the employer interpreted as insubordinate or disloyal, she could be fired. Most employees, therefore, decided to keep their jobs and to play by the company rules. The private conscience was subordinated to the organization which could efficiently produce for the public good.

The private conscience was also subordinated to the public good in areas of society other than private organizations. Professionals, such as attorneys, were asked to play a role in which they too had to forego the call of personal, political and moral conscience. In other words, the attorney was asked to shed his private conscience and to adopt a professional conscience which would lead him to professionally acceptable conduct. In many cases, the attorney became his role, and the professional conscience became his own. Although it could be argued that society lost a morally-free person in this process, it gained an attorney who could be counted on to behave consistently with society's expectations. The attorney thus became a cog in the machine, fostering efficient private planning and thus enhancing the public good.

Near the turn of the century, institutions were developed to foster this strong sense of professionalism, and attorneys were socialized to accept a set of internalized responsibilities which their professional role entailed. The function of the lawyer was defined by unauthorized practice laws; only certified lawyers could perform these jobs. Law schools developed to monitor the initiation and socialization rites. Bar associations were formed to control admission and discipline. Codes of conduct were written. The attorney was shaped to become his role and to adopt, as his own, the professional conscience.

I will call this regime the professional model. Its importance as a device for controlling social behavior, was recognized at the time. In 1924, John W. Davis, the Democratic Presidential nominee and an attorney, was criticized for having represented J.P. Morgan and company. He responded by stating that his professional role, rather than—or even in spite of—his personal feelings or conscience, required that he represent all who requested his services. As he stated: "Since the law, however, is a profession and not a

trade, I conceive it to be the duty of the lawyer, just as it is the duty of the priest or the surgeon, to serve those who call on him unless, indeed, there is some insuperable obstacle in the way."² In Davis, or at least so he said, society had a reliable and predictable tool.

To state that attorneys acted as their professional role and conscience dictated does not explain what this role entailed. The professional model of this period had two constitutive elements. First, it meant that an attorney had a duty to his client. He was to promote, as well as he could, the interests of this client. Second, he was to secure the integrity of the legal system. Of course, these two duties could conflict, but the profession elaborated a common law of accommodation. Since an attorney was expected to act consistently with this accommodation, *i.e.*, consistently with his defined professional role, society could efficiently predict his conduct. This helped the social machine to run smoothly.

The public good of society prospered at the expense of the private conscience of the organization employee and the professional attorney. In a sense, both were slaves to different masters, the organization and the professional role, respectively. To be disloyal to either meant—at least potentially—dismissal or professional censure.

But the system worked, for few single persons were ever subject to both masters. Professional attorneys did not generally work for organizations. Lawyers primarily practiced on their own. At most, they had one or two partners. Whatever decisions they had to make, they made as independent professionals. Each was free to do what his professional conscience dictated. If a client insisted that her lawyer tell the jury that she was innocent when she was not, the lawyer could easily refuse. Of course, this does not imply that there were no adverse consequences to an attorney's choice of conduct. A client could discharge her attorney. But few attorneys relied on one or two clients, and therefore, for most, the loss of one or two was financially acceptable.

Throughout this century, the organization and professional models have remained constant while the world has changed. The organization model remains the regime for much of the private productive world. This is true in spite of governmental, statutory and union inroads which limit employer discretion. Additionally, the professional model, as described, remains the norm for attorneys. But, while once the attorney worked alone, she has now gone to work for lay and law organizations. And while once she looked only to her profession for standards, she now looks to both

2. W. HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* 199 (1973) (quoting letter from John W. Davis to Julia McDonald (Feb. 15, 1899)).

the organization and the profession for guidance. Today, she fears both dismissal and disbarment. For example, an attorney may work for a large law firm, and she may disagree with a senior partner over whether an attorney can properly represent both a husband and wife in a divorce suit. How can she satisfy both her professional role and her organizational superior? At the same time, an attorney may work in the law department of a lay corporation. Her superiors may order her to negotiate directly with a lay competitor whom the attorney knows to be represented by counsel. Her professional norms define this conduct as unethical. She may refuse to negotiate, but she does so at the severe risk of losing her job. Resolving this dilemma of two masters is the most challenging problem facing professional attorneys today.

II. ONE TENTATIVE ANSWER

There are several ways of alleviating the modern attorney's problem. At one extreme, one can attack the organization model. One can insist that persons have the same rights during working hours as they do on their own time. They cannot be punished or dismissed for exercising these liberties. For example, if a person would generally be free to criticize the policies of a major corporation, that person, even as an employee, should continue to be free to criticize the corporation. The organization would not be able to fire her for exercising these rights. But such a model would make organization management extremely difficult and inefficient, sacrificing the ultimate societal goal of the public good to the demands of private conscience. At the other extreme, one can attack the professional model. One can insist that the attorney has only one duty—to serve her employer well. The duty to secure the integrity of the legal system would be forfeited. Loyalty would not only be an important organizational ethic, but it would become an equally important professional ethic. If an attorney-employee did not do what she was told, she could be fired with impunity.³ Such a regime would make organization management easy. But such a model would destroy an important element of the current professional role, which is, in part, the duty to insure the integrity of the legal system.

I want to explore the plausibility of another answer. Instead of

3. Traditionally, the client has had the right to dismiss an attorney for any reason. This suggestion does not eliminate that right. The proposal herein only provides a remedy in tort for a wrongful discharge. This is not different in concept from an attorney's right in contract when he is dismissed contrary to the terms of the contract. Moreover, it is not certain that the staff attorney's employer or the firm associate's employer ought to be considered the client in this traditional sense.

dramatically changing the organization model or completely restructuring the professional model, why not leave them essentially as they are, but provide the attorney in the private organization tenure by common law. In other words, why not provide a wrongfully discharged attorney-employee a judicial remedy?

III. TENURE

The concept of tenure in this context is not a difficult one. It means that an employer who hires a professional hires him to do a professional's job, that is, to play the professional role. Tenure will protect the attorney-employee from a remediless discharge based merely on the fact that he was disloyal, when the disloyal acts or omissions constituted mandated professional conduct; that is, when the acts or omissions were required by the professional role. It will not protect him from discharge for other reasons, or for no reasons, or because he played the role incompetently. The concept is not designed to unduly limit the employer's freedom, or to insist that it cannot rid itself of incompetent (in its own view) professionals. It is designed to encourage the attorney to play his role in a professional way.

But why would an employer want to fire an attorney for acting as an attorney ought to act? One reason is that there might be differences of opinion as to what acts are entailed by the professional role. As noted earlier, what constitutes the professional role will be a balance among conflicting duties. The professional group will have developed its common law accommodation. The employer might insist on a different accommodation and demand that an attorney who works for it be what the employer wants, and do what the employer wants. Tenure will protect the employee from a remediless discharge for not sacrificing his professional conscience and becoming merely a "team-player."

This may be made clearer by examining the concept of tenure in an area in which the term is more familiar—the world of the academic professional. A professor may have a duty to devote a substantial amount of time to student relations. In a sense, this is a duty to the client. The professor may also have a duty to the academic process to research and to inquire. The university may insist that the second duty be ignored, and it may require the professor to spend all of her time with her students. The tenured professor could not be fired for refusing such a demand if the professional group defined her role (*i.e.*, her job) as requiring research efforts. The university's concept of the role may not be substituted for the professional group's concept.

The attractiveness of the tenure concept for the attorney should now be clear. To continue with this illustration, the professor

needs security to do her job, because it requires a delicate balancing between duty to the student and duty to the academic process, and because the university might insist on a job definition different from the professional balance of duties. The attorney in the organization also needs security to do his job, because it too requires a delicate balancing between duty to the client and duty to the legal process, and the attorney's employer might insist on a job definition different from the professional accommodation of duties.

It is important to emphasize that tenure is not designed to protect the personal, moral or political conscience of the employee. It is not a license to act as she wishes. The protection is only designed to protect the attorney who acts, *in fact*, in professionally required ways. It is possible that the individual employee, as well as the employer, might misjudge what the professional accommodation is. This will be true regardless of whether the employer is a lay corporation or a law firm. In the latter case, however, the employer and the employee will both couch their arguments by appeals to professional norms. This will confuse the issue, but it will not change it. Either party could be wrong. The tenured employee-attorney ought to be protected from discharge only if his view of what the role entails is the correct one.

Finally, there may not be a single acceptable professional role for the situation. The profession itself may have left the resolution ambiguous, or there may even be conflicting, but acceptable, notions of the role. In these circumstances, it seems preferable not to afford the attorney-employee tenure. The employer may not insist that the attorney-employee act contrary to the professional norms, but it ought to be able to insist that its employee do what it wants, as long as the activity is acceptable to the professional group.

IV. IMPLEMENTATION

The courts are probably the best governmental institution to implement this concept. They should develop a tort of "wrongful discharge." This will be the legal way to enforce the concept of tenure. The concept has been articulated here on an abstract plane, and to bring it down to earth will require social experimentation. Courts are the best institutions to do this, for each disputed case will be grounded in the particular facts of the instance. A number of important issues—such as: how to define the role, which professional group or institution to look to for guidance, how to relegate proof obligations, whether to limit the remedy to compensatory damages only—will have to be decided. Until we know more about the problem, these issues cannot be addressed with confidence. Admittedly, such a gradualist approach may surprise some,

but as the common law develops the applications of the "wrongful discharge" tort, it will become clearer.

V. PLAUSIBILITY

Most courts still insist that the organization model is the law. A private employer can fire an employee for any reason, or for no reason. But there is evidence which indicates that this "wrongful discharge" suggestion is plausible.

The organization model has been dramatically limited, not only in the public sector, but also in the private sector.⁴ Statutes and labor contracts prohibit employers from dismissing employees for reasons of sex, religion, race, etc. Nor may employers fire union workers for other than "just cause." These developments of the last fifty years indicate a shift in social priorities from an emphasis on efficiency to an emphasis on fairness. The tenure concept here does not even go that far, for it merely attempts to assure that the attorney can play his role, thus enhancing efficiency.

The courts have confronted a similar problem in the landlord-tenant area. The law had been that a landlord could evict a tenant at will for any reason, or for no reason. This paralleled the organization model of employment law. In *Edwards v. Habib*,⁵ and subsequent cases, the defense of retaliatory eviction was developed. A landlord was precluded from terminating the landlord-tenant relationship if his motive was to retaliate for legitimate tenant activity, such as filing complaints with housing code authorities. The judiciary struck at the very heart of the traditional law of property; if it was willing to do it there, it may be willing to do it in the employment area.⁶

In recent years, there has been an enormous amount of discussion with respect to the proper role of an attorney engaged in corporate and Securities and Exchange Commission practice. In short, some very influential persons have suggested that an attorney's obligation to the public, or to the SEC, outweighs what many persons had believed was his primary obligation to his client. Although it has not been suggested that an attorney should be protected from wrongful discharge, some have suggested that the

4. The Federal Constitution has been used to limit the organization model in the public sector. See *Givhan v. Western Line Consol. School Dist.*, — U.S. —, 99 S.Ct. 693 (1979).

5. 397 F.2d 687 (D.C. Cir. 1968).

6. At least one court has already struck such a blow. In *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), the court held that termination by the employer of a contract of employment at will which was motivated by bad faith, malice, or is based on retaliation constitutes a breach of the employment contract. See *Annot.*, 62 A.L.R.3d 271 (1975).

reasons for an attorney's dismissal should be made public. This certainly would deter wrongful discharge, and thus encourage proper professional behavior.⁷

Finally, there is perhaps an emerging right to private employment in circumstances close to those under discussion. Two cases in the last five years, and one earlier case, support the proposition that some courts will award damages to a discharged employee if the court believes that to sanction the dismissal would jeopardize the integrity of the legal system.

In *Nees v. Hocks*,⁸ the Oregon Supreme Court held that an employee could not be discharged for telling the court clerk that she wanted to serve on jury duty, even though her employer had told her to request to be excused. The court concluded that the "community's interest in having its citizens serve on jury duty [is] so important that an employer, who interferes with that interest by discharging an employee who served on a jury, should be required to compensate his employee"⁹

In *Frampton v. Central Indiana Gas Co.*,¹⁰ Frampton was fired because she filed a workmen's compensation claim. Although the Indiana Supreme Court justified its decision by an appeal to the language of the workmen's compensation statute, the court was fundamentally concerned with protecting the right of access to the legal system—in other words, in protecting the integrity of the system. To protect this interest, Frampton was allowed to sue for wrongful discharge.

Two decades ago, in *Petermann v. International Brotherhood of Teamsters*,¹¹ Petermann, a union employee, was discharged because he would not lie to a legislative investigatory committee. Although the California Court of Appeals conceded the employer's general right to dismiss an employee "for any reason whatsoever," to permit the exercise of this right in this case would have jeopardized

7. The SEC has recently circulated the following rule for comment:

When a reporting corporation's general counsel or any attorney retained in connection with matters pertaining to the laws administered or enforced by the Commission resigns or is dismissed, the corporation shall file with the Commission Form 8-K, describing the circumstances of the resignation or dismissal. Prior to submission of the Form 8-K to the Commission the corporation shall provide the resigning or dismissed attorney with an opportunity to comment on the accuracy and completeness of the description. The attorney's comments shall become part of the corporation's submission to the Commission.

SEC Release No. 16045, 44 Fed. Reg. 44881, 44883 (1979).

8. 272 Or. 210, 536 P.2d 512 (1975).

9. *Id.* at 218, 536 P.2d at 516.

10. 260 Ind. 249, 297 N.E.2d 425 (1973).

11. 174 Cal. App.2d 184, 344 P.2d 25 (1959).

dized the integrity of the legal system. Petermann was permitted to sue for wrongful discharge because the "presence of false testimony in any proceeding tends to interfere with the proper administration of public affairs and the administration of justice."¹²

The cases are few, and as we have noted, are contrary to most other cases. But they suggest that if a balance must be struck between protecting the integrity of the legal system or adhering to the organization model, the courts might support the former. This would seem especially true in the case of an employee-attorney who, because of his professional role, is charged with a *special* responsibility to protect the integrity of the legal system.

This last point—that a professional is to be given special consideration when he acts in furtherance of or according to professional norms—was emphasized in *Geary v. United States Steel Corp.*¹³ Geary, a salesman for United States Steel for fourteen years, complained to his superior that a particular product was unsafe. His superior told him to "follow directions," but since he still had reservations, he expressed them to a vice-president of his division. Partially as a result of his efforts, the product was taken off the market. As a result of his circumvention of the corporate chain of command, he was discharged. The Pennsylvania Supreme Court, in a four-to-three decision, denied his claim for wrongful discharge. In explaining this result, Justice Pomeroy suggested that the decision might have been different had Geary had a professional obligation to concern himself with product safety. The justice wrote:

Certainly, the potential for abuse of an employer's power of dismissal is particularly serious where an employee must exercise independent, expert judgment in matters of product safety, but Geary does not hold himself out as this sort of employee. . . . There is no suggestion that he possessed any expert qualifications, or that his duties extended to making judgments in matters of product safety.¹⁴

It seems plausible, in light of *Geary*, to suggest that if he had been an expert professional employee, as an attorney, with his duty to protect the integrity of the legal system, he would have been protected.

VI. SUMMARY

Tenure for attorneys in private enterprise is not now with us. However, given some courts' appreciation that a too rigid adherence to the organization model may jeopardize the integrity of the legal system and that professional attorneys, even in an organization, have a special charge to guard the integrity of the system, it is

12. *Id.* at 188, 344 P.2d at 27.

13. 456 Pa. 171, 319 A.2d 174 (1974).

14. *Id.* at 181, 319 A.2d 178-79 (footnote omitted).

conceivable that future courts will develop the tort of “wrongful discharge” and, in effect, grant the attorney the security to do his job and to play his role according to professional standards.