Who am I to Judge?

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INTRODUCTION

It is said that in the "standard conception" of lawyers' ethics, lawyers do all that is permissible for their clients within the bounds of the law. At the core of the standard conception are the values of:

(a) Neutrality (it is not for the lawyer to be the judge of their client);

(b) Partisanship (the lawyer can or may do all that they can to achieve the client's objectives); and

(c) Non-accountability (the lawyer is not responsible for the client's decisions).[1]

For some, this standard conception arises from the fact that we live in a pluralistic society that is based on competing notions of the public good, that the institutions of law are designed to mediate between these diverse ranges of views, and that it is not for lawyers to determine 'what we will do as a community, what rights we will allocated and to whom[2]. Others who adhere to the standard conception see lawyers as technical mechanics who should respect the autonomy of their clients,[3] or on the idea of the 'civil obedience' of a lawyer who obeys the law (including professional obligations to a client) even when it conflicts with the lawyer's own morals. [4]

This standard conception has been subject to critique by legal ethicists who argue for a broader role for lawyers given their privileged role in society and their ability to influence decisions made by their clients. These moral/legal philosophers argue that lawyers should bring some element of the lawyer's own morality or sense of justice to bear on the advice they give to clients.

William Simon, the Arthur Leavitt Professor of Law at Columbia University, is one well-known critic of the standard conception of lawyers' ethics. His article *Ethical Discretion in Lawyering*,[5] is a lengthy critique. Using an approach that he defines as the "discretionary approach" he would have lawyers make contextual, discretionary judgments about justice. He says they "should take those actions that, considering the relevant circumstances of the case, seem likely to promote justice".[6] Justice is a synonym for 'legal merit', with lawyers analyzing the law in the light of fundamental legal values and principles to arrive at substantively just outcomes. This is not the same as a lawyer using his

[1] Steven Vaughn & Emma Oakley (2016) 'Gorilla exceptions' and the ethically apathetic corporate lawyer, Legal Ethics, 19:1, 50-75, page 51
[2] Ibid., at p. 52, citing T. Dare, 'Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers' (2004) 7 Legal Ethics 24.
[3] Ibid., citing S. Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities (1986) American Bar Foundation Research Journal 613,
[4] Ibid., citing A. Woolley and B. Wendel, 'Legal Ethics and Moral Character' (2010) 23 *Georgetown Journal of Legal Ethics* 1065.
[5] 101 Harv. L. Rev. 1083 (1988)
[6] WH Simon, *The Practice of Justice* (Harvard University Press, 2000) 138

own morals. It is founded on the idea that lawyers, being lawyers, have the necessary knowledge and skills to problematize legal ethics issues in terms of competing legal values (and do not have any special morality that makes them any better able than anyone else to approach ethical issues in terms of morals).

Simon's approach is challenging both in coming to terms with it and in terms of what he would ask of lawyers. I have quoted him extensively throughout this presentation. Almost everything I say about what Simon has to say from here on in is taken from his article. I have merely hoped to condense it in order to be able to refer the reader to it as an example of a non-standard conception of legal ethics.

Law Society of Alberta's Code of Conduct

Before taking an in depth look at what Simon's discretionary approach would entail, I to refer to the many provisions in the Law Society of Alberta's Code of Conduct (the "Code") that speak to the role that lawyers should play in decisions made by their clients. Some of the provisions of the Code suggest that lawyers ought to move beyond the standard conception of lawyers' ethics.

The first paragraph of the preface of the Code says:

> Lawyers have traditionally played a vital role in the protection and advancement of individual rights and liberties in a democratic society. Fulfillment of this role requires an understanding and appreciation by lawyers of their relationship to society and the legal system. By defining and clarifying expectations and standards of behaviour that will be applied to lawyers, the Code of Conduct is intended to serve a practical as well as a motivational function.

In short, in order to fulfill their vital role in the protection and advancement of individual rights and liberties in a democratic society lawyers must understand and appreciate their relationship to society and the legal system.

The next paragraph of the preface states:

> Two fundamental principles underlie this Code and are implicit throughout its provisions. First, a lawyer is expected to establish and maintain a reputation for integrity, the most important attribute of a member of the legal profession. Second, a lawyer's conduct should be above reproach. While the Law Society is empowered by statute to declare any conduct deserving of sanction, whether or not it is related to a lawyer's practice, personal behaviour is unlikely to be disciplined unless it is dishonourable or otherwise indicates an unsuitability to practise law. However, regardless of the possibility of formal sanction, a lawyer should observe the highest standards of conduct on both a personal and professional level so as to retain the trust, respect and confidence of colleagues and members of the public.

In summary, the two fundamental principles that underlie the Code – a lawyer's reputation for integrity and the aim for conduct above reproach – are aimed toward retaining the trust, respect, and confidence of not just the client but of colleagues and *all* members of the public. This is a direction to lawyers to keep societal interests in mind.

The third paragraph of the preface directs lawyers to look beyond the Code to other legislation and to consider *general moral principles* on occasion.

> The legal profession is largely self-governing and is therefore impressed with special responsibilities. For example, its rules and regulations must be cast in the public interest, and its members have an obligation to seek observance of those rules on an individual and collective basis. However, the rules and regulations of the Law Society cannot exhaustively cover all situations that may confront a lawyer, who may find it necessary to also consider legislation relating to lawyers, other legislation, or *general moral principles* in determining an appropriate course of action.

Chapter 2 of the Code is about the standards of the Legal Profession and it contains echoes of what was said in the preface. Lawyers are told that they have to discharge all responsibilities to the public with integrity. And the commentary cautions that public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Lawyers are told that their conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and *of the community*.

> **2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.**
>
> [2] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.

Rule 3.1-2 is about competence.

> **3.1-2 A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.**

Commentary 11 to this rule talks about what a lawyer is supposed to do if asked for an opinion on non-legal matters.

> **Commentary** [11] In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer

who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

The importance of this commentary, for the purposes of the consideration of this paper, is that it is a recognition that a lawyer's opinion on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose may be of real benefit to the client.

Rule 3.2-9 is a reminder that a lawyer's duty when acting for a corporation (or any organization) is to the organization, not the person that is providing the instructions.

> **3.2-9 Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer must act for the organization in exercising his or her duties and in providing professional services.**

And rule 3.2-14 is about fraud when the client is an organization. It is important because it imposes duties on lawyers to by-pass the person in the organization from whom they are taking instructions. But it is also important for the commentary that recognizes the duties a lawyer has to the public.

> **3.2-14 A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act fraudulently, criminally or illegally, must do the following, in addition to his or her obligations under Rule 3.2-13:**
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> **(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the conduct is or would be fraudulent, criminal or illegal and should be stopped;**
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> **(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to stop the conduct, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct is or would be fraudulent, criminal or illegal and should be stopped; and**
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> **(c) if the organization, despite the lawyer's advice, continues with or intends to pursue the unlawful conduct, withdraw from acting in the matter in accordance with Rule 3.7.**
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> **Commentary**
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> [1] The past, present, or proposed misconduct of an organization may have harmful and serious consequences, not only for the organization and its constituency, *but also for the public* who rely on organizations to provide a variety of goods and services. *In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences for the public at large*. This rule addresses some of the professional responsibilities of a lawyer acting for an