2011 Michael Franck Award Acceptance Speech

Stephen Gillers

When Barbara Howe called me out of a meeting of the Ethics 20/20 Commission to tell me about the Michael Franck award, my first thought, as I imagine would be the first thought of all recipients, was that "I really don't deserve this."

But then, with the passage of time….

I did not change my mind…especially after looking over the list of former recipients. I name but two who are no longer with us and from whom I learned much.

Peter Moser, graduate of the Citadel, a marine, graduate of Harvard Law School. Peter was not only more skillful at legislative drafting than anyone I have ever met, he could do it in his head and dictate perfect results.

And Bob Drinan, the man of many titles: Father, Dean, Professor, Congressman, and of course friend. If there is a moral center of the universe, Bob is there.

It is simply not possible in such company to assume desert.

The subject of my talk is professional identity.

> The prosecutor told the New York Times that "I did the best I could–to lose."

First, I want to tell you about two events where, to my surprise, I disagreed with fellow law teachers, friends whom I greatly respect. These events are of no great moment in themselves, except perhaps to me. But they presented a conundrum. The conundrum led to an epiphany. And the epiphany may offer lessons for legal education and for the work of the 20/20 Commission and future efforts to revisit the rules or laws governing American lawyers.

In 2005, two New York men in prison for murder sought a new trial. The case, called the *Palladium* case, was big news in the city. A judge would decide after an adversary proceeding whether the facts warranted a new trial. A senior prosecutor was assigned to represent the People before the judge. He had been at work reinvestigating the case for two years, so the assignment made much sense. In fact, Robert Morgenthau, the district attorney, later told me that no one else in the office had the depth of knowledge required.

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The judge ruled for the men. Charges against one were then dropped. The second man was acquitted on retrial.

In 2008, the prosecutor told the New York Times that "I did the best I could–to lose." Or as the Times summed it up: "He threw the case. Unwilling to do what his bosses ordered…he deliberately helped the other side win." The prosecutor explained to the Times just how he went about losing. He tried to lose because he believed the men were innocent.[1]

In the Times story, I was quoted as saying that the prosecutor violated his duty to his client, the People of the State of New York, represented by the elected district attorney. "He's entitled to his conscience," I said, "but his conscience does not entitle him to subvert his client's case. It entitles him to withdraw from the case, or quit if he can't."[2]

The prosecutor's conduct also denied the judge the adversary process I assume he expected in order accurately to find the facts.

Imagine my surprise, then, to see a post on a law teachers' blog the next day. Written by my friend David Luban of Georgetown Law School, it defended the prosecutor and took issue with my criticism. Later, David expanded on his analysis in a lecture at Valparaiso Law School and an article in its law review.[3]

That was the first of the two events.

Then, earlier this year, another friend surprised me.

Recently, a law firm that had been retained by the U. S. House of Representatives to defend the constitutionality of the Defense of Marriage Act, or DOMA, withdrew following public criticism of the firm.[4] As a result, the lawyer at the firm who had accepted the matter, former Solicitor General Paul Clement, left it and is now handling the case at his new firm.

While the firm had no duty to accept the matter, I believe that leaving the client in the face of negative publicity, although ethical under permissive withdrawal rules, ignored the commitment lawyers owe their clients. I was quoted in the Times saying that the "firm's timidity here will hurt weak clients, poor clients and despised clients."[5] The House of Representatives would have no trouble finding new counsel, but other clients would not be so fortunate.[6]

Imagine my surprise, then, when my friend Deborah Rhode of Stanford Law School wrote in a National Law Journal column that the firm was right to withdraw and I was wrong to criticize it.[7]

I don't want to debate the merits of the positions in these examples. We should do that another time, perhaps at a future Center conference. I raise them here because David and Deborah's responses, so different from mine, posed a conundrum. Why did we disagree about these events when we agree on so much else?

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And this conundrum sparked my epiphany. What I have come to think of as my professional identity differs from theirs, which is another way to say that we had different views about what it means to be a lawyer for a client. Professional identity is a term I have used casually without thinking much about its content. I assumed that everyone agreed generally with my view of what it encompassed even if we might disagree on what it might demand in any particular instance. But I was wrong.

I speculate that David and Deborah may be looking at these events from the perspective of the ultimate good: DOMA should be struck down. A prosecutor is right to disobey his instructions and purposely lose a case when the result is to free men he firmly believes are innocent.

I agree that DOMA should be struck down and that innocent men should be freed. But my professional identity tells me that once a lawyer has a client, the world changes. It is not for the lawyer to choose the ultimate good or to disobey a client's proper instruction in order to achieve the lawyer's vision of the ultimate good.

What is the source of professional identity? Mine was formed through the experience of having hundreds of clients in nine years of practice at a large firm, in my own practice, and in a small firm before coming to teach. David and Deborah's biographies are different. David has a Ph.D. in philosophy from Yale but no law degree, and Deborah, with a law degree from Yale, went from her clerkships to teaching. I don't mean to say that biography is destiny, but it is certainly influential.

My epiphany, if I can call it that, leads me to propose that these two events and the idea of professional identity have something to tell us about legal education and also about the work of the 20/20 Commission and future reviews of our profession's ethical rules.

It is no secret that today law schools view themselves as graduate schools, less so as professional schools. It is quite common now for new law teachers never to have practiced law or to have done so briefly and in rarefied environments, rather than in the trenches. Increasingly, in fact, law faculties include teachers who have never gone to law school. Academic language is also revealing. Two words have become commonplace at American law schools. The first is "scholar." The second is "theory."[8]

I support the changes in the legal academy. Law must have theory and the production of scholarship is what law teachers owe society for their privileged positions. But we must also guard against loss of balance. Doing scholarship and representing clients are compatible pursuits, but they are different jobs, requiring somewhat distinct skill sets and different attitudes. Good scholars do not require the professional identity of the practicing lawyer. Their work may even benefit from its absence.

It remains true, however, that the most important job of law schools and therefore of law professors is to educate lawyers, which must include imbuing law students with a sense of their imminent professional identity. We must also, in light of the evident transformation of law practice caused by new technology and easier cross-border trade, including in legal services, prepare them for the role of the lawyer in the decades ahead.

Where in legal education today do students develop professional identity? From whom do they learn what it means to be a lawyer with responsibility for a client? There are two obvious places.

First is the legal clinic. Clinics are the most important development in legal education in the last half century and at least as important as the case method, which has receded in importance.

The second place is the legal ethics course, which may be the only class in the academic (i.e., non-clinical) curriculum whose very purpose is to teach the core values that comprise professional identity. Its scope includes professional conduct rules but also all of the other sources of lawyer regulation–case law, statutes, and the Constitution.

Alas, legal ethics classes get little respect in our law schools. (The story is opposite among practicing lawyers.) When I say "little" respect, I am trying to be optimistic.

Students get this message. I try to disabuse them. I tell them, exaggerating ever so slightly, that the class is the second most important one in law school. If they become antitrust lawyers, they will have little need for their criminal law class and if they become criminal defense lawyers, they will have little need for antitrust law. But, I say, they will practice what they learn in legal ethics every day they go to work. And more broadly, through their work at bar groups, running law offices, and on the bench, they will be the rule makers, the guardians of professional values, in the next generation.

Where in legal education today do students develop professional identity?

They don't believe me, of course–until the day they actually do go to work.

I believe that if it were not for the ABA Standards for Approval of Law Schools, legal ethics would disappear as a required course most places and disappear entirely some places, at least in some years. Like the ghost of Hamlet's father, then, the ABA Standards are how the profession reminds law schools, "Remember me." Otherwise, forgetting would be all too easy.

It is unacceptable to delegate all legal ethics instruction to practicing lawyers who teach as adjuncts. Practicing lawyers do enrich the legal ethics classroom. But production

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94. Carlo Strenger & Arie Ruttenberg, *The Essential Necessity of Midlife Change,* Harv. Bus. Rev., Feb., 2008, 82.
95. Lightfoot-Lawrence, *supra* note 37, at 16-33.
96. Hedge, Borman & Lammlein, *supra* note 29, at 55-56. *See also* National Council On Aging, *supra* note 77, at 15 (describing motivations of leadership level volunteers).
97. *See* About Senior Partners for Justice, http://www.spfj.org/about.htm.
98. Godfrey & Wood, *supra* note 62, at 15 (discussing Texas Lawyers Care).
99. One possibility would be to create an opportunity for on-line exchanges of innovative ideas along the lines pioneered in Ashoka's Changemakers. *See* http://www.changemakers.com/about/changemakers.
100. Galanter, *supra* note 6, at 1105-06.
101. For example, the David and Lucile Packard Foundation provided a grant to the Pro Bono Institute to support four innovative demonstration projects for senior attorneys. Lardent & Glazer, *supra* note 2. The International Senior Lawyers Project has received funding from the William and Flora Hewlett Foundation and the Open Society Institute.
102. Rhode, *Public Interest Law, supra* note 54, at 2032.

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of scholarship in this subject, as in others, will mostly come from full-time teachers, who have the time and are expected to publish in their field.

Nor do I argue that all full-time teachers of legal ethics must have practice experience or even a law degree. Whatever may be one's biography, every legal ethics teacher must teach beyond the rules governing U.S. lawyers. They must also subject those rules to critical inquiry, just as Deborah and David have rightly done in responding to me.

I now turn to the work of the 20/20 Commission and all reviews of the rules and law that govern lawyers. Here the message is double-edged. The idea of professional identity can be beneficial or a hindrance.

How beneficial? It is our North Star. Although we will always disagree on the precise content of professional identity, we understand that how lawyers think about themselves–as professionals–and about their central place in our justice system is essential to the rule of law. One non-negotiable piece of professional identity is duty to client and the need to earn the client's trust. I suggest that the core values we often speak of converge in this most critical place–the importance of ensuring that clients can and will trust their lawyers and that lawyers earn that trust.

But in our efforts to revise our rules, the idea of professional identity also poses a danger. The danger lies in thinking that to preserve what is rich in our profession, the rules governing lawyers must be immutable. That confuses the goals with the means chosen to achieve the goals. It is a dangerous view because it may prevent us from responding to changes in the world around us, changes that counsel a reexamination of the rules so as better to protect their goals.

We are not today governed by the rules of 1908, 1970, 1983, or even 2002. The world has moved on and so have we. We have changed the rules in response to societal change and we have been able to do so while keeping duty to client paramount. Predictions of dire consequences from these efforts have proved false. Change should not be easy, of course, but neither should we listen to those who foretell, with no empirical support, that the price of change is to threaten what it means to be an American lawyer. To the contrary, the true threat to our professional identity is to ignore the need for change when it confronts us.

Endnotes

1. Benjamin Weiser, *Doubting Case, a Prosecutor Helped the Defense*, N.Y.Times, June 23, 2008.
2. *Id*. Months later, court disciplinary authorities declined to bring charges. No one had filed a complaint. Apparently, the disciplinary body investigated on its own initiative.
3. David Luban, *The Conscience of a Prosecutor*, 45 Val. L. Rev. 1 (2010).
4. Michael Shear & John Schwartz, *Law Firm Won't Defend Marriage Act*, N.Y. Times, April 25, 2011. The firm's chairman explained that he had "determined that the process used for vetting this engagement was inadequate."
5. *Id*.
6. Compare the well-known Buried Bodies case in upstate New York, where along with co-counsel, Frank Armani, a solo practitioner, defended his assigned client in a high profile murder case in the face of threats to Armani's physical safety and the toll it took on his personal and professional life. *See* Lisa Lerman, *The Buried Bodies Case: Alive and Well After Thirty Years*, 2007 Prof'l Lawyer 19.
7. Deborah Rhode, *King & Spalding Was Right to Withdraw*, Nat'l L.J., May 3, 2011.
8. One unfortunate side effect of this evolution is that some judges have declared that law reviews are of little or no help in their work.