

ETHICS MAN Daniel K Sokol

The lawyer's brief on ethics

The parallels between legal and medical ethics are clear

In August 2009 I resigned from my position as an academic medical ethicist to train as a barrister. Upon hearing of my change a friend quipped, "Ah, you've given up ethics to be a lawyer." To many people "ethics" and "lawyers" are like oil and water. In the popular perception, lawyers have no scruples and earn vast sums of money, even defending murderers, rapists, and paedophiles. In the context of medicine they sue well meaning clinicians and attempt deviously to undermine the authority of esteemed consultants in cross examination. Eager was I, then, to find out whether ethics had a place in a lawyer's training.

There was not a drop of teaching of ethics in my first year of law, the so called "conversion" year. We were taught to change our way of thinking from that of layperson ("That's jolly unfair!") to that of a lawyer ("Is there a wrongful act in law?"). We were taught the law from an academic perspective: imagine a surgeon who leaves a swab in a patient's abdomen, or a general practitioner who fails to diagnose a malignant melanoma, what must you prove to determine whether the clinician is liable in negligence?

My first contact with ethics came towards the end of the first year, during the dreaded interviews for "pupillage." Pupillage refers to the first year in a barrister's career. Nearly every interview contained a question about ethics. You are defending an elderly woman charged with driving under the influence. She has told you in conference—a private meeting—that she drinks no alcohol. On the morning of the trial you notice her outside the court room, suspiciously sipping a bottle wrapped in a brown paper bag. What do you do? Or, you are defending an alleged rapist who tells you, again in conference, that he did commit the offence but that he nonetheless wants to plead not guilty. Another client assures you of his innocence but insists on pleading guilty to

benefit from a reduced sentence.

The second year is the vocational part of the course. Reality, in the form of a client, has appeared on the scene, and the client cares not a jot for arcane legal debates. Clients want to know whether they will win their case, or how much money they can get, or whether they will go to jail, or whether they can visit their children. And with reality comes ethics. For the first time in the history of the bar training course all aspiring barristers must now pass a two hour ethics exam. It is not possible to qualify as a barrister without obtaining at least 60%. Will medical schools follow suit and set a separate ethics exam, rather than the odd question interspersed here and there? It would heighten the status of ethics in the curriculum, although it can hardly be denied that medical students are already overexamined.

There are clear parallels between legal and medical ethics. Paragraph 303 of the Bar Code of Conduct states that a barrister must "promote and protect fearlessly and by all proper and lawful means the lay client's best interests." Like doctors and their competent patients, it is ultimately up to the client to decide what course of action to take, even if the barrister considers it morally wrong or foolish. This is, in effect, respect for the client's autonomy. If the self confessed rapist wants to plead not guilty and cannot be persuaded to do otherwise, then the barrister must defend him. The burden of proof is on the prosecution to prove guilt; the barrister, however, will not be permitted to mislead the judge or jury by stating expressly that the client is innocent.

The "cab rank" rule is neatly explained by Horace Rumpole, the barrister in John Mortimer's novels. "I'm a black taxi, plying for hire," bellows Rumpole. "I'm bound to accept anyone, however repulsive, who waves me down and asks for a lift." Barristers must accept any case



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that comes their way, not just those that are considered morally worthy. They cannot pick and choose. Doctors too have a cab rank rule. They cannot usually refuse to treat patients because they find them morally objectionable. Any visible injection of moral judgment in the doctor-patient relationship would be a backward step. Doctors, like lawyers, are not moral judges.

Confidentiality, known as legal professional privilege, is also sacrosanct, perhaps more so than in the doctor-patient relationship. Without the client's permission the barrister will not tell a soul that the client has knowingly built an extension on a neighbour's land or confessed to killing a lover. As well as bolstering trust this promise of silence allows clients to talk honestly with their lawyer, and this in turn enables the lawyer to give appropriate advice. Similar reasoning underpins the duty of confidentiality on doctors: without it, patients may hold back information that could otherwise assist the doctor in making a diagnosis.

As in medicine, I wonder to what extent the lofty tenets of the barristers' code of ethics are applied in practice. Doubtless the extent to which they are respected depends on the individual practitioner. At law school we are constantly reminded that lawyers, like doctors, can be sued for negligence. Some lawyers specialise in suing other lawyers. The Bar Standards Board has disciplinary hearings to handle complaints against barristers. "Violate the code and kiss goodbye to your career" is the barely disguised message. Yet the emphasis is in the wrong place. The motivation to be ethical should be rooted not in the fear of getting into trouble but in the belief that a good lawyer, like a good doctor, is necessarily an ethical one.

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Cite this as: *BMJ* 2011;342:d1815