

The ethics of advocacy: Can lawyers handle the truth?

Andrew Bernstein

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Is law a profession or a trade? A lawyer's strongest claim to its being the former is the practitioner's adherence to ethical standards. This article raises a touchy subject: are there cases that, with concern for those ethical standards, lawyers should not take?¹

I propose that the answer is yes – although there are not many such cases. When one crosses your desk, however, you should think long and hard before taking it on. What does it look like? In my view, neither the (alleged) conduct of the client nor the viability of the action (assuming it is not frivolous) should be factors. Regarding the former, we know that terrible people deserve lawyers, too. As for the latter, bad cases aren't the end of the world; we've all acted on some, and, occasionally, arguments that seemed terrible to many might just carry the day.²

But there is a class of cases we should all be worried about. They are the ones where simply bringing them has the potential to undermine some aspect of the agreed-on social rules by which a community, country, or province agrees to govern itself. In the end, justification for doing what we do depends heavily on the need for the rule of law. When acting in a case undermines rather than reinforces the rule of law, the alarm bells should start ringing.

The same principle generally holds true for how lawyers conduct themselves during the cases we bring. Adversarial conduct is an inevitable and, indeed, necessary part of litigation. Counsel are not expected to link arms and sing "Kumbaya." But tactics that undermine the process we are supposed to be advancing – and the values this process rests on – also cross an ethical line.

Why think about this now?

Every few years we see an outbreak of lawyer-shaming in the popular press or, more recently, on social media. It usually starts when an advocate represents a controversial defendant who is alleged to have engaged in dastardly deeds. And regardless of whether the defendant is Jian Ghomeshi or Nestlé,³ a cacophony of voices asks: "How could they?" The response is predictable: the relevant segment of the bar rushes to the lawyer's defence, the people who asked the question in the first place remain totally unpersuaded, and the questions that were



raised are quickly drowned out by everyone taking sides. But the profession rarely uses such cases as occasions for introspection about why so many view as controversial what we do and how we do it.

But maybe a little introspection is worthwhile. After all, the past 20 or so months have been one of the strangest eras we have lived through. The waning weeks of the Trump administration and the pandemic caused by the novel⁴ coronavirus gave us examples of cases where it might be appropriate to ask whether the story we tell ourselves about the ethics of client representation is as straightforward as we would like.

The lawyer's dilemma, and the lawyer's defence

Almost every day, advocates face a central moral dilemma. As one lawyer noted almost a hundred years ago, a barrister "with a wig

on his head and a band round his neck [will] do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire.”⁵

We say we are seeking justice and upholding the rule of law but, if we are being honest, can’t really say that everything we do is genuinely directed toward those ends. We keep secrets that, if revealed, might change the outcome of a case. We make legal arguments that try to bend established principles to our client’s benefit. We undermine witnesses through cross-examination, even when they have been through terrible experiences. We employ the law so our clients can do things that at least most of us would not approve of in everyday life: like not paying a debt (perhaps because it’s past a limitation period), or depriving elderly retirees of their pensions (from a restructuring).⁶ In other words, we can’t possibly argue that every breath we take, every move we make, every vow we break, and every claim we stake⁷ is for a noble moral purpose, when our conduct inflicts harm on people who do not deserve it.

So how do we justify what we do and how we do it? It’s clearly not the “guinea” that we are paid for our labours. If we are doing ethically questionable things, the idea that we are doing them for money does not make it any better and may indeed make it worse. Ethicists would describe a lawyer’s explanation for what we do as acting with “role morality.”⁸ In other words, the idea that circumstances may exist where a person’s questionable conduct could otherwise be justified because of their social role. A frequently cited example is parenting. Parents can believe that every child is of equal moral worth; yet, because of the social importance of the parent-child relationship, be morally justified in preferring their own child’s interests above others.⁹

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Similarly, we might prefer our friend’s interests to those of a stranger, and, so long as we act within reason, few would consider this preference inherently unethical. As an example: if you are going to the movies with a friend and arrive first, you can save them a seat, even a very good seat. But if you are there by yourself, you clearly cannot save the seat beside you and then, as the trailers close, sell it to the highest bidder. Why is that? Because it’s socially accepted that if you are going to the movies with a friend, you should sit with them – even if it violates the generally accepted ethical norm of “first come, first served.” In other words, role morality accepts that, in addition to abstract morality, people occupy social roles; and that what they do while occupying those social roles may well justify their behaviour.

But “may well” is not exactly the same as “always.” Although the role-morality justification is powerful, it just tells us there are circumstances in which lawyers can subordinate universal moral principles (such as “pay your debts” or “don’t cause harm to people”) to other considerations. But it does not tell us what those circumstances are. We all acknowledge there are things lawyers cannot do, or should not do, even if they are in their clients’ interests. These things can be a matter of law (knowingly permit a client to commit perjury); a matter of professional responsibility (failing to inform a tribunal of a relevant adverse authority); a matter of professional courtesy (refusing an adjournment for an opposing counsel who broke his leg);¹⁰ or just a matter of human decency (asking a witness who caught a sterilizing pelvic infection from the Dalkon Shield IUD a series of “dirty questions” designed to embarrass her into dropping the case).¹¹ So where and how do we draw the line?

To answer this question, it is necessary to take a slightly deeper dive into the advocate’s role morality. “We have a role to play and we’re playing it” is not a viable answer to the question, “How do you justify the harm you inflict on third parties?” Hit men also have a role to play and play it. Rather, to justify the advocate’s conduct, we need to explain how and why the social harm we inflict is a necessary by-product of an otherwise socially productive role. And in legal ethics circles, the most compelling explanation comes from what’s called “four-fold root”: four steps which, together, can be used to justify conduct that is more consistent with role morality than ordinary morality.¹²

Step one is to *justify the existence of an institution by demonstrating its moral goodness*. For example, the rule of law and the concept of legality allow people to coexist in a pluralist society, with different moral beliefs and aspirations. But when they do so, they need a stable system through which they sort out those differences, such as “a political process that creates laws and legal institutions for the peaceful and orderly resolution of conflicts.”¹³ Ethics scholars refer to this process as the “institutional settlement.”¹⁴ Agreeing to the institutional settlement is a key prerequisite to setting up a society ruled by laws. You might not like the outcome of the process (e.g., people you disagree with may win elections and pass laws you think are harmful), but if you accept that the process is legitimate, then you will abide by lawful authority.¹⁵

Step two is to *justify the role by appealing to the structure of the institution*. If we want our laws to be more than just blunt instruments, they will be too complicated for everyone to understand them intimately. So we need lawyers to advise people on the details of their legal rights and obligations and then advocate before bodies (such as courts) that determine them.

Step three is to *justify role obligations by showing they are essential*

to the role. This step is a little tricky. It requires us to ask the question, “What must we require of lawyers to fulfill their purpose of allowing us to live in a society governed by the rule of law?” An important answer is that lawyers should not act as moral or legal gatekeepers to the justice system. That is, a client should not have to persuade a lawyer that their case is meritorious before the lawyer agrees to represent them. The client does not bear a “burden of proof.”¹⁶ And once the advocate has agreed to the retainer, their job is to advocate and allow an independent decision-maker to decide the case.

Step four is to *justify the role act by showing that obligations require it*. Once a lawyer has taken on a retainer, it’s an easy leap to what the lawyer should do: everything within the legal and professional limits to win the client’s case, which may include aggressively cross-examining the witnesses, asserting all legal defences (including limitation periods),¹⁷ and keeping confidences – even if doing so might change the outcome of the case.

If these sentiments sound familiar, that is because they are what we tell ourselves, tell each other, and, perhaps most importantly, tell those outside the barristers’ guild. Try to explain to your mother or your cranky uncle¹⁸ how that charming lawyer they see on TV could possibly defend someone as appalling as the accused, and the chances are you will end up repeating some version of this four-fold root. You might even finish with a plea that instead of criticizing lawyers, we should be thanking them for taking on difficult cases, even though it brings them public notoriety to go with their retainers.¹⁹

The four-fold root makes for a pretty persuasive defence of the practice of advocacy. But it can clearly be abused. The reason is obvious: these four logical leaps are largely premised²⁰ on a normative judgment rather than an empirically observable truth. “We need lawyers if we are going to have a rule of law”; or, “lawyers cannot be gatekeepers to the system,” are not statements of fact like three plus three equals six.²¹ Don’t believe me? Then re-watch the classic courtroom movie *A Few Good Men* and observe how Colonel Jessup (Jack Nicholson) uses the same four steps to justify the “code red” on Private Santiago (an assault that resulted in his death):

- Step one – *justify the existence of an institution*: “... we live in a world with walls and those walls have to be guarded by men with guns.”
- Step two – *justify the role by appealing to the structure of the institution*: “My existence, while grotesque and incomprehensible to you, saves lives ... You want me on that wall. You need me on that wall!”
- Step three – *justify role obligations by showing they are essential to the role*: “We use words like honour, code, loyalty. We use these words as a backbone of a life defending something.”
- Step four – *justify the role act by showing that obligations require it*: “You weep for Santiago, and you curse the Marines. You have that luxury. You have the luxury of not knowing what I know; that Santiago’s death, while tragic, probably saved lives. And my existence, while grotesque and incomprehensible to you, saves lives.”

Colonel Jessup’s message is clear to Lieutenant Kaffee (played by a very energetic Tom Cruise) and everyone else in the courtroom: *Don’t question my methods*. After all, as he told us, “I have neither the time nor the inclination to explain myself to a man who rises and sleeps under the blanket of the very freedom that I provide, and then questions the manner in which I provide it. I would rather

you just said thank you and went on your way.” Not so different from what you might tell your mom, right?

So what do we do about this? If we reject Colonel Jessup’s dystopian/utilitarian calculus of killing Santiago to “save lives,” we know the four-fold root cannot be a complete answer. This raises the question: Can lawyers handle the truth? And it brings us to the 2020 US presidential election, COVID-19, and the question I started with: whether there are cases lawyers should be turning down, or conduct we should not engage in.

Some recent events that you may have heard about

The United States had its 59th presidential election in November 2020. American presidential elections have occurred every four years since 1788–89, without fail. But it is fair to say that the elections of 2016 and 2020 were both unusual, mostly because of the Republican candidate, Donald Trump. Mr. Trump had never served in any elected office before eking out a surprise victory in 2016. Perhaps because of his “outsider” status, he had less confidence in, and less need for, democratic traditions and institutions than any of his predecessors. In both the run-up to the election he won (in 2016) and the election he lost (in 2020), he made no attempt to pretend he would accept defeat graciously. So when he lost the 2020 race, he started undermining confidence in the election and contesting the result, both in public and in court, with the help of a large team of lawyers, including some from large, well-respected US firms, such as Jones Day, Porter Wright and Foley & Lardner.²²

The large firms that were assisting Mr. Trump quickly found themselves a target of the Lincoln Project, an advocacy group of former Republican strategists dedicated to defeating the president. The Lincoln Project not only went after the firms’ reputations, but it also went straight for their clients, trying to persuade companies such as Walmart, GM, and Amazon to move their business. The pressure on the Foley & Lardner lawyer was so great that she ultimately resigned from her firm, blaming her departure on “a massive pressure campaign.”²³ And this was all before Mr. Trump’s supporters broke into and vandalized the United States Capitol Building, turning his attempts to overturn the election from a laughable farce to borderline treason.

In other news, COVID-19 swept the world in 2020–21. Although reactions across the world have differed, governments in Canada, many US states, and many parts of Western Europe have taken the significant step of imposing varying degrees of lockdown on their populations. The strictness of the lockdowns has varied significantly, from “stay in your home except for an hour of outdoor exercise each day” to “no large gatherings.” Millions of organizations and entities that rely on people gathering indoors have been shut, among them retail stores, restaurants, houses of worship, sports facilities, and offices. Although there are some disagreements on the margins, essentially every legitimate scientist in the world recognized the need for these restrictions to limit the spread of COVID-19. However, that has not stopped some individuals from retaining counsel to challenge the restrictions as being *ultra vires* the enabling legislation – imposing unconstitutional limits on freedom of association or religion, or even debating the existence of the pandemic itself. The reaction has not been nearly as strong as it was to Mr. Trump’s attempts to overturn the election, but numerous comments circulating on social media have criticized some of the lawyers engaged in this litigation.

Finally, on the question of tactics, the recent decision of the Ontario

Superior Court of Justice in *Del Giudice v Thompson*²⁴ reminds us that, despite the bar's best efforts,²⁵ lawyers may still engage in tactically unpalatable conduct. In that case, the court described counsel as bringing "unnecessary, wasteful motions that were deplorably prosecuted." It described the injunction motion as "unnecessary, overreaching, unproductive, rude, and unsuccessful," and the conduct of the plaintiffs' counsel as "reprehensible, scandalous and outrageous." The court was particularly vexed because counsel advanced "numerous allegations of improper conduct, dishonesty, conspiracy and deceit" against the defendant and its lawyers and conducted a 388-question cross-examination of a four-paragraph affidavit.

Are there cases we should not take or moves we should not make?

So where does this leave us as lawyers? How do we identify the "hard cases" where we really need to think about whether we should be taking them on at all? In my view, the answer comes back to the basis of our four-fold root in the first place: the "institutional settlement" – that is, a democratic governance structure, bound by the rule of law. Why? Because if the case you are proposing to bring is going to undermine the institutional settlement that you are using to justify your role morality, what exactly are you upholding?

The resort to the rule of law makes the decision relatively straightforward in most cases, in a way that likely appeals to our intuitive sense of right and wrong. So why is it morally acceptable to represent a defendant accused of doing terrible things, even if that means a vigorous cross-examination of someone who has been through a very bad experience? It is acceptable because the institutional settlement relies on trials to decide who is worthy of criminal sanction. To be sure those trials are fair, the accused needs counsel whose role is to test the state's evidence and ensure it meets the standard required before we convict.

Some ethics scholars have suggested that the line is blurrier for civil defendants. But, at least in my view, the underlying argument remains the same: in a system in which civil disputes are resolved through lawsuits, clients need lawyers. The mere choice to defend a client from a lawsuit thus will almost never cause ethical concerns.²⁶ However, while the *whether* is not ethically problematic, the *how* can be – if counsel takes advantage of resource dis-

parities between parties to prevent a resolution of the matter on its merits.²⁷ Of course, as the *Del Giudice* case shows us, problematic tactics can happen on either side of a civil dispute, and the plaintiff's counsel are no more merited in abusing the court's process than are the defendant's.

Cases brought primarily to vindicate a personal (or corporate) vendetta against the defendant are also problematic. Lawsuits are expensive to bring or defend, and even a modest-sized case can force an opposite party to pay tens of thousands of dollars to defend themselves with reasonably priced counsel. Bringing a case primarily to force a party to incur that expense is an abuse of process (even if it's dressed up in the language of a wrong), and lawyers need to be careful not to be sucked into their clients' grievances. This is of course difficult to police, because it requires knowing what is in a client's mind. There is nothing inherently wrong with bringing a case where the likelihood of success is slim, although that can sometimes be a red flag for poor intentions.


Perhaps the Trump lawyers earned their grief; maybe not for the first few cases (unsuccessful candidates challenge elections in court from time to time and there's nothing wrong with that), but certainly once it became clear the challenges were less directed toward the underlying legal merits and more at undermining public confidence in the electoral process. It is difficult to explain how or why bringing these cases supports the institutional settlement, when their ultimate goal seemed to be undermining and replacing it with an alternative (non-democratic) system of government.

The COVID cases, which have largely (but not completely) been unsuccessful, likely require greater nuance. There is nothing inherently wrong with challenging government orders, even in public health emergencies. The institutional settlement depends in no small measure on governments acting in accordance with law, and asking the courts to enforce this requirement is entirely consistent with a lawyer's role and the role morality that accompanies it. But there are lines that one should think strongly about before crossing. Litigation that is not about fidelity to law, but instead is premised on undermining a strongly held scientific consensus in emergency circumstances can be dangerous. Merely the act of bringing certain litigation can give aid and comfort to groups whose priorities are far away from ensuring public health. While I am not suggesting counsel bringing

these cases are acting unethically, I am suggesting that boundaries need be set before accepting the retainer, so the client understands what arguments you are willing and unwilling to make. Otherwise, you may find yourself following your clients down a deep, dark hole of conspiracy theories, with no easy way out.

A fascinating final example comes from our friends in the United Kingdom and its former colony Hong Kong, where the Chinese government recently decided that its promise of "one country, two systems," including freedom of speech and freedom of peaceful assembly, was not convenient and enacted a far-reaching national security law. Several pro-democracy activists were arrested under this law, and the Hong Kong government retained David Perry, QC, a British barrister, to act as prosecutor. This led to a significant outcry in the United Kingdom, including criticism from the foreign minister²⁸ as well as a member of the House of Lords who said, "The truth is that we are not hired guns. We are not mercenaries that take a brief that might involve the erosion of the rule of law."²⁹ Of course, and unsurprisingly, this view was not unanimous, and some members of the bar cited the need to separate counsel from client. Ultimately, the learned Mr. Perry resigned from the retainer. Although this case is tricky, it seems to me that this was the right decision. After all, the National Security Law hardly seems like an institutional settlement that we can justify upholding.

Conclusion

Interesting ethical questions are never straightforward. But it's worth taking the deeper dive into how and why lawyers justify acting in accordance with their role as opposed to "ordinary" morality. Understanding the basis of our role morality ensures that we don't overstep it or use it to justify something that perhaps is beyond justification. No doubt some will disagree with my description of what justifies what we do and others will reject anything but complete absolution for our sins, whatever they may be. Still others will reject the premise of an institutional settlement or claim that the institutional settlement is structurally unjust and therefore not worth preserving. These are all interesting claims that should be interrogated, although it is certainly possible to envision a fairer society in which the questions of what lawyers should and should not do nevertheless persist. 

Notes

1. This article was inspired by W Bradley Wendel's extremely insightful paper "Lawyer Shaming" (2021) Cornell Legal Studies Research Paper 21-09; available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3778984.
2. My favourite example is the *Reference re: Supreme Court Act*, 2014 SCC 21, but there are lots of examples out there. If you have ever been wrong about the outcome of a case, you know things are not as cut-and-dried as we sometimes might prefer.
3. The Ghomeshi case and Ghomeshi's counsel, Marie Henein, are likely well known to most readers. Details about the Nestlé case (in which the company was represented in the United States Supreme Court by well-known SCOTUS lawyer Neal Katyal) can be found at: <https://www.scotusblog.com/2020/12/confusing-supreme-court-counsel-with-their-clients/>. To be clear, the criticisms of both these outstanding counsel are in my view wrong. But you will have to read on to find out why I say that.
4. Is it just me, or did it lose its novelty sometime around June of 2020?
5. Macaulay, Thomas B "Francis Bacon; Critical and Historical Essays 290, 317," as cited in David Luban and W Bradley Wendel, "Philosophical Legal Ethics: An Affectionate History" 30 Geo J Legal Ethics 337 at 338.
6. These are examples from civil cases. The criminal context is in some ways harder (because of the stakes) but in many ways easier. We don't take people's liberty without a fair trial, and a fair trial requires a lawyer.
7. *Synchronicity* and its first hit, "Every Breath You Take," came out in 1983. I was in middle school. If you have never heard the album, start at Track 6 (*Synchronicity II*) and listen to the rest.
8. Judith Andre, "Role Morality as a Complex Instance of Ordinary Morality" (1991) 28 American Philosophical Quarterly 73 at 73.
9. To a point. It's fine to help your child study for a math test and not help the rest of your child's classmates, even if that will affect university admissions. But for a different perspective on how the choices that parents make affect others, and whether those choices are ethically justifiable, I recommend the *New York Times's* podcast "Nice White Parents."
10. I unfortunately witnessed this very early in my career. As a junior lawyer I was part of a multi-client defence team for a trial that was to start in January. One of our co-counsel broke his leg skiing during the Christmas holidays, and when he asked for an adjournment, plaintiff's counsel refused to consent (although sheepishly and apologetically indicating he was acting on instructions). The adjournment was granted over his objection.
11. Luban and Wendel, *supra* note 5 at 348.
12. David Luban, *Lawyers and Justice* (Princeton: Princeton University Press, 1988) 131.
13. Luban and Wendel, *supra* note 5 at 353.
14. *Ibid.*
15. There has been some litigation by people who claim they are "Free Men on the Land" and they do not have to pay taxes or adhere to social rules. They are essentially rejecting the institutional settlement.
16. Robert Rodes, "A Modern Legal Ethics: Adversary Advocacy in a Democratic Age" 54 Am J Juris 187 at 189 (2009).
17. David Wasserman, "Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation" 49 Md L Rev 392 (1990).
18. I have three uncles: my father's brother, Lorne; and my mother's sisters' husbands, Steve and Marty. All three are great guys, none of them are at all cranky, and they have never asked me about this. My mom and I have had more discussions about it in the context of my father-in-law doing high-profile homicide trials, but she understood it intuitively, remarking how criminal defence work is a *mitzvah* because it ensures the process is fair, which protects everyone.
19. I think it is important to acknowledge that a lot of important advocacy work for the people who need it the most, and are the least popular, is often done for very modest legal aid rates.
20. It's arguable that the complexity of the law *under our current system* and the need for lawyers is a descriptive rather than normative statement, although arguably it is a matter of how our particular system evolved, rather than an inevitable result of having a system of law.
21. Math nerds: I am one of you. I am therefore aware there are numerical systems in which three plus three does not equal six. Please don't write and tell me about them.
22. "Lawyer Shaming," *supra* note 1, 2–3.
23. <https://www.nytimes.com/2021/01/05/us/politics/deta-mitchell-foley-lardner-trump.html>.
24. 2021 ONSC 5187.
25. https://www.advocates.ca/Upload/Files/PDF/Advocacy/InstituteForCivilityandProfessionalism/Principles_of_Civility_and_Professionalism_for_AdvocatesFeb28.pdf.
26. Another question that sometimes gets debated is whether it is appropriate to decline a retainer within a barrister's area of expertise on the basis of what the client is accused of doing. (In the United Kingdom, this is subject to the "cab-rank" rule.)
27. See Amy Salyzyn and Penelope C Simons, "Professional Responsibility and the Defence of Extractive Corporations in Transnational Human Rights and Environmental Litigation in Canadian Courts" (March 5, 2021) 24(2) *Legal Ethics*. Ottawa Faculty of Law Working Paper No 2021-01.
28. <https://www.theguardian.com/world/2021/jan/17/dominic-raab-calls-qc-acting-for-hong-kong-government-mercenary>.
29. <https://www.theguardian.com/world/2021/jan/15/british-qc-prosecuting-activists-in-hong-kong-fought-to-be-allowed-to-take-case>.

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