

6-2024

Purpose, Practical Wisdom, and the Formation of Trustworthy Lawyers

Kenneth Townsend

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Townsend, Kenneth (2024) "Purpose, Practical Wisdom, and the Formation of Trustworthy Lawyers,"
Mercer Law Review: Vol. 75: No. 5, Article 3.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol75/iss5/3

This Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.

Purpose, Practical Wisdom, and the Formation of Trustworthy Lawyers

Kenneth Townsend*

I. INTRODUCTION: TRUST AND THE LEGAL PROFESSION

Lawyers have a “special responsibility for the quality of justice” in our nation and are expected to “further the public’s understanding of and confidence in the rule of law and the justice system” since “legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”¹ Upholding these and other commitments enables the profession to promote the “public interest,” according to the Preamble to the Model Rules of Professional Conduct.²

Fulfilling these responsibilities is contingent, however, upon lawyers and the legal profession maintaining the trust of the American people. We should not expect the public to entrust lawyers to be guardians of the public good if lawyers are not viewed as trustworthy professionals.

It is perhaps inevitable that lawyers will sometimes fail to conjure positive associations. Unlike an annual check-up with one’s physician, or a weekly visit with one’s pastor, rabbi, or imam, many Americans only see a lawyer because something has gone wrong, sometimes terribly so. Perhaps a marriage has deteriorated past the point of repair, resulting in vitriolic disputes over shared property, custody of children, and more. Or a loved one has died leaving a mess of financial affairs along with the accompanying heartache. Or a home has been destroyed by floods, but an insurance claim has been denied. Even when a lawyer helps solve your problems, it can be easy to resent the fact that you are having to pay that lawyer money—perhaps much more than you think fair—to resolve something that you feel never should have needed fixing. Furthermore,

*Director of Leadership and Character in the Professional Schools, Wake Forest University School of Law. Millsaps College (B.A., 2004); University of Oxford (MPhil, 2006); Yale Law School (J.D., 2012); Yale Divinity School (M.A., 2012).

1. MODEL RULES OF PRO. CONDUCT *Preamble* para. 1, 6 (AM. BAR ASS’N 2023).

2. MODEL RULES OF PRO. CONDUCT *Preamble* para. 6.

victory in our adversarial system can be a zero-sum game. Even when a lawyer succeeds in accomplishing your objectives, other parties suffer and sometimes blame the lawyers on the other side for their pain.

While it might be tempting to dismiss criticism of the profession as the inevitable result of lawyers simply doing their jobs well,³ lawyers do not have the luxury to ignore broad public distrust. There is wide and seemingly growing distrust of the legal profession,⁴ reflected, among other places, in public opinion polls that continue to reveal lawyers as one of the least trusted groups of professionals.⁵

The profession's reputation reached a nadir of sorts following the 1973 Watergate scandal, which implicated some of the nation's most prominent lawyers in serious misconduct, resulting in wide-ranging sanctions, including disbarment and prison sentences for many involved, including the United States Attorney General John Mitchell.⁶ This wake-up call led the profession to adopt a new code of conduct and a new requirement of the American Bar Association (ABA) for law students to take a course in legal ethics or professional responsibility.⁷ Despite various ethics updates, ABA reports, and more in the intervening years, the legal profession continues to confront high-level wrongdoing and the associated public relations fallouts.⁸ Prominent recent instances of lawyerly misconduct provide further fodder for a public already primed to interpret the work of lawyers through a lens of skepticism. Whether

3. See generally Monroe H. Freedman & Abbe Smith, *Misunderstanding Lawyers' Ethics*, 108 MICH. L. REV. 925 (2010) (regarding the public's failure to understand the nature and function of lawyers in an adversarial system.).

4. See, e.g., Staci Zaretsky, *Scientific Study Concludes No One Trusts Lawyers*, ABOVE THE LAW (Sept. 24, 2014, 11:44 AM), <https://abovethelaw.com/2014/09/scientific-study-concludes-no-one-trusts-lawyers/> [<https://perma.cc/6EBU-ZGDU>] (elaborating on findings from Susan T. Fiske & Cydney Dupree, *Gaining trust as well as respect in communicating to motivated audiences about science topics*, 111 PROCEEDINGS OF THE NAT'L ACAD. OF SCIS. 13593 (2014)).

5. Megan Brenan, *Nurses Keep Healthy Lead as Most Honest, Ethical Profession*, GALLUP (Dec. 26, 2017), https://news.gallup.com/poll/224639/nurses-keep-healthy-lead-honest-ethical-profession.aspx?g_source=Economy&g_medium=newsfeed&g_campaign=tiles [<https://perma.cc/D4T7-CFXP>].

6. See e.g., Arnold Rochvarg, *Eron, Watergate and the Regulation of the Legal Profession*, 43 WASHBURN L. J. 61 (2003).

7. See, e.g., Robert F. Cochran, Jr., *Lawyers and Virtues: A Review Essay of Mary Ann Glendon's A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society and Anthony T. Kronman's The Lost Lawyer: Failing Ideals of the Legal Profession*, 71 NOTRE DAME L. REV. 707, 707, 721 (1996).

8. See generally Zaretsky, *supra* note 4.

undermining elections⁹ and enabling insurrection,¹⁰ or embezzling client funds¹¹ and (allegedly) accepting bribes,¹² prominent examples of bad lawyer leaders abound.

It is in this context that the ABA has recently taken new steps to require that law schools “provide substantial opportunities to students for . . . (3) the development of a professional identity.”¹³ Shaping a lawyer’s professional identity, according to the interpretive guidance for updated ABA Standard 303(b),¹⁴ includes addressing to the “special obligations lawyers have to their clients and society” as well as the “values, guiding principles, and well-being practices considered foundational to successful legal practice.”¹⁵

This new standard represents a major endorsement from the ABA of a more holistic approach to legal education. To help rebuild trust in legal institutions, law schools should use this new professional identity formation requirement as an opportunity to tend more to the moral, aspirational, and public-oriented dimensions of lawyering. This holistic approach to lawyer development and legal practice does not require lawyers to abandon duties to clients in pursuit of public goods or to prioritize their own moral commitments over the wishes of their clients, but it does call for lawyers to be more attentive, intellectually and emotionally, to the competing demands and unintended consequences associated with their work. In what follows, I identify some of the tensions inherent in lawyering and gesture towards virtues and dispositions that will aid lawyers in developing a professional identity that enables them to better recognize and navigate contexts in which duties and values conflict.

9. See, e.g., Richard Fausset & Danny Hakim, *Jenna Ellis, Former Trump Lawyer, Pleads Guilty in Georgia Election Case*, N.Y. TIMES (Oct. 24, 2023), <https://www.nytimes.com/2023/10/24/us/jenna-ellis-guilty-trump-georgia.html> [<https://perma.cc/SB62-STCY>].

10. See, e.g., Kyle Cheney, *Judge Finds Eastman Culpable for ethics breaches in 2020 bid to keep Trump in power*, POLITICO (Nov. 3, 2023, 9:48 AM), <https://www.politico.com/news/2023/11/03/john-eastman-trump-disbarment-culpable-00125219> [<https://perma.cc/VV4X-2Z3J>].

11. See, e.g., Eduardo Medina, *Michael Avenatti Gets 14-Year Sentence for Stealing Millions From Clients*, N.Y. TIMES (Dec. 5, 2022), <https://www.nytimes.com/2022/12/05/us/politics/michael-avenatti-tax-fraud-sentence.html> [<https://perma.cc/XP3F-AX49>].

12. See, e.g., Tracey Tully, *What We Know About the Menendez Bribery Case*, N.Y. TIMES (Jan. 4, 2024), <https://www.nytimes.com/article/bob-menendez-corruption-bribes.html> [<https://perma.cc/KU32-KNLS>].

13. AM. BAR ASS’N, 2022 MIDYEAR MEETING FEBRUARY 14, 2022 RESOLUTION 3 (2022) [hereinafter ABA 2022 MIDYEAR MEETING], <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2022/300-midyear-2022.pdf> [<https://perma.cc/SAX5-7JV5>].

14. *Id.*

15. *Id.*

II. COMPETING DEMANDS

How should lawyers balance the interests of the public against those of their clients?¹⁶ Does being a professional require one to integrate, or to separate, one's personal values from one's work? Every lawyer must answer these questions, either intentionally and directly, or unconsciously and indirectly through their actions. Effective professional identity formation should give law students the space to consider these questions and the resources to navigate the implications of their answers.

The professions historically promoted public goods in addition to protecting private interests. Clergy helped parishioners work out their salvation in addition to promoting various civic virtues such as honesty, integrity, compassion, and justice. Physicians cared for individual patients while also tending to concerns of public health. Lawyers represented the interests of individual clients and, in the process, helped buoy justice, writ large. The Preamble to the Model Rules of Professional Conduct states this assumption directly:

A lawyer's responsibilities as a representative of clients, an officer of the legal system[,] and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.¹⁷

Law students generally recognize their duties to clients. The duty of zealous representation pervades popular culture¹⁸ and is reinforced throughout law school and during students' first forays into summer work experiences. While internalizing the ethic that client service is good and proper, problems can emerge if one's identity is not accompanied with an internalization of other professional norms and values. At least some of the public distrust of lawyers is the result of a public who views lawyers as focused on the zealous representation of clients to the exclusion, or detriment, of other considerations, including concern for the public or adherence to any sort of moral compass.¹⁹

A. The Lawyer's Objects of Concern: Private Interests and the Public

16. For an excellent and accessible book-length consideration of many of the questions featured in this Section and in this Article, see PATRICK EMERY LONGAN, DAISY HURST FLOYD, & TIMOTHY W. FLOYD, *THE FORMATION OF PROFESSIONAL IDENTITY: THE PATH FROM STUDENT TO LAWYER* (West Acad. 2d ed. 2024).

17. MODEL RULES OF PRO. CONDUCT *Preamble* para. 8.

18. MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 1984).

19. See generally Cochran, *supra* note 7.

Good

Although lawyers have a “special responsibility for the quality of justice” and are expected to serve the “public interest” and “further the public’s understanding of and confidence in the rule of law and the justice system,”²⁰ there are many obstacles to a lawyer internalizing and manifesting these public-oriented duties.

Except for lawyers who work directly in public service, the paying client is not “the public.” The paying client may very well have objectives that are contrary to the most straightforward conceptions of the public good. It may, for example, be in the public’s interest for egregious violations of environmental regulations to be enforced strictly, even if that is not what your energy client wants. And, it may be better for the public if the creation of artificial general intelligence is regulated, but your technology client may have different interests.

Other, less provocative examples help reveal the pervasiveness of the tension between private interests and public good. Consider the trend towards specialization in legal services. It makes sense for individual clients to prefer lawyers with deep expertise and specialization to work on their matters, but this specialization comes at a cost to the public. As lawyers become more expert in their particular domains, they are necessarily exposed to fewer types of matters and clients. One of the historic values that lawyers provided was a capacity to discern and channel broader public opinion and concerns, a capacity based in part on the diverse cases and clientele lawyers represented.²¹

To these concerns, some law students and lawyers might question the coherence of the very idea of a “public interest.” In a world in which we are increasingly aware of the wide-ranging experiences and perspectives of our fellow citizens, does the idea of a “public interest” even make sense? Don’t we all simply have different preferences? Who am I as a lawyer to assume my interpretation of the public interest is any better than my client’s?

In addition, unlike the concrete needs of clients, advancing the public good can feel abstract. Is there some lowest common denominator of values that reflects the “public interest?” Is the “public interest” a combination of everyone’s hopes and dreams? Or, is the “public interest” completely reducible to procedural commitments that bracket substantive goods or values?

20. MODEL RULES OF PRO. CONDUCT *Preamble* para. 1, 6.

21. See Louis D. Brandeis, *The Living Law*, 10 ILL L. REV. 461, 469 (1916) (providing a prescient and timeless analysis of the tradeoffs associated with specialization). “The deepening of knowledge in certain subjects was purchased at the cost of vast areas of ignorance and grave danger of resultant distortion of judgment.” *Id.* at 470.

Recall that the Model Rules of Professional Conduct assume a “harmonious” relationship between a lawyer’s representation of individual clients and the lawyer’s support of justice, writ large.²² “[A] lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.”²³ This procedural conception of justice helps minimize cognitive dissonance for a lawyer who represents unsavory clients or causes, but it is not without risks. A procedural conception of justice, combined with a total focus on zealous advocacy, leaves the lawyer ill-equipped to resist inappropriate client demands. Consider the many lawyers who have worked in recent years to undermine the integrity of our elections.²⁴ These lawyers have served as zealous advocates of their client, but have most certainly not “further[ed] the public’s understanding of and confidence in the rule of law and the justice system[.]”²⁵

B. The Lawyer’s Craft: Zealous Representation and the Role of Moral Considerations

A lawyer must be prepared not only to acknowledge that their work advances different, and sometimes conflicting, ends; they must also recognize related questions regarding how their work is to be done, including the extent to which they should channel or integrate their own values into their work as a lawyer. For example, a lawyer is expected to act as both an advocate and a counselor. As an advocate, “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.”²⁶ Within this framework, a lawyer acts as the hands and feet of the client.²⁷ As a wise counselor, however, “a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”²⁸

Since the decision to consider “other considerations such as moral, economic, social[,] and political factors” is discretionary,²⁹ it is little wonder if some lawyers simply decide to opt out of weighing moral and

22. MODEL RULES OF PRO. CONDUCT *Preamble* para. 8.

23. *Id.*

24. See Cochran, *supra* note 7; see also Fausset & Hakim, *supra* note 9.

25. MODEL RULES OF PRO. CONDUCT *Preamble* para. 6.

26. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS’N 2023).

27. *Id.*

28. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS’N 2023).

29. *Id.*

other seemingly extra-legal considerations altogether. Given the many demands facing a lawyer, the simplicity and appeal of the neutral partisan—sometimes more derisively known as the “hired gun”—model of lawyering is clear.³⁰ The neutral partisan model is associated with a professional identity that is rooted in client advocacy over wise counseling and that prioritizes technical competency over normative considerations.³¹ In the absence of external checks—whether concern for the public’s interest (described above) or the lawyer’s substantive values and commitments—this model lacks relevant resources to check bad behavior.³² The lawyer can (ostensibly at least) abdicate moral accountability by simply following the client’s wishes. Even though the Rules allow lawyers to withdraw from representation deemed repugnant,³³ lawyers who have internalized the norms of the neutral partisan will rarely avail themselves of such opportunities due to concern that doing so will reveal insufficient zeal for the client.

Other models of lawyering exist, of course. Legal philosophers such as David Luban have long argued lawyers should not shy from channeling their moral values in the course of representing clients—even when doing so leads to something less than zealous client advocacy.³⁴ Deborah Rhode has similarly argued “[l]awyers must assume personal moral responsibility for the consequences of their professional actions.”³⁵ According to Rhode, this requires lawyers to recognize that even though

clients may have a “legal right” to engage in certain conduct or to invoke a particular procedure is conclusive neither of their moral right, nor of the appropriateness of counsel’s aid. Lawyers cannot simply retreat to role [i.e., assume the neutral partisan approach] in the face of larger normative questions.³⁶

Elevating the normative dimensions of lawyering in this way is not without risks. Lawyers who are too quick or heavy-handed in channeling their own moral values can easily undermine the autonomy of vulnerable

30. See generally Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985).

31. *Id.*

32. *Id.*

33. See e.g., MODEL RULES OF PRO. CONDUCT r. 1.16(b)(4) (AM. BAR ASS’N 2023) (allowing a lawyer to “withdraw from representing a client if . . . the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement[.]”).

34. See, e.g., David Luban, *Fiduciary Legal Ethics, Zeal, and Moral Activism*, 33 GEO. J. LEGAL ETHICS 275 (2020).

35. Rhode, *supra* note 30, at 643.

36. *Id.* at 644.

clients who might be inclined to defer to the lawyer's "expertise."³⁷ These risks notwithstanding our experience in life and in law reveals that there is inescapably a moral dimension to law and to lawyering. If we show no interest in moral considerations as we counsel clients, we may inadvertently signal to our clients that their own extra-legal concerns are somehow of secondary importance.³⁸ The result is a denuded lawyer-client relationship in which we know less about our client's overall concerns and are likely less effective in representing their interests.

III. CLOSING: PURPOSE AND PRACTICAL WISDOM

The aim of this Article is not to argue that lawyers replace a client-centered professional identity with one that prioritizes the public interest or lawyers' own moral commitments. I am instead offering a more modest claim, namely that the professional identity of lawyers needs to make more room for the diverse and competing duties that lawyers confront, including some of those sketched above. This requires lawyers to hold in balance (or tension) competing duties and to recognize that there will almost certainly be occasions when representing a client zealously comes at some cost to the public and/or to one's personal values. Ignoring, denying, or minimizing this reality is not helpful for lawyers who find themselves confronting such conflicts.

Forming students who can acknowledge the reality of tradeoffs and make difficult decisions in the face of moral uncertainty is essential to lawyering but is too frequently overlooked in legal education. Law schools have historically seen their role as one of transmitting knowledge and, in more recent years, of developing lawyering skills but have hesitated to engage in moral formation out of fear that doing so is paternalistic or out of concern that there is simply more important content to cover.³⁹ Training lawyers who have the intellectual and emotional capacity to weigh moral claims, however, requires tending to the character-based components of a lawyer's identity. It is not enough for students to be told at orientation and commencement about their duties to the profession and to society or for Professional Responsibility students read the Preamble to the Model Rules of Professional Conduct.⁴⁰ Certain dispositions of character should be introduced and actively cultivated

37. See, e.g., Freedman & Smith, *supra* note 3.

38. See, e.g., Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181 (1999).

39. I have written about these concerns elsewhere. See Kenneth Townsend, *Forming Good Lawyers*, 58 WAKE FOREST L. REV. 981 (2023).

40. MODEL RULES OF PRO. CONDUCT *Preamble* para. 1, 6.

inside and outside the classroom throughout the student experience. Relevant “values, guiding principles and well-being practices”⁴¹ include humility in recognizing the limits of one’s knowledge; empathy in imagining, and feeling, the perspectives of others; and courage in resisting powerful pressures to go astray. In this closing Section, however, I briefly sketch the role of purpose and practical wisdom in equipping students to recognize and confront the professional and moral tensions inherent in lawyering.

A. Purpose

Purpose helps connect who we are with the lawyers we are becoming and, in the process, provides guidance during times of uncertainty. Some students enter law school with the aim of being zealous advocates for their clients’ interests to the exclusion of all else. Many other law students enter law school with more capacious purposes, but, as Columbia Law School’s Susan Sturm has observed, “[s]tudents have no time for reflection about what they are doing, why they are doing it, and how it relates to their aspirations.”⁴² Reflection is one of the most important ways of cultivating moral self-awareness, and without time to reflect upon and, in some cases, revise their “why,” law students tend to drift into whatever the dominant mindset values.⁴³ This “purpose drift” leaves students ill-equipped to handle circumstances in which important values come into conflict.⁴⁴

Law schools can take simple steps to elevate and integrate purpose-based reflections. Students, for example, could be given at some point in the 2L or 3L year copies of their admissions personal statements and then, in service of ABA Standard 303(b), asked to reflect upon the relationship between their current purposes and those they previously outlined. This, or similar reflection exercises, could easily be incorporated into existing courses—perhaps most naturally the Professional Responsibility course—or be included as part of a graduation capstone writing assignment.

B. Practical Wisdom

Discerning how one’s purpose interfaces with the purposes of law or of the legal profession is not simply a matter of learning the right facts or

41. ABA 2022 MIDYEAR MEETING, *supra* note 13.

42. Susan Sturm, *Law Schools, Leadership, and Change*, 127 HARV. L. REV. F. 49, 51 (2013).

43. I have written about these concerns elsewhere. See Kenneth Townsend, *Preconditions of Leadership in Law*, 56 WAKE FOREST L. REV. 859 (2021).

44. *Id.*

developing the appropriate skills. It requires cultivating the virtue of practical wisdom, the “master virtue” that acts, according to the Jubilee Centre for Character and Virtues, as an “integrative virtue, developed through experience and critical reflection, which enables us to perceive, know, desire and act with good sense. This includes discerning, deliberative action in situations where virtues collide.”⁴⁵ The work of a lawyer inevitably involves making decisions among competing goods and demands, and practical wisdom enables a lawyer to discern, to analyze, to act—even when confronted with incomplete information or moral ambiguity.

The simplest way for law schools to elevate the virtue of practical wisdom is by simply calling out its presence, which is often left implicit in standard law school curricula. The Professional Responsibility course, for example, is filled with examples in which a lawyer’s duty to a client comes into conflict with other human or professional duties.⁴⁶ Faculty should acknowledge these conflicts to students not simply as intellectual puzzles to be solved but instead as opportunities to practice and apply the virtue of practical wisdom in the face of professional discretion. Students often enter the Professional Responsibility course simply looking to learn the Rules in order to pass the Multistate Professional Responsibility Exam (MPRE).⁴⁷ While this is of course essential, law schools must help students see professional responsibility—the course as well as the concept—not simply as a checklist of rules but as encompassing the “values, guiding principles, and well-being practices considered foundational to successful legal practice.”⁴⁸

45. *The Jubilee Centre Framework for Character Education in Schools*, THE JUBILEE CTR. FOR CHARACTER & VIRTUES 1, 9 (3d ed. 2022), <https://www.jubileecentre.ac.uk/projects/virtues-in-the-professions/> [<https://perma.cc/7QVC-TGBE>].

46. See LONGAN, FLOYD & FLOYD, *supra* note 16. This short book provides a helpful, user-friendly account of professional identity formation based in part on the authors’ extensive experience designing and teaching required courses in professional identity formation at Mercer University School of Law. Chapter 8 on practical wisdom is especially useful in describing both the concept and its application in the classroom.

47. See generally *Multistate Professional Responsibility Examination*, NAT’L CONF. OF BAR EXAMINERS, <https://www.ncbex.org/exams/mpre/about-mpre> [<https://perma.cc/E3KN-7DDE>] (last visited Apr. 10, 2024).

48. ABA 2022 MIDYEAR MEETING, *supra* note 13.