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Barbara Allen Babcock

Stanford Law School, bbabcock@stanford.edu

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Commentary

By Barbara Allen Babcock*

Problems In Professional Responsibility†

The Old Testament tells of a meeting much like ours today: "And all the people gathered themselves together as one man into the street that was before the water gate. . . . And Ezra . . . brought the law before the congregation both of men and women. . . ." (Nehemiah 8:1-2)

Presuming to act as Ezra before the water gate, I have no complicated "law" to bring you. Although the Watergate affair has raised a storm about lawyers' ethics, and has created a demand for professional responsibility to be taught in law schools and be examined on by the bar, and for lawyers to create new standards and new modes of enforcing them, there is nothing in what any Watergate lawyer is accused of which would indicate that plain old Judeo-Christian standards will not do as a standard for professional responsibility: "Thou shalt not steal. Thou shalt not bear false witness against thy neighbor. Thou shalt not covet thy neighbor's house, nor his ox nor his ass, nor anything that is thy neighbor's."

And perhaps: "Thou shalt not make unto thee any graven image, or any likeness of anything," for those who recorded the tapes, and "Thou shalt not bow down thyself to them," for those who made *the presidency* an image for indiscriminate worship. At any rate, neither courses in ethics nor better discipline by the bar, nor keener awareness of delicate ethical issues have much to do with Watergate, where the things of which lawyers, particularly, were accused did not involve close questions.

There are, however, complex and difficult issues surrounding the meaning of professional responsibility. The first principle (one which is not generally understood by lay people or many lawyers either) is that professional ethics sometimes vary from, and stretch beyond, personal ethics. This means that lawyers may be caught in the most painful decisions where dictates of training and

* Associate Professor, Stanford Law School. A.B. 1960, University of Pennsylvania; LL.B. 1963, Yale Law School.

† This is a somewhat edited version of informal remarks delivered by Professor Babcock at the University of Nebraska College of Law in April, 1975.

personality point one way while the requirements of professional responsibility point the other.

Consider, for example, a case which arose when I was in practice. It was an armed robbery case—a typical one in which a man went into a small liquor store, pointed a gun at the clerk, asked for all the money, got it, and left. The clerk was the only witness, but he was an unusually good witness, calm in the face of a terrifying experience, of the same race as the robber so especially able to make a good identification; in fact, he had picked a photograph of the lawyer's client from several dozen shown him by the police. There was some circumstantial evidence, but nothing significant, and the case rested on the identification by this witness. The client denied guilt; the case was defensible; the lawyer prepared and was ready to go to trial (though the lawyer did his preparation within a few months after the client had been arrested, it was almost a year from the date of arrest until the case was set for trial). A few days before the trial was to open, the lawyer decided he should interview the witness a second time for a final evaluation of the strength of the government's case. He discovered that the witness had moved and changed jobs, but through the simple expedient of checking the post office, the lawyer obtained a forwarding address, found the witness and interviewed him. A year later, the witness was as good as ever, still certain of the identification. Thus, on the eve of the trial, the lawyer was discouraged until the prosecutor called to report that he could not find the key witness, hence he would have to ask for one more week to locate him, but would then consent to the dismissal of the case. Both lawyers recognized that since the case was old the judge would most likely order dismissal on the spot. "Eureka," said the lawyer (to himself of course)—"victory from the jaws of defeat"—and hung up the phone. Then he thought: But how can this be when all that is necessary in order to locate the witness is to check with the post office; and what am I going to do when the prosecutor says the witness has disappeared. Should I say what I know? What if the judge turns to me and asks whether I know anything about the witness' whereabouts. . . . There followed a long night in which a group of lawyers from the office try to determine a lawyer's duty in the various permutations of this potential situation.

When a question comes up like this for lawyers, there is a primary place to turn, the Code of Professional Responsibility, produced under the auspices of the American Bar Association. When one does this, she finds on the one hand, that a lawyer should represent a client zealously within the bounds of law,¹ and on the

1. ABA CODE OF PROFESSIONAL RESPONSIBILITY CANON NO. 7 (1974) [hereinafter cited as ABA CODE].

other hand that in so doing she should not “conceal or knowingly fail to disclose that which [s]he is required by law to reveal.”² But that guide is entirely question-begging, is it not, since what the lawyer wants to know is whether she is required by law to reveal the location of the witness. In the same vein, the Code tells us in another rule that a lawyer shall not suppress any evidence that she or her client has a legal obligation to produce³— and that lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.⁴ Clearly, the lawyer had not done that. But should this rule be extended by inference to mean that the lawyer should help assure the presence of witnesses at the trial?

In the end, the problem was solved by our imagining vividly this scenario: how would the client feel when the prosecutor said “Your honor we are going to have to dismiss this case eventually because the government is unable to locate its key witness” and in response his lawyer jumped up and said “Excuse me your honor, if I may be of service to the court, I know where the witness is . . .” That simply could not be zealous representation within the bounds of the law.

The lawyer’s duty was to remain silent. This is not an easy decision—on any level. Think how the lawyer felt, as an individual, having spent many hours in the preparation of the case; on the level of self-interest it was a very hard decision; but beyond that we knew that it was likely that the prosecutor would find the witness, discover that the defense lawyer had known the witness’ whereabouts and would tell the judge. Yet, in spite of these considerations, we all agreed that the lawyer’s duty in this case lay not with his own interests in getting the trial experience and pleasing the judge, but lay instead with his client’s interest. The scene played out just as we had feared in our worst imaginings: the prosecutor was given overnight to find the witness, did so and reported in outrage what the lawyer had done in standing silent the day before. The judge angrily declared that the lawyer had acted unethically and removed him from the case.

This case is a clear example of the clash between personal ethics and personal style, as well, which dictate openness, helpfulness, aiding the system by seeing that cases are brought to trial and guilt or innocence finally determined and professional ethics which in the context of this case called for considering duty to the client as para-

2. *Id.* D.R. 7-102(A) (3).

3. *Id.* D.R. 7-109(A).

4. *Id.* D.R. 7-109(B).

mount. The clash was not solvable: compromise between the two sets of values was impossible. The lawyer had to choose—and the choice had to be made without any real guidance from the profession's Code. There was a great deal at stake in this case for the client, in part because one of the first acts of the Nixon administration was to increase the penalties for crimes of all sorts in the District of Columbia. It was possible to receive a life sentence for armed robbery, and the judge before whom the case was set was tough. There was much at stake too for the lawyer who had to practice every day in that jurisdiction: the possible anger and enmity of this powerful judge, who would likely misunderstand if the lawyer said nothing, but would be most pleased and commendatory if the lawyer volunteered the address of the witness.

Why was the lawyer running this personal risk in a routine criminal case for a man who was probably guilty? In making this decision, there was a higher and certain value which the lawyer was expressing. It is an awesome thing when the state investigates and accuses of crime—the total machinery of the society is organized against the individual; the very accusation is damning. To counter-balance that, to make it fair, we have given the accused individual one person—the defense lawyer—whose interests are not in the impartial determination of guilt or innocence, not in whether the system runs well and produces the correct result—one person, an advocate, trained and skilled, whose total commitment is to the accused. With that conception of the defense lawyer's role, the lawyer in this particular context had no choice. He did the right thing, which in no way detracts from the individual courage required to do it. Many lawyers would not have been inclined nor able to do it.

I do not mean to indicate that once having decided which value is paramount that the solution is clear. When there are these unresolvable conflicts between personal and professional values, lawyers often turn to each other with the plaintiveness apparent in one of R. D. Laing's verbal knots:

There is something I don't know
 that I am supposed to know.
 I don't know what it is I don't know,
 and yet am supposed to know,
 And I feel I look stupid
 if I seem both not to know it
 and not know what it is I don't know.
 Therefore, I pretend I know it.
 This is nerve-wracking
 since I don't know what I must pretend to know.
 Therefore I pretend to know everything.
 I feel you know what I am supposed to know
 but you can't tell me what it is
 because you don't know that I don't know what it is.

You may know what I don't know, but not
that I don't know it,
and I can't tell you. So you will have to
tell me everything.⁵

Now, it is a short step, if any step at all, from the example I have given of the lawyer who knows where the government witness is to the following situation reported in the national press: Two court-appointed attorneys are to represent a man who is clearly a homicidal maniac. He admits to them that he committed the murder of which he is accused, a stabbing in a campground, but says that in addition he killed two other people in the vicinity. The lawyers have him examined by psychiatrists who say he is mad, and probably not legally responsible. He has a good insanity defense. (When I say "good," you should not hear "winning;" juries generally do not acquit on insanity defenses when a heinous crime is charged.) Even when believing that the accused is sick, they fear him and fear that psychiatrists will release him before he is really cured. (Guilty verdicts then are usually returned even when the evidence of insanity is very strong.) At any rate, in this case, which is hopeless as I have defined it, this wretched madman tells the lawyers that he has also killed two other people, and he tells them where the bodies are hidden. What are the lawyers to do now? They found and photographed the bodies. They were in the midst of representing the client by trying to plea bargain to a lesser crime: second degree murder.

Are they like any other citizen who has discovered a crime and should report it? Surely not. Are they in the situation where the dictates of the ABA Code are clear—"A lawyer should preserve the confidences and secrets of a client."⁶ Or is this one of the exceptions to the rule, in which the Code allows a lawyer to reveal confidences or secrets when permitted by the disciplinary rules or required by law or court order.⁷ The footnote to that rule suggests that "public policy forbids that the relation of an attorney and client should be used to conceal wrongdoing on the part of the client" and that "a communication by a client to his attorney in respect to the future commission of an unlawful act or to a continuing wrong is not privileged from disclosure."⁸ The concealment of the other two murders and of the evidence seems a continuing wrong that the attorneys were called upon to disclose, one that was not protected by the attorney-client relationship.

But imagine yourself in the place of these lawyers. They found out about these other two deaths only through the trust and confi-

5. R. LAING, *KNOTS* 56 (1970).

6. ABA CODE Canon No. 4.

7. *Id.* D.R. 4-101(C) (2).

8. *Id.* D.R. 4-01(C) (2) n.15.

dence they had built with the client. The client is a crazy killer against whom society wants vengeance. Disclosing this information will assure the end of the client's life—either physically or mentally. Remember also that nothing is to be gained for these lawyers personally by failing to disclose this information: this is not a rich man who will pay them well; they will not be respected for it. The parents of the dead people came and asked them if they had any information. Can you imagine how difficult it was not to tell these suffering people that rather than hope for the return of their children they should adjust to their deaths? When all of these things are considered, although I as a lawyer would have made a different decision in this case, I think that their process of decision making was probably highly ethical. But again, the point is that lawyers everyday—not quite as dramatically as in this case—deal with the most complex and difficult decisions, quite alone and without sufficient guidance from the profession or the society.

We are discussing the variance between personal and professional ethics. As the examples with which we have just dealt illustrate, there are grave ethical problems to be confronted and resolved when the stated duties to the client, to the court and to the profession conflict. The lawyer is in a double bind: not only is there a clash between personal and professional ethics, but there is a further subcategory of conflict.

Professional ethics will more likely mandate, to a much greater degree than personal ethics, that the lawyer do things which are, at the least, personally distasteful. The lawyer will not be required to lie or steal, but may be required to represent to the fullest a person who has almost certainly savagely murdered a child; he may be required to give this representation with the tact and concern for that individual which one would exhibit toward an innocent teenager accused of a minor crime, or to a former Harvard Law School dean accused of tax evasion. That is what the Code of Professional Responsibility means when it says: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."⁹ The Code adds that:

When a lawyer is appointed by a court, or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, or the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.¹⁰

9. ABA Code Canon No. 2.

10. *Id.* E.C. 2-29.

We lawyers are told by our only official guide to professional ethics that we have a duty to provide legal services to everyone, whether or not the person can afford it, and that it is the ethical obligation of each lawyer to aid the profession in that function. That seems clear; it would seem clear, too, that there cannot be a double standard of representation. The lawyer's role, according to the ABA Minimum Standards for Defense, is that of a "wise counsellor and learned friend." We are to be zealous within the bounds of the law. We are to use the same techniques of hand-holding—reassuring clients, communicating with them, and counselling, in the case of the alienated, incoherent armed robbery defendant—as we would for the bank president accused of embezzlement, or the former presidential aide accused of perjury, or perhaps more to the point, the client in a civil case whose financial future depends on our skills in successfully concluding a contract dispute.

Furthermore, the lawyer is called upon by the Code to be selfless in her representation. One of the classic examples of selflessness is that of Harold Medina's representation during the Second World War of a man charged with treason. There had never previously been an interpretation of the treason section of the Constitution by the Supreme Court; the legal research and trial preparation took many months; and the trial itself was an excruciating experience. When the summations were over and the judge had concluded his charge to the jury, but before he sent them to deliberate, he asked the defense counsel to rise and proceeded to thank him for his representation in the case, pointing out that he was assigned without compensation and that he had performed a patriotic duty.

What was the counsel to do? The judge had in effect told the jury that the lawyer probably did not believe in his client or his cause, but was acting out of abstract duty. The judge had disassociated the lawyer from his client. Yet, if the lawyer objected at this point, not only would he be widely misunderstood, accused of ingratitude at the least and at the most of associating himself too closely with his client, but he would also probably permanently anger the judge. Despite this, Medina did take exception in front of the jury to what the judge had said. This is an example of selfless courage.

Zealous representation must mean that for the pariah of society—and who is more so than the angry, young, heroin-addicted man accused of a vicious armed robbery—the lawyer explores every possible legal point, investigates all leads, and raises novel issues; in short, she throws herself into the representation with the fervor which a large retainer would inspire. There simply cannot be two standards of representation. The role of the lawyer cannot shift

and her ethical duty cannot change according to whom she represents.

The ideal is to provide legal services of the same quality to all people including those who are despised, often degraded, and frightened. Think, for instance, of the lawyer called upon to represent the SLA "soldier" accused of killing a black school superintendent. A perfectly ethical lawyer appointed to such a case might well candidly respond: "Dealing with this kind of case makes me sick, and I am not so good at it—perhaps even incompetent. Moreover, high-class, careful legal representation is wasted in the hurly-burly of the criminal courts. The best lawyers there are the ones who know the personnel and are there every day and can wheel and deal. Furthermore, I don't even speak the same language as these people. They can't understand me and I can't understand them, so how am I to play my wise counsellor, learned friend role? If I am to perform my ethical duty to make legal counsel available, there are better and socially more useful ways for me to do it. I'll bring some test civil suits, or represent community groups. Don't make me do this."

That position would find some support in the Code. Ethical Consideration 2-30 says that a "lawyer should decline employment if the intensity of [her] personal feeling, as distinguished from a community attitude, may impair [her] effective representation,"¹¹ and while this would seem to apply to paid representation since it speaks in terms of "employment," the principle is applicable to all kinds of representation. Also, a Disciplinary Rule of the Code states that "a lawyer shall not handle a legal matter which [she] knows or should know that [she] is not competent to handle without associating with [her] a lawyer who is competent to handle it."¹²

Yet again, the Code states as a Disciplinary Rule that "a lawyer shall not hold [her]self out publicly as a specialist"¹³ except under very narrow specified conditions. For instance, patent lawyers are allowed to do so,¹⁴ and very recently several states, including California, have been experimenting with other specialization programs. If lawyers, as envisioned by the Code, are not specialists but generalists, how can they be allowed, when appointed in criminal cases, to say: "I'm not competent to handle this?" And what kind of inquiry should be made about whether this disclaimer is a short-hand way of saying: "I am personally repelled, don't want to waste

11. *Id.* E.C. 2-30.

12. ABA CODE Canon No. 6, D.R. 6-101(A) (1).

13. ABA CODE Canon No. 2, E.C. 2-14.

14. *Id.* E.C. 2-14 n.38.

myself, and feel that the system should not operate by conscripting me?"

Consider first the issue of specialization and whether it makes sense, for instance, for lawyers in general practice, or corporate practice, to be allowed to say: "I can't represent people in criminal cases without possibly subjecting myself to discipline because I'm not competent to handle these matters." I personally am always torn on the issue, having spent nine years of my life representing people in criminal cases. I want to believe that such representation is arcane and intricate, and that only the truly initiated—not to say geniuses— can *really* do it, but I am not sure that is the case at all. There is a skill, but I find it hard to believe that the personal injury lawyer, for instance, or in fact any lawyer who has had any training or devoted any attention to litigation, could not acquire considerable criminal law ability very quickly. That is not to say that such acquisition would be painless, because it would take hard work, but the skill we are talking about, the special area of competence, is litigation, not criminal law. Now, it might be said that most criminal cases do not go to trial. So maybe what we are talking about is not even litigation skill, but negotiation—in which all practicing lawyers should be expert.

The likelihood of going to trial is undeniably greater in criminal cases, and the ability to negotiate effectively turns peculiarly on the wherewithal to go to trial. In the criminal cases, there is not the maneuvering room allowed by extended discovery, or the financial considerations which can enter into negotiations in a civil case. The main negotiating point of the defense lawyer in a criminal case is her willingness and ability to go to trial. I would agree that a lawyer who has never been in a courtroom may not be competent to handle a serious criminal matter and should be allowed to excuse herself on ethical grounds, at least from sole representation, under the Code of Professional Responsibility.

This does not mean, however, that a lawyer could not associate with someone who was competent in criminal matters, and learn through the association; nor does it mean that a lawyer could not assume the responsibility of becoming proficient in criminal law, by starting with less serious cases, and/or by extra diligence. That brings us directly to the issue of whether lawyers *should* feel an obligation to involve themselves in representation of the indigent accused. And this really does bring us full circle to the inherent conflicts in the Code of Professional Responsibility: between the canon which tells us to assist the legal profession in making representation available and the canon which admonishes us to be competent.

At this point, we must draw back and do what the Code fails to do: take some overview of the system of criminal justice and the lawyer's role in it, and ask what ideally we would like to have.

The first premise is that we desire a system in which each person in every case is truly represented according to the traditional model of the dealings which lawyers and clients have with each other. This, in fact, is the promise the Supreme Court has made, which has never been fulfilled to all, or even most, indigent accused anywhere—partly because the profession does not want to do it, mostly because society does not want to pay for it. The proposition that competent counsel should represent poor people accused of a crime in approximately the same fashion as she would represent the person of means accused of a crime must be faced for what it is: a moral question. The Constitution says that we shall do it and we should; but if we fail to do it on any kind of a large scale, as we always have, it does not mean that a lot of innocent people will go to jail. We all know that most people accused of crime did something along the lines of what they are accused of. Providing real counsel means that this knowledge of ours is not translated into unfair shuttling of the person through the system.

The second premise upon which an ideal system of representation would be based is that there is something different and special about criminal law which makes it useful for a large segment of the profession to be involved with it. The idea about criminal law has been that its administration reflects the tone and temper of society, and indeed, as Winston Churchill suggested, the degree of civilization. Because criminal law deals with the enforcement of moral norms by the majority, there should be a broad-based participation in the system of enforcement to help assure that the law reflects current values.

This idea that I have presented is not a generally accepted one—in or out of the profession. Therefore, let me state plainly that what I am arguing is that as a matter of professional ethics, a great part of the bar *should* consider it a duty to become involved in the practice of criminal law.

It often seems to me, since this is where I have labored most, that the problems of professional ethics rise most sharply in the heated facts of criminal cases. But the same conflicts emerge in the more civilized arena of civil law. To illustrate that, in a course on professional responsibility, students were presented with problems and the class sat as a bar disciplinary board, or as a law firm or legal services office. After debate, a public vote was taken on the solution of the problem. Each case was a close one. Virtually all the votes were divided. This vote was taken among students

who had no financial or other pressures which would keep them from voting for the "right" thing.

One of the issues which hotly divided the class was the following fact situation. A small successful computer company, which we will call CDM, is bringing an antitrust action against a giant in the field—RPM. CDM has subpoenaed a total of 27,000,000 RPM documents at a cost of \$3,000,000, from which its staff has culled 150,000 which bear on the relevant factual issues in the suit. CDM constructs a computerized tape file to serve as a data base for the otherwise incomprehensible collection of paper; the data base reveals trends and comparisons not evident from an examination of the documents themselves and also indexes the documents. The data base provides strong factual ammunition for a good suit by CDM against RPM. Meanwhile the Justice Department is also bringing a large suit on behalf of the Government against RPM because it considers the computer industry to be the most monopolized in the United States economy. RPM, having been burned by releasing too much information to CDM, is dragging its feet in the public action. The Justice Department is able to obtain fewer documents than CDM and does not have CDM's capacity for analyzing them.

Focus on the role of the lawyer for RPM. Let us say that she was formerly with the Justice Department and knows that the Department does not have the capacity to attack the computer industry; she also knows that using CDM's data base would enable the Government to make its case. Therefore, she moves very quickly to settle the case with CDM, in a way which will give them a monopoly of a small part of the industry, a concession from RPM, *on the condition* that they destroy the data base. Let us add the fact that the lawyer, as a matter of personal philosophy, believes that monopoly is a bad thing and that the computer industry, which is her client, is heavily monopolized with bad results for everybody. (Adding this fact simply strengthens the case; but it is not a necessary factor.) In negotiating for the destruction of the data base, the lawyer has done the best thing for her client; simultaneously she has done a very bad thing for society, and the American economy. Yet, what other role would you have the lawyer play except that of representing her client to the utmost? Would you want the lawyer to decide what she thought was best and advise the client that in the public interest it should give up its monopoly? Actually, that is not such a bad alternative, but it is not within the realm of anything lawyers are presently advised to do by any code of ethics. The lawyer who drives the hard bargain for her client in this situation has all the professional and societal support; she is good (that is, successful) and she has her eye on the goal

of aiding her client—the only fixed star by which to be guided on troubled ethical waters.

In the three examples set forth—the lawyers with information needed and desired by the system, the lawyers needed to represent an accused individual, who are not interested in doing so, and the lawyer who makes a settlement which is probably not in the interests of the society—the same conflicts with which we began are involved: the clash between personal and professional ethics and the total lack of systematization even within professional ethics with the result that there are often two sets of competing demands and mandates facing the individual lawyer.

The issues we have considered are examples of the hard questions—and the examples could be greatly multiplied. In dealing with the hard problems, there is, of course, no easy answer. A deep miscommunication between the profession and the public has, moreover, created a lack of understanding of the lawyer's role in the adversary process. Complicating the matter still further, there is not a great deal of good will to fall back on in assessing an individual lawyer's performance. Presumably this lack of communication can be remedied by educating both lawyers and the public. Lawyers need to understand that they must confront issues on which neither commitment to the Ten Commandments, nor humanitarian concerns for others, nor the public interest will give them any help. The public must recognize that this is the task in which lawyers are engaged. Toward this end, there should be more emphasis in law school on the difficulties of the lawyer's role, the ambiguities of professional ethics, the harshness of choices which a morally sensitive lawyer will be called upon to make.

Even while accomplishing this educational task, we must also remember that a great deal of the public's lack of understanding and sympathy for the lawyers' role arises not from the lawyers' handling of difficult and close questions but from their failure to deal with easy ones. The bar has not only failed to establish a code which will guide lawyers in difficult situations; it has failed to discipline them for very basic errors which can only be called crimes or incompetence. When the profession organizes to throw out those who steal and lie, then we may be better able to draw public understanding and support and even guidance on how to handle more complex problems. A prestigious committee of the American Bar Association, headed by former Justice of the Supreme Court Tom Clark, recently concluded after three years of studying lawyer discipline throughout the country that a scandalous (their word) situation existed in which disbarred attorneys are able to continue to practice in another locale; that lawyers convicted of

federal income tax violations are not disciplined (if they are not the former vice-president); that lawyers convicted of serious crimes are not disciplined until after appeals, often a matter of three or four years; that even after disbarment lawyers are reinstated as a matter of course; that lawyers fail to report violations of the Code and even criminal conduct by their brethren; that lawyers will not appear or cooperate in proceedings against other lawyers; and finally, that state disciplinary agencies are undermanned and under-financed, many having no staff whatever for the investigation or prosecution of complaints.

The committee outlines some very basic steps for remedying this problem such as the financing of the disciplinary process, the acceptance within the profession of the need for effective disciplinary procedures, and the exchange of information among disciplinary agencies. In the wake of Watergate, a great deal is being accomplished in some places along these lines. In California, for instance, there has been a sharp increase of disciplinary activity. But there is still a long way to go before we have even minimal enforcement of what everyone agrees are ideals of the profession (again, I am not talking here about the hard problems, but about minimal enforcement of basic standards). And yet, even that is not always easy. Let me illustrate this with excerpts from an actual case in which a lawyer was disbarred. Think about what you would have done if you had had a vote on the disciplinary committee.

Petitioner, an attorney at law, was charged in Alameda County with four counts of soliciting others to commit perjury In September, 1957, he changed a plea of not guilty to guilty on counts 3 and 4 and the other two counts were dismissed. Sentence was suspended and he was placed on probation for three years, conditioned in part on the payment of a \$2,000 fine within one year. . . .

A record of the conviction was filed with this court. We issued an order to show cause why a final disciplinary order should not be made and on November 26, 1957, suspended petitioner from the practice of law pending final disposition of this proceeding. The matter was then referred to The State Bar for report and recommendation as to the extent of discipline to be imposed. . . . The Board of Governors, by majority vote, followed the local committee's recommendation of disbarment. Three board members dissented on the ground that the discipline recommended was too severe. Petitioner likewise urges that, in the circumstances, disbarment is too harsh a penalty. We conclude that the board's majority recommendation should be accepted.

Petitioner does not dispute that the basic facts warrant disbarment but pleads that consideration be given to his background, which he sets forth as follows: He is a Negro, born in Mississippi in 1916, and presently forty-three years of age. In 1935 he graduated from high school in Mississippi, attended two semesters of college, and then quit in order to marry. He was inducted into

the army in January, 1941, and commissioned a second lieutenant. On the termination of hostilities in 1945 he reverted to inactive military status and brought his wife and three children to Oakland, California, where he has since resided. He engaged in various business activities and employments and in 1949 enrolled at [an unaccredited law school] in Oakland under the G.I. Bill but continued working outside class hours in order to support his family. He was admitted to The State Bar in 1954, and thereafter, until his present difficulties arose, practiced law independently in the Oakland area. His clientele consisted "almost entirely of and was confined to the Negro population of Alameda County."

Petitioner further declared to the local committee that his conduct had not been ethical or correct, that "I feel that I have done wrong and I have brought discredit upon the Bar Association, and all of you gentlemen here as lawyers . . . and that I should be punished . . . I went to school at night and worked and I was—it was a dog eat dog affair and scuffling for everything." Petitioner also said that his present difficulties had taught him a lesson and "I believe that my ethics and my method of operation will be much more conservative and much better . . . than it has ever been in the past."

One of petitioner's character witnesses was a Methodist minister who stated that petitioner "has been highly regarded as quite an outstanding churchman, not only in his local church but in his denomination. He is one of the leading laymen on the general church level . . . [and] a very fine family man," that "it is the feeling among" the church people that whatever petitioner "did on this occasion was not in conformity with his usual conduct." The other character witness was an Oakland roofing contractor who stated that for two or three years he and petitioner had owned a bar together, which petitioner managed; that "we were offered money by bookmakers, peddlers of marijuana and that sort of thing . . . to operate in our bar, and Claude [petitioner] turned it down cold"; that petitioner "had every opportunity" to "cheat me out of some money and it wasn't done"; that "We both got out of the bar business because the only way we could have made any money was slightly crooked. I have seen Claude time and time again turn down the chance for a fast buck."

At the time (May, 1958) of the hearing before the local committee petitioner had paid \$400 of his fine, had reported regularly to the county probation department, had not obtained regular employment but had had miscellaneous short jobs and was managing to meet a minimum of his obligations, and in the opinion of the probation officer was "making an excellent adjustment considering all the factors involved."¹⁵

Would this be different if the lawyer were a white Nebraska graduate? When we get down to it, in this case is it not a problem of inferior education in the law school setting which may be what has occasioned the recent interest in continuing education of the

15. *In re Allen*, 52 Cal. 2d 762, 763-67, 344 P.2d 609, 609-11 (1959).

bar, and even a suggestion by the past president of the ABA that lawyers be recertified every few years as to competence.

We are in the aftermath of this terrible congeries of scandal designated Watergate which has involved not only lawyers and which lawyers have had a primary part in cleaning up. Still, because lawyers have held themselves out as the guardians and purveyors of the laws, which have moral norms at their base, the deep involvement of lawyers in Watergate has provided an impetus for taking corrective measures which will educate lawyers and the public about the demands of professional responsibility. Perhaps we will reach that point described by the Supreme Court in which the lawyers in our society stand "as a shield in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truthspeaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have been compendiously described as moral character." Let me finally add that nothing which has occurred in Watergate has shaken the validity of the sentiments expressed by Justice Holmes, which I paraphrase—A person may live greatly in the law as elsewhere. His thought may find its unity in an infinite perspective; there, as elsewhere, he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unobtainable.