From the editor: The "idea of a lawyer;" what is a lawyer?

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For some years, I have been interested in the subject of "how to be a lawyer." The first person I was able to get to write on the subject – Tom Leary, a mentor of mine at White & Case and later a FTC Commissioner – changed the subject to "how to be a good lawyer." I loved Tom's article, but for me being a lawyer is more than being a good lawyer, it is being a larger person licensed to do justice and protect liberty.

Most of us define a lawyer in the context of experience. Lowell Wadmond, a senior partner at White & Case, where I started out, observed one day that someone was a "good and careful lawyer." Carefulness is a part of our tradecraft. Being a good lawyer means paying attention to what we are doing and never forgetting that we are independent advocates, not sycophants to the client. Another White & Case partner was once described by an associate as "sometimes wrong, but never in doubt." I have envied some that I would characterize in that way—it would be nice to be sure in my arguments without worrying about whether I am right. This brings to mind Learned Hand's pronouncement that "[t]he spirit of liberty is the spirit which is not too sure that it is right." Tom Leary incorporated this standard in his description of how to be a good lawyer.

In the October 8, 2009, issue of the *New York Review of Books*, Georgetown law professor David Cole discussed contrary views of the roles of private and government lawyers as follows:

> Private lawyers are sometimes considered "hired guns," whose obligation is to interpret the law as far as possible to do their client's bidding. We

> rely on the adversarial system and public airing of arguments and evidence to reach a just result. Lawyers in the [Justice Department's] Office of Legal Counsel, by contrast, work in a setting that affords no adversarial presentation or public scrutiny. In that position, the lawyer's obligation is to provide objective advice as an "honest broker," not to act as an advocate or a hired gun.

Hopefully, most of us private lawyers also seek to render objective advice as part of our obligation as licensed advocates. British barristers may be in a better position to be independent lawyers – appropriately detached from their clients – since they are retained by other lawyers, the solicitors. I recall a demonstration of a "mareva" hearing conducted by barristers at an ABA convention. In the demonstration, they were much more visibly detached from the "rascal" they were representing than an American trial lawyer would be—especially a civil trial lawyer.

Most of us have mentors from whom we derive our standards. My most important legal mentor was Orison Marden. He worked hard to be well prepared, he was a gentleman to all and he felt a profound sense of obligation to make the benefits of effective legal representation available to all, whether in helping establish: a) a legal aid office in Harlem, or b) an NGO to provide legal services to civil rights litigants in Mississippi.

As with us all, I had many mentors. Once, as an associate, I told Gene Souther, the litigation partner at Seward & Kissel, my opinion as to our position. Gene asked, "Where is the statute? Where is the regulation? Where is the case? We don't want 'Eikenberry on law!'" When Columbia Law School student Russ Fujiwara worked for me, I told him the story, and I said I did not want "Fujiwara on law." Later when he was employed in Japan by a Japanese law firm, Russ wrote to tell me that he was required to issue opinions based upon "Fujiwara on law."

At Ohio State Law School, we sat in large lecture rooms looking down on the lecturer from the raised tiers of rows above. One day in contracts class, Professor Rollie Stanger walked up through the rows – just before the end of the class – after he had talked about the same case for three days. When he reached the highest row, just before the door, he leaned on the back of the last seat, looked down upon us, stated, "The case is about tomatoes!" and walked out of the room. As a litigator, I learned early that knowing the facts was more important than anything, as Rollie Stanger had tried to teach me.

As a law review editor under the tutelage of Professors Bill Van Alstyne and Paul Carrigan, I had to observe tough standards for those who wrote under my supervision. Despite the fact that one author kept pulling sections I cut out of the wastebasket, I stuck by my edits, a skill I use almost every day close to 50 years later. As a first-year research associate at White & Case – I had to get those memos right – thoroughness and accuracy were installed into my self-styled "idea of a lawyer." The next year, as a member of the litigation department, I had to learn to write all over again as an advocate; I had to weave facts into a legal context in a persuasive manner to support a client's position.

All these meanderings from my youth on how to be a lawyer do not answer the question of "what is a lawyer?" By power of example, hard work and experience, I learned how to be a lawyer, but in the abstract, I still cannot define what it is that I am. In the 4th Edition of the *American Heritage Dictionary* (2006), surprisingly, the definitions of the words "attorney" and "lawyer" differ as follows:

> *Attorney*- A person legally appointed by another to act as his or her agent in the transaction of business, specifically one qualified and licensed to act for plaintiffs and defendants in legal proceedings.
>
> *Lawyer*- One whose profession is to give legal advice and assistance to clients and represent them in court or in legal matters.

In *Black's Law Dictionary* (8th Ed. 2004), a "*Lawyer"* is defined as "[o]ne who is licensed to practice law" and "*Attorney"* is defined as:

> 1. Strictly, one who is designated to transact business for another, a legal agent.- also termed attorney –in-fact; private attorney. 2. A person who practices law.

None of these definitions satisfy me, since all omit any duty to the court or society—which, in most of our experiences, has been supplied somewhat by use of the phrase "officer of the court." Judge Robert Katzmann has been quoted by me on more than one occasion for his fleshing out of the role of a lawyer in terms of duty to the court and society. He states as follows in the context of supporting an inherent responsibility for lawyers to ensure adequate representation of all litigants:

> Unlike grocers and taxi drivers…lawyers are involved in work created by the state. And they exercise monopoly power in a variety of ways—through prohibitions against unauthorized practice and regulations and laws fashioned, in large measure, to protect lawyers.
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> The lawyer's function is grounded in role morality, the idea that special obligations attach to certain roles- in this case, to render justice. Lawyers claim autonomy to perform their functions as a consequence of specialized knowledge and skill. The state grants such autonomy, an effective monopoly, in exchange for lawyers, as officers of the court, discharging their duty to further equality before the law. After all, the very reason the state conferred such a monopoly was so that justice could best be served.

Judge Katzmann's exposition comes closer to my concept of a lawyer. Of all the people I have ever known, no one defined, by his attitude toward lawyers, the role of being a lawyer with more power and sanctity than Judge Edward Weinfeld. He appeared to view lawyers as having a secularly sacred duty to justice and to the court, and it was with a sense of awe that we gave him our respect. The snowstorm incident that I have related before best typified our respect.

Thirty years ago or so, there was a great snowstorm in New York City, and I had a calendar call before Judge Weinfeld. The radio reported that "all federal offices were closed," but I did not think that that applied to Judge Weinfeld. As I arrived at about 9:20 a.m. for the 9:30 a.m. calendar call, the Judge's courtroom was filled. No one was absent of the dozens of lawyers scheduled to be there, except for two. They were not able to get transportation from Connecticut and called in, as was reported to us by the courtroom deputy. There were no other functioning courtrooms at Foley Square that day. I am informed that at around lunchtime, staff was finally able to convince the Judge to adjourn the jury trial he had that day.

Chip Gray, long time head of Brooklyn legal services, whose parents and a grandparent or two were distinguished Boston lawyers, has spoken of the "citizen soldier" concept of being a lawyer. This adds something to the role, but is it really accurate, since we are the persons chosen to replace soldiers and violence as a method of resolving disputes?

When I asked Mike Chepiga of Simpson Thatcher "how to be a lawyer," he replied that a lawyer is a zealous advocate for a client. Mike, the former head of Legal Aid, wrote and produced his own existential off-Broadway play while he was a first-year law student. After law school, he served as clerk to Judge Amalya Kearse, and he was once a high school teacher in the New York City system. Thus, I give his definition respect as I do Judge Korman's passing on of Judge Rifkind's admonition that a lawyer is one with "passion" for his or her client's cause.

Yet, being careful and prepared, being independent, staying honest and being zealous does not seem enough. Perhaps my soil-conservationist father's often expressed

opinion that all lawyers are crooks encourages me to seek higher meaning in my job. For whatever reason, I feel the need to define myself more satisfactorily. Medical doctors must take an oath “to do no harm.” Maybe lawyers should take one “to do justice” with a recited litany that spells out what that means. Perhaps, I will write one some day. Mentoring younger lawyers, working to help ensure that all citizens have access to adequate legal representation, advocating just laws and improvements in legal procedures to help ensure that the legal system is closer to a goal of equal access to justice—would all be part of the litany. Humility has to be part of the definition. I know that most mistakes I make come out of moments of arrogance.

Not only are lawyers licensed to practice a learned profession, but there is also some truth in de Tocqueville’s opinion that “[i]f I were asked where I place the American aristocracy, I should reply without hesitation…that it occupies the judicial bench and the bar.” We have a fair percentage of the important leadership positions in government, business, the arts, with important roles in journalism and the media as well. In 2010, of course, all justices of the Supreme Court are lawyers, the president and the first lady as well are lawyers, and the legislative bodies are blessed with a multitude of them. My law school, Ohio State, is developing a curriculum in leadership, a step in the right direction. True leaders of the bar of course have to say no at inconvenient moments, take other difficult positions and often organize for constructive change when circumstances reflecting injustice go without remedy.

In my experience, a poor or otherwise disadvantaged person has in theory a real opportunity to receive equal justice from our courts. Yet, in our rule of law democracy, a substantial portion of the members of disadvantaged groups lack adequate access to the

legal representation necessary for them to realize upon their opportunities. In a 2004 report, the New York State Bar Association found that "only 14% of New York's indigent with general civil legal problems were able to access legal services." Judge Katzmann has reported that, of the hundreds of thousands of immigrants detained yearly, only about 10% had legal counsel.

I am attracted to Whitney North Seymour's words where he spelled out the *Peculiar Care of the Bar*, which speech is found on the wall of the Seymour Room on the first floor of the New York City Bar Association. I quote in part:

> The great concepts which make our hearts beat fast; liberty under law, a government of laws and not of men, equal justice for all, eternal vigilance as the price of liberty, these are not mere clichés for the bar. They distill hundreds of years of struggle, first in England where liberty from sovereign tyrants was won by brave judges and lawyers- and then in our own struggles to form the Constitution and then to make it work. Every generation has had to hold the line; liberty is always under the guns…And it is this effort of our predecessors which still preserves for us a sense of individual dignity, which gives reasonable assurance that each person can achieve that goal and position in life which talents and energy insure.
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> Rights involve responsibilities, we must remind ourselves. Robert Frost said, "Freedom is to feel easy in your harness." Whatever it may be, it is a peculiar care of the bar.

Conclusion

In New York State, CLE courses are divided into "how to" skills courses or ones on "ethics." Ethics courses usually explore concrete problem situations, such as conflicts of interest in law firm hirings or mergers. Would we not also benefit from discussions and lectures on a lawyer's rule of law responsibilities? The question of "what is a lawyer?" is not easy to define, but most of us recognize one when we see one with the full package of essential qualities, such as a Whit Seymour or an Orison Marden. Vilia

Hayes, for instance, recently received a lightly publicized Federal Bar Council award; she meets my definition of a lawyer.

I do not opine as to what the definition of a lawyer should be, but I ask, *inter alia*, the Association of American Law Schools, the ABA, the New York State Bar Association, the admission authorities of New York State and of the various federal courts and the deans of the various law schools— what is the definition of a lawyer, and how can we set standards for being one if we have not yet defined the term? Somehow, I would like to see something of Whitney North Seymour's criteria as to the *Peculiar Care of the Bar* incorporated into the standard.

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