Rules and morality: What a lawyer must do versus what he/she should do

By Gregory C. Sisk *

Lawyers seem to be forever haunted by a penetrating question, one that is as old as the legal profession, but ever new in each generation: “Can a good lawyer be a good person?”

Many seem pessimistic about the answer. In recent years, leading scholars, such as former Yale Law School Dean Anthony Kronman and Harvard Law School Professor Mary Ann Glendon, have identified a crisis of morals and morale in our profession, describing lawyers as having lost their ideals and their identity. We lawyers are said by some to have lost our sense of a higher calling. Some suggest we have degenerated from a noble profession into a business concerned only with maximizing profit.

The answer to this crisis of faith within the legal profession will not be found in any code of disciplinary rules. Wise voices remind us that a set of rules, however well-constructed, cannot substitute for character and moral reasoning. In their casebook on The Rules of the Legal Profession, Professors Robert Cochran and Teresa Collett explain the difference: “Professional rules outline what a lawyer must do ... morals determine what a lawyer should do.”

Indeed, scholars on professional responsibility for lawyers increasingly find that excessive attention to black-letter rules may stunt ethical growth and inhibit development of moral character. As Professor Joseph Allegretti suggested in his book, The Lawyer’s Calling, the risk of a narrow focus on rules is that “the Code [will set] the boundaries of [the lawyer’s] moral universe.”

Likewise, Professors Ian Johnstone and Mary Patricia Treuthart warn that exclusive concentration on the formal disciplinary rules “sends the message that legal ethics involves no more than distinguishing permissible from impermissible conduct and that all ethical concerns can be resolved by referring to a clear set of rules.” But as practicing lawyers learn by painful experience, the ethics rules may say very little about what is most important in moral terms about a particular dilemma or area.

To live a truly uplifting life in our chosen profession, a lawyer needs to remain true to his or her most deeply-held values. As tempting as it may be to avoid moral questions by adopting the all-too-common and ultimately fictional posture of “amoral legal technician” in the practice of law, that is the road to perdition.

While the lawyer is not appointed to be a moral dictator, imposing his or her values upon dependent clients, neither will a lawyer find moral satisfaction by compartmentalizing his or her life into separate professional and personal (moral and spiritual) departments. The lawyer who attempts to be one type of person in private, family and social life (presumably a person of good character), while affecting a different and morally callous or indifferent persona in professional life, will find that he or she eventually becomes all one or the other. Sadly, most often, the lawyer who so tries will find him or herself collapsing into the morally inferior of the two lives.

In the practice of law, as in any other meaningful area of human relationships, the ethical practitioner must draw deeply from the well of those same values in which we have (or should have) been instructed since our youth. In a May, 1992 essay in the Iowa Lawyer, Justice Mark Cady of the Iowa Supreme Court reminds us that “the conduct of a lawyer is not simply guided by rules of law and professional ethics,” but rather “that personal values acquired as human beings remain an instructional force in the practice of law.”

In other words, to realize ethical progress in the practice of law, we must develop habits and disciplines of good character, in the same manner that we have done since childhood. As Professor Cochran submits: “It may be that the problem in the legal profession is not too little attention to rules, but too little attention to character.”

In his book titled The Lost Lawyer, Dean Kronman described the lawyer’s wisdom—that element that defines the outstanding lawyer—as “a trait of character that one acquires only by becoming a person of good judgment, and not just an expert in the law.” Professor Lisa Lerman argues that lawyers need to become “reflective practitioners’ who retain and develop their moral perception and their moral judgment.”

And, on that note, there is good cause for growing optimism about our profession, at least for those of us fortunate to practice in the upper Midwest. Iowa lawyers are not better, more ethical, or more professional because we adopt this or that formal rule of discipline or legal standard for practice. Instead, we are what we are because of our character, because of our traditions, because we still regard ourselves as part of a great profession and understand what that means. Precisely because of our distinct character and traditions, Iowa lawyers have much to offer the profession at large.

And what exactly does it mean to be a professional? Professor Neil Hamilton, now of the University of St. Thomas School of Law in Minneapolis, explained in a June, 2000 essay in the Iowa Lawyer that lawyers...
are members of one of the four original learned professions (law, medicine, theology, and the professoriate):

The historical characteristics of the learned professions were: (1) the pursuit of a learned art through formalized education and extensive training; (2) a commitment to a distinctive ideal of public service which imposes ethical demands, to which ordinary citizens are not subject, to restrain self-interest and to use the special knowledge and skills gained for the common good; and (3) professional autonomy obtained from self-regulation.

... Essentially, society and members of a learned profession form a social compact whereby the members of a profession agree to restrain self-interest, to promote ideals of public service, and to maintain high standards of performance while the society in return allows the profession substantial autonomy to regulate itself through peer review.

In sum, a true professional appreciates the opportunity to serve our fellow human beings with moral forthrightness and dignity, to practice law as a higher calling—yes, as a vocation—in which professional responsibility means so very much more than avoiding disciplinary sanction.

The bar as an organized profession or guild serves one other vital role in our society: It plays an intermediary role in protecting the citizen against the power of government. The bar is subject to regulation by the state government, primarily through the judicial branch which itself is removed to some degree from direct political control. But the legal profession must remain independent if it is to achieve that integral role as the watchman for liberty. We must remain eternally vigilant against attempts by government to co-opt lawyers into political functionaries in the guise of public responsibilities. We must object to government interference with the attorney-client relationship that may undermine the ability of citizens with the assistance of counsel to resist the overreaching of government.

For these reasons, Professor Stephen Carter once “urge[d] the professions to celebrate and preserve a radical autonomy from the culture and the government.” Autonomy does not mean an isolated individualism or a lack of moral understanding within the profession. Rather, if that autonomy is to be robust, well-grounded, and strengthened by the solidarity of fellow professionals, it must be grounded in moral principles.

No regime of disciplinary rules adopted to regulate the legal profession will revitalize the profession or inspire a renewal of moral practice. The Iowa Rules of Professional Conduct are no exception. We ask too much of a formal ethics code and too little of ourselves if we expect to find within disciplinary rules the roadmap to a happy and moral life and legal practice.

At the same time, while a solid set of ethical rules may not be sufficient for a healthy profession and moral practitioners, it surely is necessary. By themselves, good rules of ethics alone cannot make good lawyers. But bad rules of ethics will undermine professionalism and moral aspiration.

If a code of ethics is ambiguous, has become obsolete, fails to address emerging problems, or fails to resonate with the actual experiences and changing practices of lawyers, that code will lose the respect of the governed. At some point, an antiquated body of professional rules may become
worse than having none, because they breed cynicism and invite readers to regard those canons as high-minded but empty rhetoric, out of touch with the reality of their professional lives, and unworthy of meaningful meditation.

According to Professors Geoffrey Hazard and William Hodes, in the 1990 edition of the leading treatise on *The Law of Lawyering*, a well-drafted and contemporary “corpus of rules can at least establish a common core of shared values and have an educative and uplifting effect.” As now-Judge Patrick Schiltz of the United States District Court for the District of Minnesota explained in his classic critique of the profession, while ethical legal practice requires more than mere compliance with the rules, “[t]he rules are important, for they affect the conduct of lawyers (in both anticipated and unanticipated ways) and they influence the values of the profession.”

Thus, as the Iowa bar continues to maintain a tradition of professionalism, we must give due attention to the Iowa Rules of Professional Conduct, while not neglecting moral development and character. From the law schools to the law firms, we all have a role to play in maintaining and advancing ethical progress in our profession.

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**TRANSITIONS**

James B. Benda has been named Vice President/Senior Trust Officer of West Bank in West Des Moines. Jim previously served as a trust officer at Bank of America for the past 13 years. He received his B.A. and J.D. degrees from Drake University.

Amy Plummer has been named a shareholder at the law firm of Smith, Schneider, Stiles and Serangeli, P.C. in Des Moines. Amy graduated from Pepperdine University School of Law in 2002. She practices general business law, including corporation and limited liability company formation, and electronic commerce law.

Angela M. Haen has joined the Parmenter Law Office in Huxley as an associate. Angela received her B.A. in Sociology from the College of St. Benedict in 2005. She received her J.D. at William Mitchell College of Law in 2008. She will engage in the general practice of Law.

Patrick McMullen has joined the law firm of Matthias, Campbell, Tyler, Nuzum & Rickers as an associate. Originally from Marshalltown, Patrick received a B.A. degree from the University of Iowa in Marketing in May of 2003. He then received his J.D. from the University of Missouri-Kansas City in May of 2007. Patrick will be engaged in the general practice of law, with a focus on family law, criminal law and civil litigation.

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