

Jesus Christ:
Advocate, Counselor, Mediator
(THE ROLE MODEL FOR THE CHRISTIAN LAWYER)

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INTRODUCTION

He that saith he abideth in him ought himself also so to walk, even as he walked. 1 John 2:6.

It has long been accepted that lawyers play three primary roles: advocate, counselor and negotiator or mediator. As advocate, the lawyer asserts the legal rights of others. As counselor, the lawyer advises people how to live within the law. As negotiator or mediator, the lawyer helps people to settle disputes without a fight in court.

In the exercise of these three functions, lawyers have long searched for a “role model.” In this century, the American Bar Association has twice articulated a set of standards governing the legal profession, first, in its early 20th Century Canons and, second, in its 1970 Model Code of Professional Responsibility. Both times the A.B.A. has charted an uneasy, and often an uneven, course between two rejected models of professional behavior: the lawyer as “hired gun” and the lawyer as “social engineer.”

On February 1, 1980, the American Bar Association’s Commission on Evaluation of Professional Standards issued a discussion draft of the proposed Model Rules of Professional Conduct which are designed to replace the 1970 Model Code. Once again the A.B.A. has faced the recurring questions of professional responsibility:

If a lawyer may defend a guilty man. how should he do it?

If a lawyer may advise a client of moral and other non-legal considerations before choosing a course of action, how should he do it?

If a lawyer believes that a particular course of action is the right one for the client, how should he negotiate that?

And once again, these questions and others have been answered by the A.B.A. Commission which has proposed to chart the same uneasy and uneven course between the model of the lawyer as “hired gun” and the lawyer as “social engineer.”

As a “hired gun” a lawyer would become a tool of the client’s; as a “social engineer” a client would become a tool of the lawyer’s. As a “hired gun” a lawyer would refuse to take any responsibility for the rightness or wrongness of the client’s cause; as a “social engineer” a lawyer would substitute his values for that of his clients. To avoid these extremes, the new Model Rules contain such statements as the following:

“An advocate does not vouch for the justness of a client’s cause but only its legal merit.”

“In advising a client a lawyer shall exercise independent and candid professional judgment uncontrolled ... by the lawyer’s own interests or wishes.”

“A lawyer as negotiator should not impose an agreement on the client, even if the lawyer believes the agreement is in the client’s best interests. By the same token, a lawyer does

not necessarily endorse the substance of an agreement arrived at through his or her efforts.”

A friendly observer is likely to respond to these statements with the word, “balanced.” An unfriendly observer is more likely to comment: “tricky.” But for those of us who practice and teach law, we must press for a deeper understanding.

As I studied these Model Rules and their predecessors, I came to the conclusion that the lawyers have done, on the whole, a good job. But as I thought a little deeper, I came to the realization that something crucial was missing. While lawyers have identified the “hired gun” and the “social engineer” models of professional conduct as ones to be rejected, they have failed to identify a positive model of professional conduct, a model to be measured by. On the one hand, lawyers are told not to be a “hired gun”; and, on the other hand, he is admonished not to be a “social engineer.” But what should a lawyer be?

I believe that Christians have an answer to that question in the Lord Jesus Christ. Jesus did tell the lawyers of his day how not to practice law:

“Woe unto you also ye lawyers! for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers.” (Luke 11 :46)

“Woe unto you, lawyers! for ye have taken away the key of knowledge; ye entered not in yourselves, and them that were entering in ye hindered.” (Luke 11:52)

But he left us with a much richer legacy. He gave us through His own life a Biblical model for the practice of law because He performed, and continues to perform, the three essential roles of a lawyer. He is our Advocate; He is our Counselor; He is our Mediator.

JESUS CHRIST AS ADVOCATE

In 1 John 2:1, we find this remarkable passage:

“...And if anyone sins, we have an Advocate with the Father. Jesus Christ the righteous.”

As our advocate Jesus Christ has been called alongside to help us because we have sinned. For example, he helped the adulterous woman even though she was guilty. See John 8. Advocacy is, indeed, a high calling - for the need is great!

Today, many have attacked the lawyer’s role of advocate and the adversary system to which it has given birth. While the A.B.A. Commission has endorsed as legitimate, the lawyer’s role as advocate, I detect some uneasiness with that traditional role in several of the proposed Model Rules of Professional Conduct.

In its introduction to the section governing the lawyer as advocate the Commission has stated that a lawyer does not vouch “for the justness of a client’s cause, but only its legal merit.” If a client’s cause has legal merit, is it not just for a lawyer to advocate that claim? While the ultimate issue of justice is for the judge, and not for the lawyer, the Commission ought to embrace, not apologize for,

the role of the lawyer as advocate. It ought to make a positive statement about the need, if justice is to be done, for a lawyer to serve the client as advocate. There need be no apology for the lawyer's role as advocate.

The disclaimer that a lawyer as advocate does not vouch for the justness of his client's claim spills over in the definition of several of the proposed Model Rules. Let me address three of those.

Rule 3.1 (a) states that "A lawyer shall not file a complaint, motion, or pleading, other than one that puts the prosecution to its proof in a criminal case, unless according to the lawyer's belief there is good ground to support it." If a motion or complaint or pleading in a criminal case requires the prosecutor to prove beyond a reasonable doubt that a person is guilty of the crime charged, then surely a lawyer has good grounds to support that action. A plea of "not guilty" does not always mean that the defendant did not do it. A "not guilty" plea, is often entered solely to contest the authority of the state to take jurisdiction over the defendant. After all, a criminal case is not just a search for truth for the state has authority over a defendant only to prove the crime or crimes which have been charged.

Rule 3.1 (a) takes an unnecessarily cynical view of the role of the advocate in a criminal case. This cynical view, also, accounts for an erosion of the defense attorney's responsibility to prohibit the introduction of false or misleading testimony in a criminal trial. While the principle that a lawyer must not introduce evidence that he knows to be false or misleading is reaffirmed in civil matters, the Commission has proposed a rule that a lawyer must introduce on behalf of a defendant in a criminal case

"evidence regardless of belief as to whether it is false if the client so demands and applicable law requires that the lawyer comply with such a demand."

What possible law could there be that would require a lawyer to offer into evidence testimony that he knew to be false? In the comments the drafters suggest that in some jurisdictions the Constitutional guarantees of due process and of assistance of counsel may require such conduct. I doubt if there is any case law supporting the proposition that a lawyer must actively assist a client to tell a lie in court. The United States Supreme Court has repeatedly stated that neither guarantee gives a defendant in a criminal case the right to commit perjury. Should the A.B.A. encourage courts to depart from this position?

Would Jesus Christ, our advocate, offer such evidence before the Father? Did He, by defending the adulteress, take a position that she, in fact, had not done the act charged? No! As our Advocate He intercedes on our behalf to assure that we have not been falsely accused by Satan, the master deceiver, who accuses the Christian "day and night." Rev. 12:10. As our Advocate Jesus exposes Satan's untrustworthy character and reputation (John 8:44) and impeaches his testimony. (John 16:11)

In addition, Jesus, as advocate, appeals for equity, for fairness. For example, He argued on behalf of the adulteress: "He that is without sin among you, let him first cast a stone at her." John 8:7. His appeal succeeded as one by one they dropped the charges against her. John 8:9.

Would not the lawyer's position as advocate - as intercessor against false accusations and as appealer to the community conscience - be inevitably compromised if the lawyer's duty to do everything he can to prevent a client from offering false testimony is modified? I cannot help but think that the A.B.A. should protect the advocate's position by a firm barrier against even the appearance that a lawyer may be cooperating with a lying client. God's Word is clear and uncompromising:

“Thou shalt not raise a false report: put not thine hand with the wicked to be an unrighteous witness ... Keep thee far from a false matter.” (Ex. 23:1 & 7a)

Moreover, it is no accident that the verse in 1 John 2:1 has identified the sinner's advocate as “Jesus Christ, the *righteous*.” The lawyer, as advocate, must not identify too closely with a client lest the lawyer lose his righteous insulation.

If the lawyer is not to be too closely identified with the client in order to preserve his position as advocate, he must also be independent from the state or from others who oppose or accuse his client. The lawyer is an advocate, not an accuser.

The A.B.A. has long recognized this principle. It is best illustrated by the rules safeguarding the lawyer-client privilege of confidentiality. But the proposed Model Rules contain one provision that I think seriously threatens this privilege. Section 1.7(b) reads as follows:

“A lawyer shall disclose information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm to another person, and to the extent required by law or the rules of professional conduct.”

The Commission has explained this section as follows:

“When homicide or serious bodily injury is threatened by the client, the lawyer must make disclosure to the extent necessary to prevent the wrong”

In the 1970 Model Code of Professional Responsibility a lawyer was not bound to keep confidential a client's intent to commit a crime, but the Code did not command the lawyer to disclose such information. That rule is as it should be. Any time a lawyer reveals a statement made in confidence to him he jeopardizes his role as advocate by becoming the client's accuser.

Once again we may find guidance in the Word of God. In John 3:17 we read: “For God sent not his Son into the world to condemn the world; but that the world through him might be saved.” And so it is with a lawyer. He is not appointed by the state or by another person to condemn the client, but to protect that client. If the lawyer is obligated to compromise that role in favor of protecting another by breaking the client's confidence, then he inevitably weakens his position as the client's advocate. Moreover, we ought not enact any rule requiring a course of action based upon a person's assessment of the future. God has warned us against such presumption:

Whereas ye know not what shall be on the morrow. For what is your life? It is even a vapour, that appeareth for a little time, and then vanisheth away. James 4:14.

JESUS CHRIST: COUNSELOR

Thus far, I have tested three of the Model Rules by the Biblical standards for an Advocate. Let me now turn to the guidelines that Jesus Christ gives us as Counselor:

“For unto us a child is born, unto us a son is given: and the government shall be upon his shoulders and his name shall be called Wonderful, Counselor ...” Isaiah 9:6.

Immediately after Jesus had won the case for the adulteress we find these words “Go, and sin no more.” John 8:11. As her Advocate Jesus had “won the case”; but as her Counselor He had a greater responsibility. Had Jesus given such counsel under the Model Rules of Professional Conduct, would He have risked violation of Rule 2.1?

“In advising a client a lawyer shall exercise independent and candid professional judgment uncontrolled by the interests or wishes of a third person, or by the lawyer’s own interests or wishes.”

One could readily agree that Jesus’ advice to the adulteress was “independent” and “candid,” but was it “uncontrolled” by the interests of the adulteress’ family or Jesus’ own interests or wishes? While the Commission has allowed a lawyer’s advice to take into account ethical, equitable and other non-legal factors, it has failed to identify when those factors amount to an impermissible “control.” Jesus’ advice was dictated by an absolute moral code set by God. Would that be impermissible? Does Rule 2.1 allow only for a lawyer who subscribes to a “situational ethic”?

Suppose, on the other hand, that the adulteress had informed Jesus in the midst of her trial that she desired only His services as an advocate and did not desire any advice concerning her future conduct. Should Jesus have been *relieved of a duty to counsel her* to go and sin no more as apparently he would have been under Model Rule 2.4:

“A lawyer who knows that a client contemplates a course of action which has a substantial likelihood of serious legal consequences shall warn the client of the legal implications of the conduct, unless a client has expressly or by implication asked not to receive such advice.”

The drafters have justified this modified responsibility with the remark that “a lawyer has no duty ... to give advice that the client has indicated will be unwelcome.”

Consider the following “unwelcome advice” of the Lord Jesus Christ:

“Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you.” Matt. 5:44. “For whosoever will save his life shall lose it; and whosoever will lose his life for my sake shall find it.” Matt. 16:25.

“And if your brother sins, go and reprove him in private, if he listens to you, you have won your brother.” Matt. 18:15.

As counselor the government is placed upon Christ's shoulders and his disciples' desires could not remove that.

Can the lawyer as counselor be relieved of his responsibility simply because of the client's wishes? Under the proposed Model Rules, apparently so. Rule 2.2 provides that "a lawyer may refer to all relevant considerations unless in the circumstances it is evident that the client desires advice confined to strictly legal considerations." Only if the lawyer finds such a restriction "repugnant or imprudent" (Rule 1.5(b)), would he be justified in referring such a client to moral and ethical considerations relevant to the client's cause. Otherwise, as Rule 1.3(a) prescribes, it is the client, not the lawyer, who decides the objectives of the representation and the means by which they are to be pursued.

While a lawyer cannot force any client to accept his advice, one wonders why the Model Rules have been drafted in such a way as to force the lawyer to accept the client's! Once again I believe that the Bible guides us to the right balance in the joint undertaking of lawyer and client.

"Therefore take no thought, saying, what shall we eat? or, What shall we drink? or Wherewithal shall we be clothed? ... But seek ye first the kingdom of God, and his righteousness; and all these things shall be added unto you. Matt. 6:31, 33.

Jesus did not give the disciples the advice asked for because He knew better. Those who heard his advice were not bound by it, but neither was Jesus bound by their stated desires.

JESUS CHRIST: THE MEDIATOR

"For there is one God, and one mediator also between God and men, the man Christ Jesus." 1 Tim. 2:5.

Jesus, we are told by the writer of Hebrews, is the mediator of a "new covenant" (12:24), of a "better covenant, which was established upon better promises" (8:6). Under this new covenant God promised

"If we confess our sins, he is faithful and just to forgive us our sins, and to cleanse us from all unrighteousness ..." 1 John 1:9.

And man, under the new covenant, was called upon to forgive anyone who had wronged him:

"Then Peter came and said to Him, 'Lord, how often shall any brother sin against me and I forgive him? Up to seven times?' Jesus said unto him, 'I do not say to you, up to seven times, but up to seventy times seven.'" Matt. 18:21-22.

As mediator Christ ministers true healing between God and man and between man and man through repentance and forgiveness.

Is this pattern of repentance and forgiveness - of Christian mediation - available to a lawyer as the means of reconciling a dispute? Can he actively assume the role of mediator on behalf of the client to negotiate the settlement of a dispute? The Christian Legal Society has endorsed this principle and

many Christian lawyers are encouraging and enabling their Christian clients to take seriously Chapter 6 of 1 Corinthians:

“Now therefore there is utterly a fault among you, because ye go to law one with another. Why do ye not rather take wrong? Why do ye not rather suffer yourselves to be defrauded?”

I have serious doubts whether the proposed Model Rules accommodate this practice. The drafters see the goal of the negotiation process as “agreement,” not healing. Consequently, they exhort the lawyer to “seek the most advantageous result for the client.” While the lawyer is encouraged to settle, rather than to go to court, he “is to act as an agent,” not as a “mediator,” for the client.

While the proposed rules do not prohibit Christian mediation, I think they may place serious limits on that method of settling disputes. For example, Rule 4.1 (b) provides that a lawyer, in the conduct of negotiations for a client, shall

“in connection with an offer, take reasonable steps to assure that the judgment of the client rather than that of the lawyer determines whether the offer will be accepted.”

“A lawyer shall accept a client’s decisions concerning the objectives of the representation and the means by which they are to be pursued ... unless in violation of law or the rules of professional conduct (or) unless repugnant or imprudent....”

These rules coupled together do not encourage the kind of open dialogue between client and lawyer that is the hallmark of Christian mediation. Rather, they reflect an assumption that the lawyer performs the same type of advocacy role in the settlement process as he does at trial. In fact, the Commission has explicitly endorsed that adversary model in its introduction to the Model Rules governing the lawyer as negotiator:

“(I)t must be recognized that in negotiations a lawyer is the agent for the client and not an arbitrator or mediator. Negotiation is in part a competition for advantage between parties who have the legal competence to settle their own affairs.”

Not only do these rules and this statement discourage Christian mediation as a means of settling disputes, the new rules governing advertising have not even addressed the problems of accommodating advertising with the lawyer’s role as mediator. Rule 9.1 prohibits only false, fraudulent, or misleading statements. If a lawyer advertises uncontested divorces with no children at \$80, will such a lawyer take the time to discuss and to pursue the possibility of mediating a reconciliation, and thereby, to bring true healing into the marriage? The Commission has simply failed to address the potential harm that advertising poses to the settlement process.

JESUS CHRIST: PATTERN FOR THE CHRISTIAN LAWYER

In His role as Advocate, Counselor and Mediator, Jesus Christ has set the pattern for the Christian lawyer. As advocate, Christ knew the law thoroughly (*see, e.g.,* Matt. 5:21-28) and displayed a high degree of skill in defending the guilty, *see* John 8.

Yet, He did not limit Himself to legal knowledge and “technical defenses.” As counselor and mediator, He helped people to find “fulfillment” in their lives just as He came to “fulfill” the law. See Matt. 5:17. He was not satisfied to have just won the case for the adulterous woman in John Chapter 8. Rather, He counseled her to sin no more. Moreover, He did not limit His counsel to “the law.” Instead, He gave Godly counsel to His followers that they might taste the abundant life. Finally, as mediator Christ ministered true healing to God and man and man and man. The pattern of repentance and forgiveness was established by the new covenant as the means for realizing this healing.

The Christian lawyer as advocate, counselor and mediator ought to practice law in the pattern set by Christ. With the power of the Holy Spirit he can truly become a minister of healing in the breakdown of all types of legal relationships. Through intercessory prayer and the exercise of the gifts of the Holy Spirit, the Christian can believe for miraculous, not just legal solutions to his client’s problems:

“Verily, verily, I say unto you, He that believeth on me, the works that I do shall he do also; and greater works than these shall he do; because I go unto my Father.” John 14:12.

Other writings by Herbert W. Titus:

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