

1978

Crisis at the Bar: Lawyers' Unethical Ethics and What to Do About It (1978)

Jethro K. Lieberman

CRISIS AT THE BAR

*Lawyers' Unethical Ethics
and What to Do about It*



Jethro K. Lieberman

W·W·Norton & Company·Inc·
NEW YORK

Copyright © 1978 by Jethro K. Lieberman. Published simultaneously in Canada by George J. McLeod Limited, Toronto. Printed in the United States of America.

ALL RIGHTS RESERVED

FIRST EDITION

Library of Congress Cataloging in Publication Data

Lieberman, Jethro Koller.

Crisis at the Bar.

Includes bibliographical references and index.

1. Legal ethics—United States. I. Title.

KF306.L53 174'.3'0973 77-25492

ISBN 0-393-05644-9

1 2 3 4 5 6 7 8 9 0

KF
306
L53

Contents

<i>The Fine Print: A Disclaimer and Some Acknowledgments</i>	ii
1 <i>An Ethics Quiz</i>	15
2 <i>The Bar as Unindicted Co-Conspirator</i>	23
The Art of Lying	23
Mea Culpa	32
3 <i>Writing the Ten Commandments</i>	41
The Legal Profession: An Overview	42
Formalizing the Code	54
The Code of Ethics: A Preview	62
4 <i>"Keeping It for Ourselves": The Bar vs. the Public</i>	68
A Responsibility to Serve	68
Group Practice and Its Enemies	71
"Like Being against Vietnam in 1960": Sins of Self-Promotion	79
"The American People Are Like Children": The Ethics of Advertising	87
A Note on Soliciting	102
5 <i>The Ethics of Fees: The Bar vs. Its Clients</i>	107
Preliminary Double-Talk	107
The Minimum Fee: How Lawyers Broke the Law	110
Supplemental Income: The Strange Custom of Kickbacks	114

The Ethics of Inconspicuous Production	120
A Curious Rule against Contingency Fees	129
Fees for Those Who Can Afford Them	132
6 <i>The Ethics of Doing Harm: Clients vs. the Public</i>	136
The Bad Client	136
Guilty Secrets	138
The Lawyer as Advocate	153
The Lawyer as Counselor	166
The Lawyer as Negotiator	169
The Lawyer as Lobbyist	172
7 <i>In the Best Interest of the Client: The Problem of Conflicts</i>	176
The Revolving Door	176
In the Boardroom	180
What Is the Client's Interest?—And for That Matter, Who Is the Client?	182
8 <i>The Failure of Self-Regulation</i>	197
The Ethics of Enforcement	197
The Failure of the Ethical System	208
9 <i>What to Do about It: Twelve Proposals for Reform</i>	212
Notes	229
Index	239

The Fine Print: A Disclaimer and Some Acknowledgments

This book is critical of lawyers. Because individual remarks, not to mention a general tone, can be misunderstood, I wish to make a disclaimer at the outset. I do not hate lawyers, nor undervalue the worth of their services or the importance of their social function. Neither do I abhor law or legal institutions. One who has been trained in the law, who has worked side by side with lawyers, and who spends his professional time talking to and about lawyers cannot have an unsophisticated animus against the fundamental process and values they represent.

But this book is not a history of law or of the bar, nor an analysis of how legal institutions work (or how they ought to work) in a democratic society. The book has a much narrower, hence more intense, focus than that. I deal here with a cluster of serious problems that lawyers have largely brought on themselves. This cluster carries the label "ethics." I contend that the ethical system is in complete disarray. No attempt is made to provide a history of the good things that lawyers in fact have done.

Moreover, reams have been written about the issues discussed, and

this book should not be read in the expectation of finding a summary of the literature. Nor, though the book does discuss the crisis in lawyers' ethics, does it pretend to be a lawyer's analysis, with each lawsuit and argument laid out in catalogue order.

Many people have given me their time, thought, and opinions. Some are mentioned in the text or notes and to them I am grateful. But I do wish especially to thank Monroe H. Freedman, Ruth Hochberger, Joel F. Henning, C. Russell Twist, and Thomas S. Johnson for their advice or other aid. Of course the opinions expressed in this book are mine and should not be imputed to them or to others. Thanks also to Bonnie Nelson and Elizabeth K. Lieberman for their typing services and to Jessica D. Lieberman for indexing help. And special thanks to Edwin Barber, editor nonpareil, and the efficient but invisible staff of W. W. Norton & Co. Finally, I am pleased to acknowledge the kindness of the Michie Publishing Co. for permission to reprint pp. 30-31, 48 of Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* (Bobbs-Merrill, 1975); and the American Bar Association's Section of Criminal Justice for permission to reprint pp. 8-10 of "Standards of Conduct for Prosecution and Defense Personnel: A Symposium," in *American Criminal Law Quarterly*, vol. 5, Fall 1966.

J.K.L.

Hastings-on-Hudson
November 1977

CHAPTER 1

An Ethics Quiz

From the shadows of the Sunday pulpit and the twice-weekly philosophy classroom, the problem of unethical conduct has burst into the glare of daily headlines. The news stories have not been confined to any one group: politicians, public administrators, business executives, and others have been subjected during the 1970s to intense public abuse for acts that they had routinely (but often secretly) practiced for years. The public outrage is due largely to our suddenly finding out what those acts consisted of.

But one group—the lawyers—have practiced their craft openly and with a well-developed set of publicly proclaimed ethical principles. No profession on earth, not excluding the ministry, has today as comprehensive and publicly articulated a code of ethics as the lawyers. The bar's written canons have been buttressed since the early years of this century by an interpretive gloss of Talmudic dimensions. Yet, for all that, lawyers have not been immune from public criticism. To the contrary, they have felt more heat than all the others.

That lawyers have been marked for public contempt may be accounted for by their general failure to abide by their self-professed principles. But I submit—and it is the burden of this book to show—that the public contempt for lawyers stems rather from their adher-

ence to an unethical code of ethics, paradoxical though that may seem.

A code of ethics ought to be a forthright instrument. Do right by one's client. Avoid conflicts of interest. Uphold the law. Such precepts ought to be clear to anyone, but especially to lawyers, given the very nature of their profession. But are they clear? The following quiz may help to answer that question.

1. You are the salaried attorney for an automobile insurance company. One of the provisions in its standard insurance contract guarantees to supply a lawyer at no charge to policyholders whenever they are sued in connection with an accident covered by the policy. As the company's lawyer, is it ethical for you to serve as defense counsel?

Yes____ No____

2. You are a private practitioner. You represent buyers and sellers of houses. As part of your representation of home buyers you arrange for title insurance policies to cover the sale. These policies provide your clients with insurance to cover losses in the event that title to the property is later proven defective. Your client pays a one-time-only charge for the policy. The title insurance company offers you a percentage of this premium as a "commission" for bringing it the business. May you ethically accept the commission?

Yes____ No____

3. Your city bar association decides to establish a legal aid program for people who cannot afford lawyers' regular fees. Under the program a reduced schedule of fees is in effect. To qualify, the client must earn no more than an established maximum salary. May the bar association ethically advertise this program in newspapers and on radio and television?

Yes____ No____

4. A man comes to your office and says that his invention of a better mousetrap has been pirated by a large national manufacturer. This invention, he claims, is worth a lot of money. He wants to sue the manufacturer for a percentage of its profits, but until he wins the case he cannot afford to pay you. May you ethically take on the case in return for a promise that the client will pay you one-third of all future royalties if you win?

Yes_____ No_____

5. You practice in a small Western town. There are fifteen other lawyers in the community; no other lawyers are available for a radius of at least 150 miles. One day a man of Oriental appearance comes to your office and asks you to file suit against the town's largest employer, a factory, for unlawfully refusing him a job. There is considerable anti-Chinese feeling in the community. The man tells you that he has talked to all the other lawyers in town and they have refused to help. You are the last lawyer to whom he can feasibly look for assistance. He offers to pay you your regular fee. You have never been employed by the factory. May you ethically refuse to represent him?

Yes_____ No_____

6. You are the salaried attorney for a bank. The president of the bank hits on an ingenious scheme to lure customers away from his competitors. He offers to have the bank's trust department prepare free wills for anyone depositing \$5,000 or more. He asks you to supervise the drawing of the wills. May you ethically participate in this plan?

Yes_____ No_____

7. You are asked to represent Equality Now, an activist women's rights group, on an ongoing basis. EN wants you to tour your state, making speeches to other women's groups, urging them to bring test cases against practices that appear to discriminate against women. You are permitted to offer the services of EN, yourself included, in filing such suits. As part of your campaign you prepare handbills

explaining EN's position and its commitment to file suits and asking for donations. You list yourself as director of the litigation project. May you ethically act as the attorney for clients who are induced to come forward in such a manner?

Yes_____ No_____

8. You are a recent law school graduate. You are concerned that a large number of people in your town cannot afford the customary fees of lawyers in the community. You conclude that your bar association's legal aid program is not working properly. You decide, therefore, to establish a "legal clinic," which will process a high volume of cases requiring relatively simple services, like uncontested divorces and simple wills, for a low fee. You refuse to take on as clients people making more than an established maximum salary, but you cannot and do not police this salary requirement. May you ethically advertise your clinic on television, listing your fees?

Yes_____ No_____

9. You decide to take the patent case in Question 4. As you begin to research the case, you discover that it involves extremely complex laser technology. Without the help of several laser experts, you have no hope of winning. But your client cannot afford to pay the experts. He suggests making the same arrangements with them that he has made with you: to pay a percentage (smaller than yours!) of all future royalties if the suit is successful. May you ethically approve of and cooperate with such an arrangement?

Yes_____ No_____

10. A sensational murder trial has just ended in a guilty verdict, though the defendant stoutly maintained his innocence and gave what sounded like a convincing alibi to the jury. The judge sentences him to life imprisonment. You have been following the case closely because a good friend has been conducting the defense (although you have never spoken to him about the case or the defendant). Several

weeks after the defendant loses his final appeal and is carted off to prison, a nervous-looking man whom you have never seen before comes to your office and begs to consult with you professionally. You agree to listen to his problem. You close the door and instruct your secretary to hold all calls. Your new client then blurts out that he is the actual murderer. He asks whether he is safe from prosecution now that someone else has been convicted. You verify his story. It becomes clear to you that the person in prison has been framed. You advise your client to give himself up but he adamantly refuses. May you ethically contact your friend, the lawyer for the man who has been wrongly convicted, to tell him of this startling development?

Yes_____ No_____

Answers: Questions 1-5: Yes.

Questions 6-10: No.

If you answered all the questions correctly, either you peeked or you are a lawyer in desperate need of rethinking some fundamental ethical questions. If you answered one or more incorrectly, congratulate yourself, because you evidently possess a consistent mind and an honorable disposition.

The ten quiz questions come from common situations in legal practice and from debates that have recently exercised the legal community. If you remain confused over the answers, explanations (such as they are) follow.

1. Normally a lawyer may not accept payment from anyone other than his client because the client's interest and the employer's interest may differ. A conflict of interest contradicts the entire purpose of the lawyer-client relationship. There happens to be a potential conflict of interest between the insurance company and the driver, but the ethics committee of the American Bar Association has ruled that it is nevertheless permissible for insurance company lawyers to represent

policyholders on the ground that there is no actual conflict of interest.

2. As long as you tell your client that the title insurance company pays a commission and obtain your client's permission to take the fee, it is ethical to do so—again, even though the payment comes from someone other than the client. According to the bar, consent cures all problems.

3. Although advertising has long been considered a grave impropriety, the bar may ethically advertise its legal aid program because it is performing a public service in doing so, even though individual participating lawyers may profit from the ads.

4. Long-standing tradition forbids lawyers to buy into lawsuits. But there is an exception to the general rule for the so-called "contingent fee" whereby the lawyer is paid only if he wins the case. Even though the contingent fee arrangement may pose a conflict between the client's interest (a smaller, but quicker settlement) and the lawyer's interest (a larger, farther-off judgment after trial), it is justified on the ground that without it many people would be unable to afford legal counsel at all.

5. Although the legal profession claims a duty to serve the public, an individual lawyer may refuse to represent anyone. The canons of ethics state explicitly that the decision to accept a client is solely for each lawyer to make. Otherwise, presumably, false claims would be constantly pressed.

6. The bank's lawyer may not draw wills for depositors. Doing so would violate the rule against being paid by someone other than a client.

7. Soliciting clients is reprehensible because the lawyer has a duty not to stir up litigation. However, the Supreme Court has ruled that the

bar may not constitutionally prevent a lawyer from participating in a plan to alert people to their civil rights and to help them secure those rights. So the Equality Now lawyer can stump the state and solicit plaintiffs. But the constitutional right to do so does not make it ethical for the lawyer to print her (or his) name on a handbill. Solicitation, unless done by the bar itself, can be undertaken only for the people's advantage, not for the lawyer's.

8. Until 1977 the lawyer could not ethically advertise his law clinic. In June 1977 the Supreme Court ruled that a lawyer has a constitutional right to advertise fees for routine services. But that ruling has not prompted the bar to more than grudging acquiescence, and every sign suggests that the bar will resist any liberalization of the Court's rather narrow decision, which did not by its terms extend to television.

9. Although the lawyer may represent the inventor on a contingent fee basis, he may not arrange for the client to pay the expert witnesses in the same manner. Because the experts would be paid only if the client wins the case, a contingent fee arrangement might induce the experts to lie. (But if a large corporation puts an expert on retainer, so that he will testify when necessary, that is ethically permissible, even though the expert might come to enjoy his regular payments and feel a similar compulsion at least to shade his testimony in favor of his employer.)

10. A lawyer may never reveal the confidences of a client, even though an innocent man may languish in prison. The lawyer's fidelity to client must be total.

These answers are not my invention. They are the ones commonly given by lawyers who have the power to make such pronouncements officially, either as judges or as members of ethics and disciplinary committees of state bar organizations. But the answers are no more

defensible for that. They betray an inconsistency that runs deep through the lawyers' code of ethics. They also betray a faulty moral tone: for the pre-eminent public profession in America to have ethical guidelines that violate the United States Constitution is astonishing.

But change is afoot. Of late lawyers have been challenged to answer many of the same quiz questions in court. And they have scored badly, occasionally even flunking. It is this failure, prompting a crisis throughout the legal profession, that I will chart in the present book.