1-1-2005

Introduction -- 21st Century Law, Technology, and Ethics: The Lawyer's Role as a Public Citizen

Irma S. Russell
University of Montana School of Law, irma.russell@umontana.edu

Introduction—21st Century Law, Technology, and Ethics: The Lawyer's Role as a Public Citizen

IRMA S. RUSSELL*

The University of Memphis Law Review Symposium, *21st Century Law, Technology, and Ethics*, held in October 2004, presented an exploration of issues relating both to the practice of law and to the broader goal of social ordering in the modern age of technology. This symposium issue of *The University of Memphis Law Review* presents the research of some of the participants in the symposium. The works assembled in this symposium edition of the *Memphis Law Review* examine the lawyer's duty to clients and to society, providing examples of the wide array of ethical issues connected to technology, science, and law in the context of a dramatically changing world.

Changing technology touches the lives of every creature on the planet—both in its broad meaning and in all manner of narrower meanings. The term "technology" encompasses more than machinery and hardware. *Webster's* defines the term generally as "the practical application of knowledge especially in a particular area."[1] It also provides more specific meanings: (1) "a capability given by the practical application of knowledge," (2) "a manner of accomplishing a task especially using technical processes, meth-

---

* Professor, Cecil C. Humphreys School of Law, University of Memphis. The author gratefully acknowledges comments and discussion by the participants at *The University of Memphis Law Review* Professional Responsibility Symposium, including Thomas Morgan, Lance Bracy, Teresa Collett, Jef Feibelman, Albert Harvey, Kimberly Kirkland, Lisa Lerman, Carol Needham, Lucian Pera, Carl Pierce, Bruce Smith, and Ernest Lidge. She thanks Chuck Holliday for his valuable research assistance in preparing this piece for publication.

1. MERRIAM-WEBSTER ONLINE DICTIONARY, *at* http://www.webster.com/cgi-bin/dictionary?book=Dictionary&va=technology (last visited March 29, 2005).

ods, or knowledge," and (3) "the specialized aspects of a particular field of endeavor."[2] In the last decade the pace of change has increased, bringing changes in technology and business and considerable uncertainty regarding how these changes affect law and society. Even with the uncertainty surrounding technological change, we know that these changes have repercussions for law, business, and society in general. Business and law have reaped tremendous benefits—and perhaps some detriments—from recent technological changes. For example, technology now makes it possible to practice law from anywhere in the world, giving rise to controversy about the regulation of lawyers.[3] Scientists, lawyers, and the public debate the efficacy and safety of a wide range of new technology, from the use of the internet to human cloning; from identity theft to the safety of genetically modified foods.[4] Some believe that technology has made the consequences of deceptive practices more damaging. For example, the recent large-scale corporate bankruptcies dramatically illustrate the dangers of self-dealing on the viability of corporations and the economic health of the nation and the world.[5]

Some might ask why ethics is of special significance to technology and, moreover, why the point of view of lawyers should have particular significance in the discussion of changing technol-

---

2. *Id.*

3. Most law firms now have websites. Additionally, lawyers use the Internet and e-mail to attract clients and provide legal services for clients who are physically remote. *See, e.g.*, William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501 (2001); David Beckman & David Hirsch, *Web Worries of Dot-com Lawyers*, A.B.A. J. 86 (June 2000) (explaining need to encrypt confidential client information to protect against electronic break-in); David A. Grossbaum, *Casting Your Net for Clients: Using the Internet to Attract Clients Has Its Risks*, 87 A.B.A. J. 74 (Mar. 2001); Louise L. Hill, *Change Is in the Air: Lawyer Advertising and the Internet*, 36 U. RICH. L. REV. 21 (2002).

4. The discovery of the production and exportation of genetically modified organisms (GMOs) in food products created wide-spread concerns in Latin America and Europe. *See* http://www.foei.org/corporates/gmoaid.html (last visited April 5, 2005). *See also* Philip Brasher, *EPA Asked to OK Genetic Corn as a Food*, THE COMMERCIAL APPEAL, Oct. 26, 2000, at 68.

5. *See* Anthony J. Luppino, *Stopping the Enron End-Runs and Other Trick Plays: The Book-Tax Accounting Conformity Defense*, 2003 COLUM. BUS. L. REV. 35 (2003).

ogy. Ethics is a system for judging the moral efficacy of human choices. Ethical issues arise in the use of technology in society, and lawyers play a central role in social ordering. Lawyers serve as legislators, regulators, judges, public officials, and active citizens, expressing their views on the best way to structure society. As public citizens lawyers have an affirmative commitment to the social goal of a just society.[6] Indeed, the notion that advocates in an adversary system have special responsibilities predates this country,[7] and threads of the concept run through ethics codes relating to the practice of law.[8] Knowledge of the legal framework is essential for operating any type of business. Likewise, knowledge of law and skills in analysis are enormously helpful in assessing the social benefits and costs of technology.

The lawyer's role as a "public citizen" also involves a duty to "seek improvement of the law."[9] Thus, the lawyer's obligation goes beyond using her knowledge of the law for her clients. She also bears the duty to "employ that knowledge in reform of the law."[10] Lawyers should also "strive . . . to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."[11] The adversary system of justice, including professional representation by lawyers, is justified by the overarching societal benefits of the legal system. The Preamble to the ABA Model Rules of Professional Conduct calls the lawyer a public citizen[12] and states that the lawyer's role is vital to the "preservation of society."[13] The Model Rules note the special place of lawyers in society, stating that: "[a] lawyer, as a member of the legal profes-

---

6. MODEL RULES OF PROF'L CONDUCT Preamble (2004). "As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession." *Id.* ¶ 6.

7. *See* Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 96–103 (2002) (chronicling the noblesse oblige tradition).

8. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT Preamble (2004).

9. *Id.* ¶ 6.

10. *Id.*

11. *Id.* ¶ 7.

12. *Id.* ¶ 6.

13. *Id.* ¶ 13.

sion, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[14] The Preamble to the ABA Model Rules of Professional Conduct also states: "The [legal] profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."[15] This symposium issue provides examples of the range of issues and analysis that lawyers bring to the debates as public citizens.[16]

While it is clear that lawyers play a special role in society, the full meaning of the lawyer's role as a public citizen is open to interpretation. The United States Supreme Court shed light on the role of lawyers in *Supreme Court of New Hampshire v. Piper*.[17] In *Piper*, the Supreme Court affirmed a grant of summary judgment by the U. S. District Court for New Hampshire in favor of a Vermont resident who challenged the residency requirement for admission to practice law in New Hampshire.[18] The Supreme Court held that the New Hampshire residency requirement violated the Privileges and Immunities Clause of the U.S. Constitution.[19] The Court reasoned that the framers of the Constitution intended to create a national economic union by inclusion of the Privileges and Immunities Clause. Moreover, it found that the practice of law is the type of fundamental right protected by the Privileges and Im-

---

14. *Id.* ¶ 1.

15. *Id.* ¶ 12.

16. In a recent article on the lawyer's role in society, I focused on the lawyer's responsibility for providing pro bono services to people who are unable to pay for their services as part of the lawyer's role as a "public citizen." *See* Irma S. Russell, *The Lawyer as Public Citizen: Meeting the Pro Bono Challenge,* 72 UMKC L. REV. 439 (2003). The lawyer's role as a public citizen includes much more than pro bono services, however, and the influence of lawyers extends far beyond the practice of law.

17. 470 U.S. 274 (1985).

18. *Id.* (holding that state's reason for discriminating against a nonresident must be "substantial" and the discriminatory treatment must bear a close relationship to the state's reasons for the disparate treatment and finding New Hampshire's residency requirement did not meet this standard). *See also* Barnard, Chairman of the Comm. of Bar Exam'rs of the Virgin Islands v. Thorstenn, 489 U.S. 546 (1989).

19. *Piper*, 470 U.S. at 288 (citing U.S. CONST. art. IV, § 2).

munities Clause.[20] Both the Supreme Court of New Hampshire and the dissent by Chief Justice Rehnquist argued that lawyers are formulators of state policy, essentially officers of the state and, thus, should not be within the scope of the Privileges and Immunities Clause.[21] The *Piper* majority rejected this argument, however, noting the special role of lawyers.[22] The majority opinion in *Piper* recognized that the lawyer is "an officer of the court" but also held the lawyer is not an "officer" of the state in a political sense.[23] Although the Court rejected the argument that the Privileges and Immunities Clause does not apply to lawyers, it emphasized the central role of the lawyer in society. The majority stated that "[t]he lawyer's role in the national economy is not the only reason that the opportunity to practice law should be considered a 'fundamental right.' We believe that the legal profession has a noncommercial role and duty . . . ."[24]

In a strong dissent, Chief Justice Rehnquist argued that New Hampshire's residency requirement passed scrutiny under the Privileges and Immunities Clause based on the state's substantial interest in the formulation of policy and local laws and the need to insure that lawyers have a stake in the state. The Chief Justice rejected what he regarded as the majority's view of law "as just another form of business frequently practiced across state lines by interchangeable actors."[25] His dissent urged a broader conception of the role of the lawyer in society and criticized the majority opinion for failing to take into account that "the practice of law is—almost by definition—fundamentally different from those other occupations that are practiced across state lines without significant deviation from State to State."[26] The Chief Justice's dissent noted that the state's interest in attracting lawyers to the state as residents

---

20. *Id.* at 283.

21. *Id.*

22. *Id.* at 282–83 (declaring that the 1973 decision of the Court of *In re Griffiths*, 413 U.S. 717 (1973), foreclosed this interpretation of the role of lawyering).

23. *Id.* at 283.

24. *Id.* at 281.

25. *Id.* at 289 (criticizing the majority's inclusion of a least restrictive test as unworkable "second guessing" of the state's decision).

26. *Id.*

extends beyond the role of lawyers as lawmakers and representations of parties in lawsuits: "What is at issue here is New Hampshire's right to decide that those people who in many ways will intimately deal with New Hampshire's self-governance should reside within that State."[27] The dissent pointed to lawyers as legislators and formulators of law by their representation of parties to disputes and interested citizens. Chief Justice Rehnquist stated:

> [T]he State . . . might conclude that those citizens trained in the law are likely to bring their useful expertise to other important functions that benefit from such expertise and are of interest to state governments—such as trusteeships, or directorships of corporations or charitable organizations, or school board positions, or merely the role of the interested citizen at a town meeting . . . . [T]he Court ignores a host of other important functions that a State could find would likely be performed only by in-state bar members.[28]

The important functions noted by Chief Justice Rehnquist grow from a belief that lawyers, as public citizens, owe special responsibility to society, including a role in scrutinizing social rules and developments, ranging from specific rules of legal ethics to societal issues. By training, lawyers are able to identify symmetries and asymmetries within law and policy. They articulate the principles that inform and justify a particular rule or that suggest that rule should be limited or discarded. By inclination, lawyers are interested in the effect of laws; they take seriously the incentives created by law as well as the intended requirements and prohibitions set forth by a law. The approaches of both the majority and the dissenting opinions in *Piper* recognize this role to differing extents. The vision of the lawyer's role set forth by both the majority and the dissenting opinions in *Piper* emphasized the need for

---

27. *Id.* at 289–90 (noting the need for each State to be free to establish its own laws as a fundamental precept of our Constitution "of equal stature with the need for the States to form a cohesive union").

28. *Id.* at 293 (internal citation omitted).

analysis and judgment of the public good. The opinions in *Piper* by the majority and the dissent also stand as exemplars of the broad role of lawyers in the public policy debate. Both opinions agreed upon the fundamental principles at stake in the case and recognized the intent of the framers "to 'fuse into one Nation a collection of independent, sovereign States'" by the Privileges and Immunities Clause.[29] Likewise, the justices accepted the right of lawyers to practice and the interest of the State in insuring self-governance. The differing conclusions of the majority and the dissent derive from different judgments regarding which of these important background principles should predominate in the question at issue. Thus, the opinions provide apt examples of the role of the public citizens that happen to be lawyers. This public role involves lawyers engaging in debate regarding the proper balance of applicable principles in particular contexts.

The persistent and continuing nature of the debate regarding the public good is a tribute to the continuing vitality of the democratic form of government. For the sake of the common good, lawyers also have a duty to inform clients about the law, despite the lawyer's normative judgment.[30] However, the lawyer is also called upon to exercise moral judgment as part of his service to a client.[31] In fact, clients often rely on lawyers as advisors rather than as technocrats. This reliance calls for normative judgment on the part of the lawyer. One commentator states:

---

29. *Id.* at 274, 290 (citing Toomer v. Witsell, 334 U.S. 385, 395 (1948)).

30. *See* Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984, 1021–22 (1995) (noting that lawyers have a duty to inform their clients of the law and its boundaries).

31. The Scope section of the Model Rules notes that the Rules do not "exhaust the moral and ethical considerations that should inform a lawyer." MODEL RULES OF PROF'L CONDUCT Scope ¶ 16 (2004). Additionally, Comment 2 to Model Rule 2.1 notes that "[p]urely technical legal advice, therefore, can sometimes be inadequate." *Id.* at R. 2.1 cmt. 2. Accordingly, the comment notes, "[i]t is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice." *Id.* Because the role of lawyers is central to the "preservation of society," lawyers also owe duties to the public and non-clients, such as the duty to avoid assisting in a crime or fraud and the duty of candor to the court and others. *See id.* at Preamble ¶ 13. Balancing the diverse duties and interests is a central task of the lawyer's role. *Id.* at Scope ¶¶ 14–16.

> Client objectives are often multiple or indeterminate, and are shaped in part through dialogue with counsel. Analyzing potential liability or the merits of particular strategies will often demand more than "technical" judgments, and lawyers' own moral intuitions cannot help but color their decisions. To pretend otherwise misconceives an integral part of attorneys' counseling function. Particularly where clients' true "interests" are not self-evident, one of lawyers' greatest potential contributions lies in persuading individuals to act in conformity with their most socially enlightened instincts.[32]

Recognition that lawyers as legal advisors may sometimes refer to moral, economic, social, and other factors indicates that lawyers are not merely legal technocrats or "hired guns," despite the fact that they seek to further the client's objectives when the objectives are legal.[33] In fact, the lawyer who acts as a "hired gun" risks personal liability.[34] The lawyer's role of "public citizen" requires dedication to the principle of the rule of law and to the concept of a just society.

---

32. Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 623 (1985).

33. Model Rule 2.1 states that the lawyer "*shall* exercise independent professional judgment." MODEL RULES OF PROF'L CONDUCT R. 2.1 (2004) (emphasis added). Comment 2 to the rule notes that "[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant." MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 2 (2004).

34. *See, e.g.*, David A. Gantz, *The Foreign Corrupt Practices Act: Professional and Ethical Challenges for Lawyers*, 14 ARIZ. J. INT'L & COMP. L. 97, 116 (1997) (urging lawyers to "be mindful of their professional responsibilities, both to their clients and to themselves, and to their potential criminal liability"); Richard W. Painter & Jennifer E. Duggan, *Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 50 SMU L. REV. 225, 227 (1996); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1560 (1995) (noting that lawyers are "likely to face tort liability" for providing legal advice that facilitates criminal conduct).

The Symposium,[35] *21st Century Law, Technology, and Ethics,* provided many examples of the breadth of the lawyer's role in society. The event resulted from the efforts of many people including the staff and editorial board of *The University of Memphis Law Review*, two interim deans of the Cecil C. Humphreys School of Law, the symposium editor, faculty, and students. Interim Dean Rodney Smith provided guidance during the 2003-04 academic year. Interim Dean Dan Wanat continued the work during his term as dean in the fall of 2004. Jennifer Parker, the symposium editor, managed every aspect of the symposium from venue to travel and work on the articles produced by the panel. Bruce Smith, of Apperson Crump & Maxwell, PLC, served as moderator for the first two sessions of the symposium. Professor Ernest Lidge and other professors helped organize the live event, provided transportation, and welcomed the participants.

The first panel of the Symposium, entitled "The Regulation of Attorney Conduct," included a presentation by Lance B. Bracy, Executive Director of the Tennessee Board of Professional Responsibility, summarizing the regulation of attorney conduct in Tennessee over the last ten years, "Regulation of Lawyer Conduct—The Tennessee Experience." This presentation noted strengths of the Tennessee Lawyer Discipline System as well as recommendations for the future of the system. Professor Lisa G. Lerman, of The Catholic University Columbus School of Law; Professor Carol Needham of St. Louis University School of Law; Lucian T. Pera of Armstrong Allen, PLLC; and Professor Carl A. Pierce, University of Tennessee College of Law also made presentations on this topic.

During the second panel, "Ethical Decision-Making in the Legal Profession," Professor Teresa S. Collett of the University of St. Thomas School of Law examined scenarios of conflict between the practice of law and an attorney's moral convictions in her presentation, "Civil Disobedience & Practice." The session included presentations by Albert C. Harvey of Thomason, Hendrix, Harvey, Johnson & Mitchell; Jef Feibelman of Burch, Porter & Johnson; Professor Kimberly Kirkland of the Franklin Pierce Law Center; and Professor Tom Morgan of The George Washington University

35. October 15, 2004, at the FedEx Institute, Memphis, Tennessee.

Law School. Professor Morgan also delivered the keynote address of the symposium, focusing on the changing world of the practice of law.

Professor Stan Franklin of The University of Memphis presented examples of his work involving autonomous mobile robots in session three, "Legal and Ethical Issues Arising from Decisions Made from Autonomous Software Agents." In session four, Sonia Miller of the S.E. Miller Law Firm explored advances in science and technology that move toward treatment, prevention, and cure of debilitating diseases in her presentation, "The Pursuit of Excellence: Biotechnology and Genetic Engineering for Human Enhancement." Ms. Miller noted the convergence of biotechnology, information technology, cognitive science, and the legal and ethical implications of new technology across several practice areas.

This symposium issue of *The University of Memphis Law Review* provides startling examples of the breadth of the lawyer's role in pursuing the public good. Professor Kimberly Kirkland's Article, *Ethics in Large Law Firms: The Principle of Pragmatism,* provides arresting insights into the influence of senior lawyers on the lawyers they supervise. This influence reaches more than legal ethics, imbuing the role of senior partner in large law firms with tremendous power to shape future lawyers. This Article draws on empirical research to investigate how legal workplaces "transform [a] lawyers' ethical sights" so that the lawyer identifies the "set of rules, premiums, and sanctions that create" a lawyer's ethical compass. Professor Kirkland bases her analysis on extensive interviews with lawyers in large law firms. From her in-depth interviews of lawyers, she concludes that the bureaucratic structure of large law firms tends to cause lawyers to adopt a view of ethics and the "professional ideal" that furthers the firm's "own survival and advantage."

In *Client Misconduct in the 21st Century,* Professor Carl A. Pierce examines the recent proposed regulation published by the Securities and Exchange Commission relating to noisy withdrawal by lawyers. Professor Pierce, who served as a Reporter for the Ethics 2000 Commission, considers the proposed regulation against the backdrop of several state rules. His insights into the responsibilities of lawyers who are considering disassociation from a client relate the pending regulation to the broader, ongoing de-

bate about client confidentially, the attorney-client privilege, up-the-ladder reporting, and permissive whistle-blowing.

Two student works add to the discussion of the lawyer's role. In his Note, *Attorneys Beware: Metadata's Impact on Privilege, Work-Product, and the Ethical Rules,* Campbell C. Steele assesses the significant risks associated with the inadvertent disclosure of metadata in electronic documents, including the risk of violating the duty of confidentiality and inadvertently waiving the attorney-client privilege or the work-product doctrine and concludes that as the existence of metadata "becomes more widely known," courts should discipline lawyers when their failure to protect against the transmission of metadata results in loss to their clients. In her Case Comment, Amy C. Worrell examines the 2004 case of *Doe v. Doe,* in which the Tennessee Supreme Court held unconstitutional the confidentiality provision of the Court's Rule 9 as a violation of the First Amendment and Tennessee Constitution Article I. Amy Worrell's Comment explores the holding, its rationale, and the effect of the holding on lawyers practicing in Tennessee.

Modern developments in technology and the law bring with them the need for reassessment of the vision of the lawyer as a public citizen. Dramatic changes in society and technology mean that lawyers today face new questions and old questions in new contexts. Although the basic guiding principles of ethics and the public good have significant continuity, application of these principles to new problems is by no means easy. As the law, business, technology, and society undergo change, lawyers and others work to balance competing interests of individuals and society to further the public good. The articles of this symposium continue this important work.