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The Lawyer and the Private Legal Process

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"[W]e need education in the obvious more than investigation of the obscure."[1]

I. INTRODUCTION

Private law—particular rules created for and applied to particular individuals to govern their relationships with each other—is a marked characteristic of society. People in a nation of free enterprise with a developing, malleable economy must have the freedom and the power to shape their legal relations with one another through the use of rules of law suited to their goals. Most of this law—contracts, wills, and trusts—has only temporary effect. The terms are limited, and all of it is for a private, rather than a public purpose. The limited scope of private law, however, is not a good measure of its influence. The private legal process as a part of our system of jurisprudence makes a great contribution to the social life. Many new forms of legal relations trace their origins not to the courts or to the legislature, but to a new kind of instrument first created in the lawyer's office.

> It was the lawyer who devised the long-term lease for real estate improvement, and the collateral trust for real estate financing, or for financing new equipment for a mortgaged railroad. And greatest perhaps of any single line of growth within our law, it was the lawyer who from the outset shaped the thousand uses of the law of trusts . . . .[2]

The private legal process, however, is not limited to the making of private law. The office lawyer must know not only how to do, but what to do; he must give advice and counsel and settle disputes—functions no less important than the drawing of deeds or partnership agreements or trust indentures. Poor advice can be as harmful to the client as a badly drawn contract, and the failure to settle a dispute can be as costly as

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1. O. W. HOLMES, *Law and the Courts*, in THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 168, 169 (M. Howe ed. 1962).

2. K. LLEWELLYN, THE BRAMBLE BUSH 146 (1951).

both. These tasks give the office lawyer three distinct roles—legal adviser and counsellor, private law maker, and private adjudicator. Clearly separate in function, the roles overlap in practice because most often the purpose of advice is to settle or avoid a dispute and reach an agreement that can be reduced to writing as a private statute.

Unlike the judicial process, the private legal process has no well defined structure. This factor does not hinder the effectiveness of the office lawyer as a private representative of his client, but it does obscure his important role as a representative of the social order. The common core of ideas concerning what the lawyer may and may not do for his client and what his client may and may not do tends to blend and merge these two roles. Most lawyers want to and do aid their clients in a way consistent with the customs, traditions, and requirements of society. In so doing, they fulfill their public role as they work in their offices unaware of their contributions to the stability and advancement of the social order. Yet, a greater awareness of their public responsibilities would enable office lawyers to contribute better to the social order and better serve individual clients.

The emphasis on the public responsibility of the lawyer has been focused on the advocate rather than the office lawyer. Yet, the public responsibilities of one are no less than those of the other, for their roles are complementary. The office lawyer shares with the advocate a fundamental problem: how can he best perform his dual role as a private representative of his client and a public representative of the social order?

II. THE PRIVATE LEGAL PROCESS

The least noticed, the private legal process is also the most pervasive process of law in our society. Legal authors have devoted their attention to the judicial, the legislative, and the administrative processes. Yet, said one writer,

> [I] suspect the first book has yet to be written about the process whereby a couple of lawyers bring two . . . parties together in an office, adjudicate their disputes, draw a decree or statute called a contract to govern their conduct . . . and thereafter administer the law they have written in a way that will . . . carry out the legislative intent.[3]

The process, perhaps, seems too obvious for a book, but it is too important to be ignored.[4] The simple fact is that more law is made and

3. Cavers, *Legal Education and Lawyer-Made Law*, 54 W. VA. L. REV. 177, 180 (1952).

4. "[I]t too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the everchanging and

administered and more disputes are adjudicated in the private legal process than in the legislature, the administrative agency, and the courts combined.

Unlike the other legal processes, the private legal process has no official institutional setting to give it form and shape. Its setting is the lawyer's office, which functions as a private administrative agency of law for the individual. The analogy to the public administrative agency is striking. The lawyer in his office administers law by interpreting and utilizing it for his client; he exercises quasi-legislative functions in producing rules and regulations for his clients in the form of legal instruments; he exercises quasi-judicial functions in settling disputes through conciliation, negotiation, and compromise; and his advice, opinions, and decisions are subject to judicial review.

The special nature and breadth of the office lawyer's work and his responsibilities are apparent when they are contrasted with those of the advocate. The advocate deals with the past and is subject to safeguards and restraints in the courtroom. He is faced with an expert adversary, a judge, and often a jury as well. He has one basic role to perform in representing his client in court; he is expected to stress the matters most favorable to his side and to do everything he can within the limits of the law to win for his client. The office lawyer is a problem solver who deals with the future, works alone in his office, and performs several roles. In performing these various tasks, he must perceive and appreciate the other's viewpoint. He cannot stress only the matters most favorable to his side, because he does not submit a case to a tribunal for decision, he acts alone or deals directly with his opponent. His primary concern is not conflict, but coordination.

These differences come into sharper focus when some of the details of the three basic roles of the office lawyer are considered. The client who brings his problem to the office of the lawyer typically seeks in the first instance advice concerning a proposed course of conduct or advice about his rights and duties under a past transaction. To the extent that the lawyer informs his client that the law forbids, compels, or allows certain conduct, he is interpreting and enforcing the law. The interpretation and advice, of course, carry no official power of enforcement. The sanctions are more subtle; they exist in the form of the client's confidence in his lawyer. The primary role of the lawyer in his office, however, is the affirmative one of helping his client to achieve his objectives by creating

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constantly multiplying rules by which they must behave and to obtain redress for their wrongs." Hickman v. Taylor, 329 U.S. 495, 514-515 (1947) (Jackson, J., concurring).

legal relationships through the instrument of private law. The law may be unilateral, as in the case of a will; it may be bilateral, as in the case of a contract; or it may be multilateral, as a partnership agreement or a corporate charter. Conciliation, negotiation, and compromise are also a part of the office lawyer's work, for he also serves as a private judge. Adjudication is usually identified with formal litigation, but it is not necessary to invoke the machinery of the state to resolve human conflicts in a rational manner. Indeed, the elements of wise dispute settlement—conciliation, negotiation, and compromise—are better carried on in the lawyer's office around the conference table than in the courtroom. The goal of dispute settlement is not the victory or defeat provided by the judgment at law which may terminate the relationship of the parties. It is the sound reconciliation of the parties' interests for their future relationships.

These functions of the office lawyer give the private legal process a broader scope than the judicial, the administrative, or the legislative processes because the private legal process rests on the power of the individual, not of the government. This difference often leads the office lawyer to view his activities and the private law he creates as solely a matter of private concern. His client, for example, has a right to insist on any provision in the contract to which the other party will agree, no matter how unfair, so long as it does not violate the law. This idea is supported by the concept of freedom of contract. But private law is no less law than a statute. The common law is not so explicit as Code Napoleon, which provides in Section 1134 that "Agreements legally formed have the force of law over those who are the makers of them," but its effect is the same. A valid contract determines the rights and duties of the parties as effectively as a statute. Private law is private only in a limited sense—in that it is law made by persons as private individuals for their own benefits—for any law that may be enforced by the courts is vested with a large public interest.

The lawyer's administration of private law is thus no less important than the government's administration of public law. "The most effective realization of the law's aims often takes place in the attorney's office, where litigation is forestalled by anticipating its outcome, where the lawyer's quiet counsel takes the place of public force."[5] Since the private lawyer exercises power as important, if not as specialized, as that of the government official, he has a responsibility to exercise his power wisely.

5. *Report of the Joint Conference on Professional Responsibility*, 1958 A.A.L.S. PRO. 187, 192.

The unarticulated premise of American jurisprudence is that power, whether it is economic or legal, public or private, shall be exercised responsibly and fairly. "The lawyer as client caretaker provides the dynamics of the principle that in this society all power should be constitutional power—that all power, not just public but private as well, should be responsible power, exercised subject to the check of someone other than the power holder."[6] The results of the abuse of this power are well illustrated by decisions such as *Baker v. Carr*,[7] *Miranda v. Arizona*,[8] and *S.E.C. v. Texas Gulf Sulphur Co.*[9] The first case imposed a limitation on the power of a state legislature, the second on police officers, and the third on corporate officials. The failure of the Tennessee Legislature to comply with its own constitutional requirements made it necessary for courts to inquire into abuses of the electoral process even down to the level of county school boards, to which the one-man-one-vote rule now applies.[10] The abuses of the rights of accused persons dealt with in *Miranda* have lessened the discretion of police officers. Corporate officials, as a result of the *Texas Gulf Sulfur* case, must develop new policies for releasing information about new developments in their companies and exercise discretion in naming brokers to their boards of directors. A greater sense of responsibility in the exercise of these powers would have made it unnecessary for the courts to limit them so severely.

The lawyer can easily overlook the need to exercise his power responsibly and fairly because he thinks in terms of legal rights and legal duties. But, in fact, he acts in terms of power, the ability to bring about a desired result. He plans his client's legal relations first in terms of the client's power at his disposal, and after determining what the client has the power to do, he formulates the plan in terms of rights and duties. The greater the power of the client, the greater the probability that the plan will be to the advantage of the client at the expense of another. The corporate counsel who drafts an adhesion contract might load the contract with protective provisions for his client, minimizing the duties and maximizing the rights. Yet, courts in construing the contract will view not only the terms of the agreement, but the relative bargaining positions of the parties as well. The party who drew the contract has the

6. Hurst, *The Lawyer in American Society* 1750-1966, 50 MARQ. L. REV. 594, 599 (1967).
7. 369 U.S. 186 (1962).
8. 384 U.S. 436 (1966).
9. 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).
10. Delozier v. Tyrone Area School Bd., 247 F. Supp. 30 (W.D. Pa. 1965). *See also* Avery v. Midland County, 390 U.S. 474 (1968).

burden of showing, implicitly or explicitly, that the contract is fair. The greater the disparity between the parties, the heavier the burden. Thus, it is in the client's interest for the private legislation to be fair.

The task of the office lawyer, then, is not merely a matter of determining what is right and what is wrong in terms of rules of law. His problem is determining the wisest course of action in terms of social as well as economic implications.

The private legal process presents the office lawyer with a job that is more complex and challenging than that of the advocate in the judicial process. To deal with the future is more difficult than to cope with the results of the past. To prevent litigation is more helpful than to win a lawsuit. To work alone in the office is less dramatic than to work in the structured setting of a trial. But the opportunities for the office lawyer are greater. He receives problems in their most malleable form and has the opportunity to mold opinions, to shape conduct, and to provide reasoned, intelligent solutions to problems.

III. The Qualities of the Office Lawyer

The role of the office lawyer, wide in its scope, deep in its implications, and without any clearly defined structure, may be the most important of the lawyer's roles. The influence of the lawyer in his office begins with the client's statement of his difficulties and ends when they are resolved. But the effect of his influence may extend beyond the resolution of the specific problem even to people of whose existence neither the lawyer nor the client will ever be aware. Indeed, so important is the influence of the office lawyer that standards as mere rules of conduct are not sufficient to guide him in his work. Loyalty, candor, and fairness are no less important for him than for the advocate, but the office demands more than the courtroom. Personal qualities—qualities such as judgment, tact, and competence—are essential for the office lawyer to advise, counsel, and devise solutions for his client's problems; while the advocate specializes in conflict, the office lawyer specializes in cooperation.

This section discusses the standards of the office lawyer in terms of the necessary personal qualities. The discussion first deals with the duty of fairness, which applies to the lawyer in all of his roles. This subsection is followed by a discussion of the three basic roles of the office lawyer, as counsellor and adviser, as private lawmaker, and as private adjudicator, and the special qualities appropriate to these roles.

A. The Duty of Fairness

The duty of fairness, which pervades our legal system, is best illustrated by the equal protection, the privileges and immunities, and the due process clauses of the fourteenth amendment and the due process clause of the fifth amendment. These provisions of the Constitution are the most concrete manifestations of the idea that the law should treat all men fairly. Though they are limited in their application, to government and the public legal processes, their effect may be sufficiently broad to affect private individuals in their legal relationships, as in *Shelley v. Kraemer,*[11] which held that a racially restrictive covenant cannot be enforced in the courts. Even so, for the most part, the idea of fairness has not been applied so explicitly to the private legal process. The major reason for this deficiency, perhaps, is the *caveat emptor* complex that is part of the adversary system. The office lawyer, no less than the advocate, is subject to the allure of the idea that he must get whatever he can in any way he can for his client. Yet, it is clear that the "reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is immoral, unfair, or of doubtful legality."[12]

How is the applicable standard of fairness to be measured? The lawyer who advises his client to sell property to another who is misinformed about the acreage involved, or to proceed with the construction of a building in violation of a contract or building code because the damages he will have to pay will be worth the risk, or to infringe a copyright because the owner will not be in a position to know or to bring suit is being cheap and petty. Deeent lawyers avoid such advice. The point is not one that needs elaboration because it is clear that when the person with whom the client is dealing proceeds under a misapprehension known to the client, or when the client proceeds without informing his opposite number, any supposed advantage accruing to the client is the result of unethical conduct.

But what about the wealthy client who wishes to back an impecunious, but talented, young man in a business venture by forming a corporation? With the money, the client is in a position to claim as large a share of the company as he desires. The client wishes 90 percent of the stock. Should the lawyer proceed, or should he attempt to get his client to accept 60 percent of the stock? The Code of Professional Responsibility provides some assistanee.

Advice of a lawyer to his client need not be confined to purely legal considerations

11. 334 U.S. 1 (1948).
12. *Report of the Joint Conference on Professional Responsibility, supra* note 5, at 192.

> . . . . A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.[13]

Many lawyers would see no problem here because they fail to distinguish between their roles as advocates and as office lawyers. The difference is that the lawyer in the courtroom shares no responsibility for the past conduct of his client; the lawyer in his office by advising his client as to future conduct is responsible when the client acts in accordance with that advice. A part of this responsibility is to help the client to be his better self and to perceive both his long-term and his short-term self-interest. This responsibility is what the client pays for, and no decent lawyer can afford to abdicate it on the premise that he is merely doing what his client wants. "In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment."[14]

The proper measure of fairness is the responsible exercise of power. The point is best illustrated by the due process clause, a limitation on the power of government. The purpose of the clause is to restrain government officials in the exercise of their power and to compel them to exercise it in a responsible manner. The office lawyer exercises power on behalf of his client in much the same way as a government official, and the requirement that he act in accordance with private due process in the use of law is essential. The difference in the two situations is that the government official must apply a uniform standard of due process to all, regardless of their status or position. The wealthy corporation has as much right to fair compensation for its land taken under the power of eminent domain as the poor farmer. On the other hand, the lawyer in the private legal process should take into account the relative positions of the parties involved. The lawyer representing General Motors Corporation has different obligations from the one representing a poor widow. "The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding."[15]

Fairness and the responsible exercise of power by the lawyer are important not only for the client, but for the profession as well. Failure to comply with the standard of a private due process in the making and administration of private law leads to redress by statute. As the due

13. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (Final Draft 1969).
14. *Id.*
15. *Id.* at EC 7-11.

process clause of the fourteenth amendment was adopted in response to the abuse of governmental power by the states, so the abuse of power by lawyers, or their clients, calls for limitations on the exercise of power by the individual. An illustration of this reaction is the Uniform Consumer Credit Code drafted by the National Conference of Commissioners of Uniform State Laws and approved by the American Bar Association at its meeting in August 1968. The abuses and unfairness in the use of law in this area are too well known to discuss.[16] As the Consumer Credit Code demonstrates, the concept of private due process for the lawyer is one of large social implication, for the lawyer must be concerned with social fairness as well as individual fairness. "The lawyer's function is in the nature of a fiduciary or trustee, and he is answerable as such, not only to the particular person standing in direct relation to him of client, but answerable also to all those, whether it be the public or individuals, to whom the client himself owes an accounting."[17]

Social fairness requires a judgment about the soundness of the client's proposed conduct in light of its effect on others apart from questions of its legality. It involves a long-range view of the client's self-interest which he often does not perceive. The problem is one that is particularly applicable to the businessman-client, who must act responsibly in terms of the public welfare and be fair with the public upon whom he depends for a profit. Suppose a corporation proposes to establish a manufacturing plant that will pollute a river, or produce a product for sale that is unsafe, or wants a warranty drafted that will mislead the consumer. When his client wishes to engage in such conduct, the lawyer can be effective in educating him to the fact that the client's own self-interest requires a concern for fairness to others and to the public. One price business pays for not acting responsibly is government control. One need only view the regulation of railroads, the trucking industry, and airlines, or the rise of big labor to see that the story of government regulation of business is the story of the failure of business to act responsibly. A still more obvious illustration is the failure of manufacturers to be concerned for automobile safety, which has resulted in the imposition of federal standards by Congress.[18]

The responsible exercise of power is the measure by which the fairness of conduct in relation to the public good can be gauged. As the

16. One of the most revealing sections of the Code provides: "Except as otherwise provided in this Act, a buyer, lessee, or debtor may not waive or agree to forego rights or benefits under this Act." UNIFORM CONSUMER CREDIT CODE § 1.107(1).

17. Brown, *Some Applications of the Rules of Legal Ethics*, 6 MINN. L. REV. 427, 435 (1922).

18. 40 U.S.C. §§ 701-03 (1964).

complexity of the problems in modern society increases, the exercise of power by individuals and groups becomes a circumstance of increasing concern.

> [T]he business corporations of this country, perhaps as a result of the series of blows that have been rained upon them in the last twenty-odd years . . . have begun to feel themselves that they ought to look at the whole panorama in charting their courses. Many of them recognize a public responsibility going beyond bare legal rights. As a result their lawyers have been encouraged to give a broad kind of advice.[19]

This quotation might be misinterpreted. If it means that lawyers give broad advice only in response to the wishes of their clients, and not because of their own sense of professional responsibility, it would be an indictment of the profession because it means that lawyers have failed as counsellors. The point is one that goes to the heart of the office lawyer's guiding role. To what extent should he control, or attempt to control, his client's actions in the interest of fairness and justice to others?

The lawyer whose client insists upon conduct that will be unfair or unjust to others may follow one of three courses of action. He may refuse to do his client's bidding and lose a client; he may do his client's bidding and gain a fee; or he may attempt to educate his client and persist in his efforts to get his client to act responsibly. To do the first is to abdicate a responsibility by leaving the client free to injure himself or others. To do the second is to fail as a lawyer. To follow the third course is his professional duty. "It is not only the right and privilege, but it is the professional and personal duty of the lawyer . . . to use his utmost endeavor, even to the extent of shrinking or even losing his standing with his client, to keep his client from doing injustice."[20]

B. The Lawyer as Counsellor

The particular duty of the lawyer in advising his client is "to preserve a sufficient detachment from his client's interests so that he remains capable of a sound and objective appraisal of the propriety of what his client proposes to do."[21] This duty requires special emphasis on the qualities of competence, judgment, and tact.

The lawyer's professional duty of competence is clear. "If the attorney is not competent to skillfully and properly perform the work, he should not undertake the service."[22] More than competence in the law,

19. W. Seymour, *Religion and the Law*, in MAN AT WORK IN GOD'S WORLD 152-53 (1963).

20. Brown, *supra* note 17, at 435.

21. *Report of the Joint Conference on Professional Responsibility*, *supra* note 5, at 192.

22. Degen v. Steinbrink, 202 App. Div. 477, 481, 195 N.Y.S. 810, 814 (1922), *aff'd mem.*, 236 N.Y. 669, 142 N.E. 328 (1923); ABA CODE OF PROFESSIONAL RESPONSIBILITY CANON 6 (Final Draft 1969).

however, is required for the lawyer in advising his client as to a proper course of action. "The client is not merely a point or problem of law. He is a human being who seeks advice and help in meeting a problem with personal as well as legal aspects."[23] The client who wishes to disinherit his daughter for marrying a man of a different faith would almost surely regret his action. The issue for the lawyer in such a problem is not the rules of law necessary for the client impulsively to achieve his immediate objective, but the wisdom of the objective. The competence of the counsellor, in short, calls for him to weigh the human factors as well as the legal factors involved. Yet, many lawyers are apt to limit their inquiry to facts they deem relevant to the legal issues, facts necessary to make a given plan effective. The genuinely competent lawyer will go further and be coneerned as well for the effects of his client's goals, not only on the client, but on those who will be affected by them.

The lawyer is paid for his judgment. "He contributes not only that feeling for relevance which is the essence of his profession, but a sense of priorities, which is the next step up from relevance . . . . [H]e will be able to see in many situations implications that have escaped other people."[24] The lawyer thus must remain free of emotional entanglement in the client's problem[25] and avoid any conflict of interest.[26] Yet, unquestioning adherence to the client's desires can be an inhibiting factor on the lawyer's judgment, for the exercise of sound judgment requires independenee of thought. The lawyer in advising his client must not have his perspective foreshortened by the client's eagerness and desires for the present. The problem at hand must be considered not only in light of the client's aims and his immediate goals, but also in the light of wise policies and long effects, for errors of judgment usually occur when only immediate goals are kept in mind. To advise how to make a contract legally binding is one thing; to advise how to make a contract work is another.

Tact also is an essential quality of the lawyer. Both Justiee Holmes and Chief Justice Hughes considered it one of the two necessary

23. Cheatham, *The Growing Need for Specialized Legal Services*, 16 VAND. L. REV. 497, 499 (1963).

24. M. MAYER, THE LAWYERS 307 (1967).

25. "A lawyer should not accept proffered employment if his personal interests or desires will . . . affect adversely the advice to be given or services to be rendered by the prospective client." ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-2 (Final Draft 1969).

26. "The professional judgment of a lawyer should be exercised . . . solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client." *Id.* at EC 5-1.

qualities.[27] The lawyer is concerned with establishing relationships that involve compatible but differing aims. The process is one that inevitably gives rise to friction, suspicion, and disagreement. The basis for dispelling the friction, allaying the suspicion, and resolving the disagreement is tact. Tact rests on an understanding of the other person—putting yourself in his place—and consideration in dealing with him; the essence of tact is the ability to respect others and to convey that respect, even while disagreeing with them.

C. *The Lawyer as Private Legislator*

Private law is especially important in a free and changing society in which technology requires a continual readjustment of human relationships. The swiftly changing conditions of our times call for new arrangements requiring imagination and creativity, but the need for the lawyer to create new law in the form of a wholly new type of legal instrument is the exception rather than the rule. The problems of most clients can be solved through the use of approved, and perhaps standardized, legal conceptions chosen for and applied to the particular situation. The primary duty of the lawyer is to effectuate the desires and plans of his clients in ways that will not be successfully challenged because of their novelty. Thoroughness, competence, and a good clear head are the qualities required.

Most legal conceptions, however, are flexible, and skill and imagination also are required to shape them to fulfill the unique needs of the client. To the client, even the application of a standardized rule is significant, and the role of the lawyer in making law for his client goes beyond that of drafting the instrument. He must, of course, be accurate and full in statement and in formalities in order to avoid future controversies concerning meaning or validity. But equally important, he has an early part in his client's affairs, and he is a creator and shaper of future relations. As a dispassionate yet loyal adviser, he can be more comprehensive in his views of the interests involved and affected; therefore, he can develop plans that are wiser in the long run than those the client originally had in mind. To his role as private law maker, the lawyer also must bring perspective and judgment—perspective that takes into account standards of conduct as well as rules of law, judgment as to what serves the best interest of his client.

The responsibility of the lawyer in molding and shaping his client's

27. *See* O. W. HOLMES, *The Use of Law Schools*, in COLLECTED LEGAL PAPERS 35 (1920); C. HUGHES, SOME OBSERVATIONS ON LEGAL EDUCATION AND DEMOCRATIC PROGRESS (1920).

plans as well as effectuating them depends in large measure upon whether the situation involves a unilateral or a bilateral transaction. In the former, typified by making a will or drafting a trust instrument, the client is interested in controlling his own affairs. As in every case, the lawyer will describe the problem, clarify the issues, enlighten the client on the factors affecting his choice, and aid the client in making his final decisions. In the unilateral transaction, however, the social factors are minimal. The client is interested in preventive law, law that in a family settlement, for example, may give security to his heirs through generations. For the most part, the lawyer's exercise of power coincides with the public interest, because he uses power to insure orderly relationships.

In bilateral or multilateral transactions, which include the majority of transactions with which most lawyers deal, another factor enters. The client, whether he realizes it or not, is interested in the exercise of power, and power is a very attractive goal for most men. He wants the completed transaction to vest in him the power to achieve his aims. The other parties involved in the transaction want the same result for themselves. The interests of all parties require that the transaction be more than just legally valid; it must also be one that will work because the parties believe it is fair.

The lawyer realizes, or should realize, what the client may not—that he is dealing with emotions as well as reasoning. A famous lawyer made the point well.

> Many of our severest battles are with our own clients; anger and vengeance have to be extirpated from their minds and emotions, and a sense of justice instilled. We have to teach them the limits of the law . . . . We learn that all opposing parties are not rogues and liars; that there is much on their side—sometimes too much. We learn that opposing counsel are not only able and alert, but also in most cases, with only tragic exceptions, prove to be honorable gentlemen. We learn that misunderstanding, rather than greed or spite, is at the root of many quarrels.[28]

The final agreement embodied in the contract signed by the parties may constitute law, but it is only a means to an end, and it will be workable only to the extent that it reflects the wishes of both parties.[29]

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28. Smith, *Inaugural Statement*, 1 PERSONAL FINANCE Q. REP. 1, 6 (1946).

29. The same point may be stated differently. A contract may be primarily a framework for cooperative effort, without regard to its enforceability or the interpretations a judge would give to it. In preparing it, the lawyer often has to balance 2 aims: (1) placing his client in a position to win any lawsuit arising out of the contract, and (2) creating an instrument of collaboration that will function effectively without a lawsuit. "If he cannot have both these things, he may properly favor the second at some cost to the first, since his role as practical legislator for the situation may be more important than his role as advocate in a hypothetical future adjudication." Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL ED. 189, 195 (1948).

A man does not enter into a contract with one in whom he has no confidence or trust, and a contract is no substitute for these qualities. The functions of a contract are to clarify the agreement between the parties, to define their rights, and to delineate their duties. These functions are necessary because of the fallibilities of men—imprecise communication, faulty memories, and the need for guidelines in a complex undertaking. The contract is given the force of law to make it effective. But the rights defined and the duties delineated are exercised and performed by men, and men act as often on the basis of emotion as on the basis of reason. It is important, then, that rights and duties in a bilateral or a multilateral transaction be determined and imposed fairly. There must be fairness in reaching the agreement and fairness in the agreement itself. Equally important, all parties must think they have been dealt with fairly. The lawyer knows, and he must make his client know, that law involves not only rules, but also standards of conduct. The client who attains his objectives at the expense of his reputation and another's pride may have only a Pyrrhic victory.

The nature of modern society—increased specialization, increased division of labor, and the interlocking nature of so many interests—makes the increased use of private law as a means of providing order inevitable. As a result, there is a need for constantly changing legal methods and adaptations in business and otherwise. One of the tasks of the lawyer is to furnish the imagination and judgment for the creation and selection of appropriate and wise new methods as a private lawmaker.

D. The Lawyer as Private Adjudicator

The process of private adjudication provides the lawyer with an opportunity for perhaps the greatest service to his client. The simplest and most common adjudication by the lawyer occurs when the client alone asks the lawyer about his rights. The answer will usually resolve the issue for the client. In the more complex situation, when the client is in dispute with another, private adjudication prevents litigation and saves the client time, effort, money, and perhaps, reputation. The disputes that the office lawyer settles usually arise as an incident in the negotiating and planning of future relationships and conduct, but they may arise out of past relationships and conduct. In either event, the principles of private adjudication are the same, for in contrast to the narrow, highly formalized nature of a trial, private adjudication is a broad, malleable process. It has four distinct stages—reconciliation of aims, exploration and explanation, give and take, and agreement. These

stages may also be characterized as conciliation, negotiation, compromise, and settlement. Unlike public adjudication, however, private adjudication is not a process structured by rules to cover variable situations. It is a process structured by the lawyer in light of the particular situation, and the various stages intermingle and overlap.

In any legal dispute, the emphasis on the three essential elements—factual, legal, and human—varies as the dispute moves from the process of conciliation through negotiation and compromise to settlement or litigation. In the beginning, around the conference table, the dominant factor is the human element, followed by emphasis on the facts and then the law; in the courtroom, when positions have become fixed and attitudes hardened, the dominant factor is the legal element, with emphasis to be given to the facts, and with less emphasis on the human element. The process of dispute settlement thus moves from reliance on the ability of the parties to reach an accommodation of personal wishes, desires, and motivations to reliance on legal rights and legal duties. With a proper beginning, the transition will usually be made smoothly to a decision concluded in the lawyer's office. Without a proper beginning, the transition may be to an exacerbated dispute that must be concluded in the courtroom or to a rupture in the relationship of the parties.

The lawyer's role as private adjudicator requires that initially he view the dispute in terms of its human elements. To view the dispute in this manner is to recognize that conflicts between people do not originate out of rights or duties granted or imposed by law, but out of personal feelings, personal desires, and personal motivations. Disputes can be most effectively dealt with when understood in terms of their origin.

The role of private adjudicator like that of counsellor requires one quality in particular, that of tact—the ability to respect other people and to convey that sense of respect even while disagreeing with them. The desire for and the process of face-saving are referred to at times with derogation and often considered an Oriental trait. But the Orientals may differ from us only in their clearer recognition of its importance and fuller efforts to safeguard it. The pervasiveness of human pride makes tact essential in settling any dispute. The continuous desire of all men for the respect of others is a fact of life, and in any dispute, this respect is apt to be the first casualty. The assembling of a group of people to resolve a dispute represents a continuing threat to one's pride, and the essence of tact in the dispute settling process is to protect, and if necessary, to repair the pride of the disputants. Lawyers are prone to underestimate the importance of this quality. Their emphasis on the traditional skills in

dealing with facts and law often leads them to ignore the vital human element in a dispute. Their training to deal with matters objectively tends to make them suspicious of treating matters subjectively, as the use of tact requires them to do. Lawyers want to deal with reason not emotion, but emotion is a fact of life that cannot be avoided.

The major threat to the process of private adjudication is the adversary system of the common law. Trained in the adversary system of advocacy, the lawyer tends to view a dispute as a contest for advantage, not an opportunity for settlement. The adversary system was not meant to be a means of settling a dispute but a means of presenting it to a formal tribunal. It has little relevance to the process of private dispute settlement, which is based on the premise that people in conflict remain capable of acting responsibly. The lawyer's duty is to implement that premise. To the extent that he fails, he diminishes the efficacy of the private dispute settling process. To the extent that he succeeds, he strengthens it and enlarges his contribution to the welfare of society.

III. The Use and Misuse of Law

A client may wish to pursue a course of conduct that is not consistent with or cannot be realized within the limits of established law or precedent. When he is asked to provide such a plan, the lawyer is faced with the difficult task of determining the fine line between evasion of the law and creating new law that will be accepted by the courts as a sound piece of private legislation. He must develop a plan that involves the proper use, rather than the misuse, of law.

The problem is not often perceived in these terms for two reasons. First, the courts are concerned only with the legal effectiveness of a plan and not with the legal or professional quality of the lawyer's work, and they seldom hold him to account for misuse of the law. The lawyer's duty to his client insulates him from criticism by the court, except in cases of the most flagrant abuse. Courts almost always speak in terms of the actions of the parties even though the lawyers are responsible for the parties' conduct. Secondly, but equally as important—and perhaps the court's attitude is partially responsible—lawyers rarely acknowledge their own responsibility for misusing law. They can too easily rationalize it away, because both the client and the lawyer use law. The client used it to obtain a benefit in a particular situation, as when he enters a contract. The lawyer used it as an instrument to achieve the goals of his client.

The misuse of law is made most apparent by the sanctions that courts impose when it occurs. The most common sanction, of course, is the striking down of the plan by the courts. This penalizes the client. But

in some instances, the sanction is imposed directly on the lawyer, as when he is subjected to censure,[30] or when he is suspended from practice or disbarred.[31] In extreme cases, he may be subjected to criminal prosecution[32] or a suit for damages.[33] A major consideration involved in the use of sanctions against the lawyer is the social desirability that he be free to do the best he can for his client without the threat of personal condemnation of liability. "Whenever the law draws a line there will be cases very near each other on opposite sides."[34] Consequently, lawyers must have a substantial measure of freedom in their work. "Infallibility is an attribute of neither lawyer nor judge . . . . It is a silly perversion of the legal fiction that every one is bound to know the law, to insist . . . lawyers shall decide all questions in accordance with what the courts may ultimatcly hold . . . ."[35]

If the lawyer is to be accorded this freedom, he must accept a corresponding responsibility. Courts impose the responsibility by striking down those plans that do not come within the law. The most difficult problem, however, is whether the lawyer is to be condemned for a questionable plan that comes barely within the letter of the law. The answer, thus far given by default, appears to be no; given the nature of our legal system, this conclusion may not only be necessary but desirable. This answer, however, is not satisfactory for the individual lawyer who assumes a serious risk whenever he devises a questionable plan. For him, the issue is one of practical rather than theoretical importanee, for he does not know until after the fact whether his plan is within the law. Unfortunately, the lawyer often assumes the risk unwittingly and consequently unnecessarily.

Two observations may be useful. First, lawyers have a responsibility—to themselves, their clients, and the profession—to exercise their best judgment in providing decent plans not only for the client but also for others who will be affected by them. The failure to recognize this responsibility increases his risk, and it also tends to weaken the moral underpinning so essential to a healthy and dynamic system of law. Secondly, the purpose and spirit of the law play a major role in the standards courts apply in upholding or striking down plans that come close to the line. The importance of these factors, in turn, depends in large measure on the social values involved, for the courts are

30. *In re* Gelman, 230 App. Div. 524, 245 N.Y.S. 416 (1930).
31. People *ex rel.* Healy v. Macauley, 230 Ill. 208, 82 N.E. 612 (1907).
32. People v. Kresel, 243 App. Div. 137, 277 N.Y.S. 168 (1935).
33. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685 (1961), *cert. denied,* 368 U.S. 987 (1962).
34. United States v. Wurzbach, 280 U.S. 396, 399 (1930) (Holmes, J.).
35. People v. Kresel, 243 App. Div. 137, 142, 277 N.Y.S. 168, 176 (1935).

concerned with fairness and the responsible exercise of power by lawyers and their clients.

Plans involving misuse of law typically fall into three basic categories. First, some plans so clearly violate the law that the courts strike them down without hesitation. In *Ostiguy v. A. F. Franke Construction, Inc.*,[36] for example, the court held a loan usurious because the defendant was compelled to pay plaintiff's attorney 2,000 dollars under a purported retainer agreement for which no services were rendered.

Secondly, plans may seemingly comply with the law, but in fact be inconsistent with its purposes. An example of this category is *Fraw Realty Co. v. Natanson*,[37] in which the court denied effect to an ingenious scheme that was within the letter of the law but was designed to limit very narrowly the liabilities of real estate promoters. Quoting from an earlier decision, the court said: "'The logical consistency of a juridical conception will indeed be sacrificed at times when the sacrifice is essential to the end that some accepted public policy may be defended or upheld.'"[38] And in the leading case of *Gregory v. Helvering*,[39] the court overthrew an effort to escape the taxes incident to the normal method of effecting the purpose in mind, even though the unusual method adopted by the taxpayer exactly followed the provisions of the tax statute.

Thirdly, under some plans the parties by agreement supplant a general rule of law with a private rule. This category is well illustrated by *Reinhardt v. Passaic-Clifton National Bank & Trust Co.*,[40] in which a depositor gave a stop-payment order to defendant bank, which negligently paid the check and defended an action by the depositor on the ground that the order contained a provision exculpating the bank from liability if for any reason the check was paid. The order form was used by the customer, but prepared by the bank. The court, recognizing that other jurisdictions had upheld such provisions, denied its effect on the ground that the defendant gave no consideration to make the agreement binding because it promised to do only what it was under a legal duty to do. But in contrast to this attitude, in *Capehart v. Heady*,[41] an action by a lessee against a lessor for breach of a lease for a filling

36. 55 Wash. 2d 350, 347 P.2d 1049 (1959).
37. 261 N.Y. 396, 185 N.E. 679 (1933).
38. *Id.* at 405, 185 N.E. at 682.
39. 293 U.S. 465 (1935).
40. 16 N.J. Super. 430, 84 A.2d 741 (App. Div. 1951), *aff'd per curiam*, 9 N.J. 607, 89 A.2d 242 (1952).
41. 206 Cal. App. 2d 386, 23 Cal. Rptr. 851 (1962).

station, the court upheld a provision in the lease that any action against the lessor must be brought within three months. Distinguishing an earlier case, the court said: "The limitation clause in the lease . . . was agreed to by plaintiff in entering into the lease, and it is clear and distinct."[42]

All of these cases appear to be decided solely on the basis of rules of law and most of them could have been decided the other way with acceptable legal reasoning. Every lawyer is familiar with similar cases in which he disagrees with the court's opinion and for which he could supply equally good or better reasoning to reach the opposite result. Yet, it is not sufficient for the lawyer to agree or disagree with the results of cases in planning for his client's future. He must have an understanding of why the results were reached, and of the pattern that emerges when these cases are considered together.

Each of the plans the court struck down was either created when the lawyer acted unilaterally, as in the *Fraw* and *Gregory* cases, or when the lawyer's client was in a far superior bargaining position, as in the *Ostiguy* and *Reinhardt* cases. In the *Capehart* case, where the court upheld the plan, two businessmen, presumably in substantially equal bargaining positions, were involved. The judges in these cases faced the same problem they faee in all cases, that of reconciling the two basic policies of the law, order for society and justice for the individual. The two policies are directed to the same ends because without order justice for the individual is a fortuitious circumstance.

Whenever the lawyer creates a plan or instrument that is not within both the letter and the spirit of accepted rules, he runs the risk of having this plan struck down by the courts, because this type of plan gives rise to a conflict between the policies of order for society and justice for the individual. This conflict lies at the heart of the problem. When will the court sustain a questionable plan in the interest of stability and order on the grounds that "contracts, when entered into fairly and voluntarily shall be held sacred, and shall be enforced by Courts of justice"?[43] And when will the court sacrifice "the logical consistency of a juridical conception" in the interest of justice for the individual as in the *Fraw* case? The answer can be found only by resort to a third policy, the policy of fairness. The ultimate question for the lawyer in evaluating his plan is whether it is fair. Is it fair for the parties; is it fair for society; is it fair when measured by decent moral standards? Fairness implies a definite

42. *Id.* at 391, 23 Cal. Rptr. at 854.

43. Black & White Taxicab Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 528 (1928).

relationship between two parties and the measure of fairness is usually limited to the parties involved in the transaction. A contract between a supplier and a utility, for example, may be fair to both, but unfair to the consumers, who are not parties. The power of individuals, on the other hand, is a product of the law of the society in which they live and as such carries with it a duty to exercise it wisely. This duty naturally extends to persons with whom one is dealing directly, but it also extends to all persons who are affected by the exercise of the power.

To view the duty of the lawyer in the use of law as that of the responsible exercise of power is to provide a basis for resolving problems of the misuse of law, since most of the problems arise because of the duty of loyalty to the client. The duty of the responsible exercise of power serves to bring this duty of loyalty into proper perspective in two ways: first, it serves to make the lawyer aware that part of his duty or loyalty is to enable his client to be his best self;[44] secondly, it gives the lawyer a basis for the exercise of independent judgment. The pressure on the lawyer to satisfy his client is enhanced not only by the duty of loyalty, but by his need to make a living. Just as the lawyer needs a basis for acting for his client—the duty of loyalty—he also needs a basis to refuse to act improperly—the duty of the responsible exercise of power.

IV. CONCLUSION

Of the four major legal proeesses in society, the private legal process is the only one for which the profession lacks a clear conception of purpose and function. The other three—the judicial, the legislative, and the administrative—are public legal processes, the purposes and functions of which are well established in the consciousness of the bar. Yet, the twin goal of all law—order for society and justice for the individual—can be realized only if the private legal process works well, for the fulfillment of the law's goals begins not with an institution of government, but with the individual. When the private legal process fails, resort to the court, the legislature, or the administrative agency is necessary, with a consequent limitation on the individual's freedom of action. The purpose of the private legal process—to secure the individual's freedom of action in a society based on law—goes unrealized. Its function, to aid the individual in utilizing this freedom of action wisely in ordering his relationships with others, fails.[45]

44. "It is the lawyer's duty to keep the client from putting a black mark on his business record and never to yield, nor to permit his client to yield, to the purpose or intent of following a course of persecution or oppression or of any form of fraud or of injustice." Brown, *Some Applications of the Rules of Legal Ethics*, 6 MINN. L. REV. 427, 436 (1922).

45. *See generally* L. BROWN, PREVENTIVE LAW (1950).

The lawyer determines how well the private legal process works. To a large degree he has succeeded in making it work well. He would be more successful, however, if he were more conscious of its importance. He would be more successful, too, if he realized and accepted a fundamental fact: the important qualities for that process are personal, rather than intellectual, qualities. Tact, judgment, will, and a sense of fairness are necessary in making private law for the client and for those with whom he deals. The need for this realization brings Holmes' aphorism to mind: "[W]e need education in the obvious more than investigation of the obscure."[46]

46. O.W. HOLMES, *supra* note 1, at 169.