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## Resisting the Current

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# Resisting the Current

*Stephen L. Pepper\**

I. NOT A PRETTY PICTURE .....	1015
II. THE ABBA.....	1017
III. ETHICS, ROLE AND MODESTY.....	1019
IV. CONCLUSION .....	1022

## I. NOT A PRETTY PICTURE

The occasion was a faculty lunch with presentations from three members of the local bar. One was a partner at one of the largest and most respected firms in the city. Another was a former student of great ability and charm who had left one of the other large elite firms to form his own small, successful firm. The third, if I recall correctly, practiced with one of the federal agencies. Our purpose was to reinforce contacts with the city's practitioners and learn more concerning their views of contemporary law practice. I remember the two private practitioners more clearly because I had familiarity with and admiration for both the large firm and the young lawyer, and because I was taken quite by surprise by one aspect of the message they brought us: each made it clear that law practice had changed, and that there was no longer time for mentoring. The need for both associates and partners to accumulate billable hours and to spend time attracting clients simply left no significant opportunity for the mentoring relationship. That this was true was not so much the surprise. What I found distressing and memorable was the matter-of-fact presentation, the absence of any indication that these lawyers felt either alarm or shame that this was their situation.

Professor Schiltz has done a great service in posting a warning about the current reality of practice in large elite law firms. The picture he reveals is not a pretty one. The law firm work environment which our most able law students enter will diminish them in significant ways. Few will successfully resist the pressures they will

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encounter. And there seems to be very little that legal educators or young lawyers can do about it. It is hard to fight the market, hard to resist a dominant culture. One thinks of swimming in the ocean or floating a river; for the most part you go where the water takes you, controlling your direction only within quite modest confines. Those of us who teach the legal profession course (also known as "professional responsibility" or "ethics") are well aware that although we can provide some perspectives and models, transmit some knowledge, open some questions and plant some seeds, the major determinants of professional behavior will result from role modeling and practice pressures during the neophyte lawyer's apprenticeship experience. Our influence as teachers of ethics will be small compared to that of the lawyers from whom our students learn to practice law.

Each year when I teach the legal profession course one or two hours are devoted to trying to educate the students concerning the situation described by Professor Schiltz. With the students I try to generate alternatives and search for creative possibilities. I have had hopes that in time the market would self-correct to some modest extent, that the unattractiveness of what the big firms had to offer would become manifest, and therefore change. Perhaps the most discouraging message in Schiltz's letter was that law students don't welcome such a market option even when it appears:

The hiring partner of any major firm will tell you that if his firm offers first year associates a salary of \$69,000, and a competitor down the street offers them \$72,000, those who have the choice will flock to the competitor—even if the competitor will require them to bill 200 hours more each year.<sup>1</sup>

The letter will become one of the assignments for this segment of the course. It will help paint the picture and generate some motivation, but I doubt that it will help much with the options or with optimism that there are a lot of alternatives available. A few creative, courageous, or lucky students among those sought by the elite firms will find alternatives, but most will not.

There is some hope in remembering that relatively few law students become employees of elite firms. At most law schools, most graduates will not have this temptation. Because a position at an elite firm is not available to them, they will have little choice but to try to be creative in seeking options. The most salutary effect of Professor Schiltz's letter for this group may well be to diminish their

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1. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 898 (1999).

envy for those who practice law at such firms. It could help them to believe that they are genuinely fortunate to be forced to find or construct other options.

## II. THE ABBA

Professor Schiltz is a neo-Aristotelian. He sees ethics more as a matter of perception, habit, and virtues than of rules or principles.<sup>2</sup> In the past I have found this view of ethics helpful in approaching problems which resist solution by the rules of lawyers' ethics or by the general theory which underlies the rules.<sup>3</sup> It also seems more descriptively accurate concerning the way we perceive the moral issues in our lives and how we reach decisions regarding them. I think it helps as well in looking for ways to ameliorate the situation described by Professor Schiltz. Under this view a community and a functioning "practice" are necessary to provide the context for ethics based on perception, habit, and virtues.<sup>4</sup> This kind of ethics cannot function without role models, and thus my sharp disappointment at that faculty lunch when the mentoring culture was so blithely dismissed. I had thought that those two lawyers, at least, would assume that time for meaningful mentoring relationships was essential for the development of young lawyers. I was wrong, and should not have been so surprised. For some time it has been clear that the practice of law, at least at most elite American law firms most of the time, does not appear to be a "practice" in the neo-Aristotelian sense.<sup>5</sup> In his letter, as well as in his previous article,<sup>6</sup> Schiltz demonstrates that focus on the external goods of money and status have left the internal goods of the practice of law in the shadows. They are valued now—if at all—only as they contribute to the external goods.<sup>7</sup>

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2. This is suggested from his prior article even more clearly than in the current letter. See generally Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705 (1998).

3. See Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1607-09 (1995).

4. My understanding of the neo-Aristotelian approach is drawn primarily from ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2nd ed. 1984) and JEFFREY STOUT, *ETHICS AFTER BABEL: THE LANGUAGES OF MORALS AND THEIR DISCONTENTS* (1988). A brief introduction to this view in relation to the practice of the professions, and a brief explication of the neo-Aristotelian meaning of "practice," can be found in the final chapter of Stout's book.

5. See Pepper, *supra* note 3, at 1609.

6. See Schiltz, *supra* note 2, at 720-46.

7. The last chapter of *Ethics After Babel* provides a discussion of the interplay of internal and external goods, using the practice of medicine as one of the recurring examples. See STOUT,

How might we assist our students in resisting the market and the dominant culture in the legal profession, both focused almost exclusively on external goods? The warning and awakening we might accomplish in law school will at best alert them to where the waves or current are likely to carry them. One possibility I have occasionally considered is to encourage our former students to form an organization to support resistance to the tide, to remind them that there are values other than money which might guide their lives. A few senior lawyers—those inclined to be mentors, or who remember their own mentors, or who hate the tyranny of billable hours—could be sought out to join as well. Such an organization might not do much. But hope and reminder, which it could occasionally furnish, are better than nothing. Such an association might also support a richer view of professional ethics than that provided by the Model Rules, on one hand, and the avoidance of malpractice or other legal liability on the other. There are a number of law professors who, if approached, would likely support an effort of this kind. Robert Gordon,<sup>8</sup> Anthony Kronman,<sup>9</sup> and Patrick Schiltz come easily to mind. There are likely to be many others who would be willing to support such an organization. We could call it the ABBA.<sup>10</sup> A monthly meeting with an at least somewhat like-minded group could help lawyers

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*supra* note 4, at 266-92. This section includes a short list of the "virtues" involved in good medical practice. This list is suggestive of similar virtues, which might be relevant to the ethical practice of law. *See id.* at 269.

8. *See generally* Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

9. *See generally* ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

10. The "After Babel Bar Association," referring to Jeffrey Stout's *AFTER BABEL*, *supra* note 4. Stout attempts to accommodate both liberal, individualist understandings and the neo-Aristotelian approach to social institutions, practices, and ethics. For example, at one point he summarizes:

A stereoscopic social critic would be inclined to concentrate on factors like these: the tendency of the capitalist marketplace and large-scale bureaucracies to provide material conditions that permit social practices to flourish, while at the same time they undermine the moral conditions needed to achieve goods internal to such practices; the tendency of professionalization and bureaucratic enforcement of rights, in some instances, to mitigate the bad effects of the marketplace on specific social practices and the people participating in them; the tendency of particular social practices, especially within the professions, to become all-consuming, thus making it increasingly difficult to be both a full-fledged participant in the practice and a good anything else . . .

*Id.* at 289. My approach to professional ethics, particularly lawyers' ethics, involves a similar attempt to include both understandings. *See, e.g.*, Stephen L. Pepper, *Autonomy, Community and Lawyers' Ethics*, 19 CAP. U. L. REV. 939 (1990); Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181 (1999) [hereinafter Pepper, *Law and Justice*].

remember that they are not crazy, that the craziness is in the work world in which they are engulfed.

### III. ETHICS, ROLE AND MODESTY

Professor Schiltz advises young lawyers that the ethics of their professional lives with which they should be concerned fall into three major categories. First are the disciplinary rules, which are only "the lowest common denominator of conduct that a highly self-interested group will tolerate."<sup>11</sup> Second are ordinary moral intuitions. These have little to do specifically with being a lawyer; they have to do with being a decent, ethical person in general, including during one's many hours at work. Third, aside from being a lawyer, is living an ethical life by meeting one's responsibilities to family, friends, community, and God.<sup>11</sup> This delineation of professional ethics is too narrow and has the potential to mislead lawyers in ways which are significant. Although it leads in a different direction from Schiltz's primary and important message, I want to spend a few minutes expanding the notion of ethics to which young lawyers should attend.

The only ethics distinctive to lawyering which Schiltz takes account of are the disciplinary rules, and that approach leaves out something essential: the underlying nature of *professional* ethics. Professionals are servants.<sup>12</sup> Their function is to help the client or patient with something which (1) is of special importance, and (2) the client or patient cannot do for himself. The patient needs access to health care; the client needs to use or learn about the law. The professional has a monopoly on the needed knowledge and assistance, and the client is vulnerable because he has no basis from which to judge or evaluate the assistance he is receiving from the professional. Professional ethics derive from this imbalance: the vulnerability of the patient or client, the stronger relative position of the professional, and the fact that the professional is making a living in the context of this imbalance. Professional ethics are thus role specific. Ordinary market-based ethics are thought insufficient due to the special need

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11. Schiltz, *supra* note 1, at 908-10.

12. See generally Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of The Romans of the Day*, 105 YALE L.J. 177 (1995), for an extended discussion of the implications and difficulties of viewing the professional role from this angle.

and vulnerability of clients.<sup>13</sup> The imbalance creates the need for a special restraint and obligation absent from other relationships.

It is important for lawyers to have thought through and understood the role specific obligations of being a professional. The obligation of putting the client's interest first—the underlying professional ethic—works best when internalized and assumed, when it becomes a habit. But it is easy to forget, and easy to never learn. It is this aspect of a lawyer's ethical obligation which Professor Schiltz has to a large extent left out. Consider an example provided in his earlier article:

James Fitzmaurice, who was my partner and mentor, once sued an insurance company on behalf of another law firm. The insurance company had refused to pay our client for several years of work that the firm had done for one of the company's insureds. The company had also refused to pay several other law firms, and all of them had brought their own claims. Millions of dollars were at stake.<sup>14</sup>

The lawyer for the defendant insurance company was extraordinarily obnoxious, "about as difficult and obstreperous and just plain nasty as a lawyer could be." Apparently he was not well liked by someone at his own law firm as well, or at the client insurance company, because Fitzmaurice received an unmarked envelope in the mail containing "a copy of a lengthy memorandum" analyzing the strengths and weaknesses of the case and strategy for handling it—a document obviously intended to be confidential and of potential importance to the outcome of the action.<sup>15</sup> Several of the lawyers for other plaintiffs also received the document. There was no legal obligation to return the document or not to use it. The other lawyers used it and did not tell the opponent they had received it. Only Fitzmaurice returned it with a letter explaining how he had received it, and did not read or use it.<sup>16</sup>

Professor Schiltz admires this choice by Fitzmaurice, thinking it reflected "the highest professional ethics."<sup>17</sup> I believe both Fitzmaurice and Schiltz overlooked their client. The lawsuit was not the lawyers', it was the client's. The lawyers were there in a

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13. Or so the argument goes. There is of course substantial skepticism concerning this model from many angles. See, e.g., Stephen L. Pepper, *Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice*, 4 CONN. INS. L.J. 27, 41-46 (1997-98) (sketching the model and some of the critique).

14. Schiltz, *supra* note 2, at 715.

15. *Id.* at 715-16.

16. See *id.* at 716.

17. *Id.*

representative capacity, as servants of the client. The document was sent to the lawyers because they were representing their client in that particular matter, and for no other reason. It was lawful to read and make use of the document.<sup>18</sup> Their client believed it had been cheated of compensation for several years of work. The defendant who had cheated them had hired an obnoxious, uncooperative lawyer, thus adding further expense and unpleasantness to resolving the matter. Someone associated with that lawyer or with the defendant felt strongly enough about the situation to have sent the document. Using the document or not might have been the determinative factor in the outcome of a suit which involved a very large amount of money apparently justly owed to the client. The client was sophisticated and could easily have understood the choice to be made.

I believe that choice ought to have been the client's, not Fitzmaurice's. In being reflexively "ethical," Fitzmaurice overlooked the client, and was insufficiently modest. The client might have thought that given the unjust way it had been treated by the defendant, the obnoxious and unproductive conduct of the attorney, and the amount at stake, it was morally justifiable to make use of the memorandum. (Our mothers and fathers taught us that "two wrongs don't make a right," but the client might have concluded otherwise in this situation.) Fitzmaurice was free to disagree, and to try to persuade the client that he was right and they were wrong.<sup>19</sup> He was free to withdraw from the representation if he failed to persuade them and was unwilling to serve them through use of the memorandum. But he ought not to have presumed to take the choice from them.

The rules of the profession agree. This was not a technical matter which the client could not understand. There was no time pressure. Model Rule 1.4(b) states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>20</sup> The client was not allowed to make an informed decision about this aspect of this matter. Rule 1.2(a) states in part that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."<sup>21</sup> No consultation about means in regard to the memorandum occurred. The Comment to Rule 1.2(a) states in part: "In ques-

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18. See *id.* at 716 n.27.

19. See Pepper, *Law and Justice*, *supra* note 10, at 190.

20. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1983).

21. *Id.* Rule 1.2(a).



tions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected."<sup>22</sup> Use of the memorandum seems to me more analogous to concern for third persons and expense than to technical and tactical questions, but others might disagree. Ethical Consideration 7-8 of the Model Code of Professional Responsibility states in part: "In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."<sup>23</sup>

Rules are likely to be secondary at best, however, in this kind of situation. Whether or not a lawyer perceives the issue as one of client choice is more likely to be determined by her understanding of what the appropriate general ethical role for the lawyer is. It is how the lawyer *sees* the situation which will be determinative. Fitzmaurice could have reflexively seen the situation as one calling for a discussion with the client concerning what was the right thing to do. That would have accorded more with the underlying ethic of the professions. It also would have allowed lawyer and client to have a moral influence upon one another. The more ethical choice becomes a respectable topic of discussion for lawyer and client—the more ethical choice becomes a matter of common deliberation among those involved—the better off we will be as a culture.<sup>24</sup>

#### IV. CONCLUSION

Twenty years ago when I left a large, elite firm to go into teaching, several of the senior partners expressed envy for my choice and for the life I was heading toward. This was a quite distinct surprise to me, for these partners had appeared paragons of success, happy with who they were and what they did, and (one might have said) quite self-satisfied. Only in the privacy of their offices did they reveal regret at the choices they had made. And this was before the devolution in the satisfactions of elite law practice that has characterized the past two decades. It strikes me as an uncomfortable role for those of us who left law practice, and who now make our living preparing others for that which we have left, to be sending our students

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22. *Id.* Rule 1.2(a) cmt.

23. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1981).

24. See Pepper, *Law and Justice*, *supra* note 10, at 203.

out into a law firm market and culture we perceive as so likely to be harmful to them. Perhaps it is unseemly for us to articulate this view of the profession. Those who teach the legal profession course face this problem constantly. As teachers and scholars our job is to try to find and teach that which we believe to be true. Yet in this course, so much of what we believe to be true may be disillusioning and discouraging to those about to enter work in the profession. Professor Schiltz's letter is a valuable contribution to our role as scholars and teachers. One can hope that it will function as a beginning and not an end, and that at least a few, both in the law schools and in the firms, will try to find ways to ameliorate the situation he describes.

