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Working Group Reports & Agendas, Symposium, Report of Working Group #1

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WORKING GROUP REPORTS & AGENDAS

REPORT OF WORKING GROUP #1

Tami Scarola

Working Group number 1 organized its discussion into four parts: an overview of the paper by the author; comment on the paper by the group members; a general examination of the meaning of pluralism; and preparation of the agenda. Most of the discussion centered around the paper, but the agenda does not reflect that focus. The agenda was a debated compromise, which speaks in general terms.

Howard Lesnick described his article, *The Religious Lawyer in a Pluralist Society*, as a normative, rather than a doctrinal, approach to the issue. The article sets out three qualities which all religions share: obligation, integration, and transcendence, and discusses the implications of integrating attorneys' religion and the norms of their practice. Religious differentiations are currently treated as merely contingent characteristics, which presume that all lawyers should act very much the same. Thus, religion is regarded as just one of many idiosyncrasies of the individual lawyer. Professor Lesnick then explains that a religious lawyer should not refrain from making decisions based on her subjective religious beliefs. A lawyer should not, however, impose her view on a vulnerable client such as in the Tennessee example.

The entire group commented on Professor Lesnick's article. Some expressed concern that the dominant view of a religious lawyer's scruples could create an "adversarial shield" between the attorneys' own religious values and their practice. Thus, attorneys would be encouraged to claim no responsibility for the client's acts. The group also discussed whether the definition of religion was too broad.

A discussion then ensued concerning the lack of recognition of the client's spirituality in the analysis. The question was: How does an attorney counsel a client whose own spirituality is as important as the attorney's? One member of the group decided the answer depends on the way one defines spirituality. Two general answers were proposed to resolve the question of conflicting spiritualities: (1) an attorney would expect the legal system to let her off the case—perhaps by deeming the attorney disabled from providing effective representation; or (2) if the attorney could not withdraw, she should find a way to share her moral convictions in a way which *respects* the client's ability to make the decision. The attorney must share the client's sense of right and wrong so the client can understand the morality of the issue.

One member disagreed with these two answers, and argued that religious scriptures should be used in every decision. This member argued that one should not water down the word of God just because

it hurts other people's feelings. A third answer to the question suggested that the attorney has a duty to preach her convictions and tell the client that what she is doing is wrong or right. This is considered the "Christian Witness" perspective. Other members argued it is not in the collective good for someone to preach or "bear witness" to a vulnerable client.

The leader of the group then offered a bankruptcy hypothetical. Essentially, a man is going bankrupt and has an insurance policy which he is not sure is good in the event of suicide. The man calls his attorney. The attorney infers that the man intends to commit suicide and knows that the suicide will not void the insurance policy. What should the attorney do? Five answers were offered: (1) manipulate the client by delaying; (2) tell the client the attorney cannot answer the question; (3) call the police after the client leaves the attorney's office; (4) counsel the client on moral grounds; or (5) give full disclosure. The fifth answer was termed the "Disclosure Model" from securities law and explained that the attorney must lay everything out on the table for the client to ultimately make the decision. It was argued that this is the best alternative because the attorney is protected. A counter argument is that neutral advice is wrong because that is not God's teaching. Others believed that if the attorney takes a gentle stance on the issue it would be ethical to give directive moral advice. Once the attorney becomes combative, however, the advice has crossed the line of ethical action. One participant then stressed that law schools must teach students this non-combative approach. Becoming aware of the danger of imposing the attorney's beliefs on the client is the first step in avoiding the problem.

The discussion then turned to the question of whether a lawyer is a neutral agent or the client's agent. Underlying this conflict is an attorney's religious perspective. Religious attorneys feel there is a "prior claim on them" and, therefore, they are required to split themselves off from this other claim before they practice law. Thus, the characterization of an attorney must be clarified. Professor Lesnick's idea of "integration" may solve this conflict. Integration is the balance between this "prior claim" and the attorney's practice. One member argued, however, that those who do not have a religion do not need the "integration." A counter argument was made that those without religion have morals which must be integrated.

The article comments were summarized as: (1) an attorney can bring her religious self into the attorney client relationship; (2) the legal culture and the self can be integrated; (3) legitimizing the lawyer's self aids the common good; and (4) religious pluralism must be considered. The group then moved on to a discussion of religious pluralism.

The group focused on the importance of being aware of religious pluralism. If one makes a statement in religiously diverse company,

that person should recognize that the different reactions may be evoked by such a statement. Thus, one could look at pluralism focusing on differences, but the group stressed commonalities. A person in mixed company could avoid a problem by focusing on consensual value statements, rather than subjective statements. Attorneys should build common ground, while keeping in mind the differences, as the solution to pluralism. One member suggested the ground be built on values. Another member felt this problem is rare because when clients choose attorneys they frequently choose someone with the same beliefs, thus avoiding a conflict. One participant stressed that there are few religious attorneys today and thus less suspicion that the attorney is bringing religious perspectives to work.

There was disagreement over whether a common ground could be found. One participant felt the political model should be followed in the practice of law. Other members were concerned that there is no end to the definition of religion and thus a common ground is difficult to build without a clear understanding of religion. One member pointed out that to define religion would be to violate the Establishment Clause of the Constitution. The group summarized these issues as: Should a pluralist society acting through norms of legal culture view as a public good the religiously grounded scruples of attorneys?; and, What about scruples which are not religiously grounded?

The group then discussed when religious convictions can be brought into the practice. The group decided an attorney cannot use a client as a means to a religious end. However, if there is a trust relationship, then the attorney can give such advice. The group also decided that the attorney must withdraw or seek leave of court to do so, if the client decides she no longer wants the attorney's services. The agenda was initially formulated as a detailed "to do" list for schools, the profession, and religious community. Because the group had so much difficulty agreeing on the wording and content of the list, open-ended questions were created to address the main points. The group, therefore, decided that rather than recommending a rule change, they would suggest further research be conducted on the viability of a new rule, which would follow Professor Lesnick's argument in his paper.

Notes & Observations