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Kara H. Ching

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REPORT OF WORKING GROUP #5

Kara H. Ching

The Working Group on Deciding Whether to Represent a Client discussed, as the title suggests, whether and to what extent a lawyer's religious beliefs should influence her decision to accept a client. The working group had the benefit of the attached outline of questions, which had been prepared before the working group met. The group explored many of the questions raised in the outline as well as other questions raised by the participants.

There was no dispute among the group members that a lawyer's religious perspective was an appropriate factor to consider when deciding whether to represent a client. As the group continued its dialogue, however, it became apparent that there were several issues over which participants disagreed.

The group discussed several issues involved in representing corporate clients. Some provocative questions were raised in connection with the situation where a lawyer is not alone in deciding whether to accept a corporate client. Specifically, the scenario where a junior associate in a law firm is assigned to defend an ill-intentioned corporate defendant sparked some debate among participants. One member advanced the view that there are certain cases in which a religious person simply should not be involved, regardless of the consequences. This participant went on to stress that a lawyer does not always suffer negative consequences when she makes the right choice, but rather that in some instances the decision is rewarded. Another member suggested that not all lawyers, for example, those with families, may view the possibility of losing their jobs or being removed from the partnership track as an acceptable risk. A participant mentioned that one option for a lawyer who is representing a client she would not have chosen on her own, is to make the most of the representation—to work from within to enlighten and influence the corporate client.

One group member expressed her belief that, although Christian lawyers should avoid evil, in many instances it may be appropriate for a lawyer to represent a guilty individual criminal defendant but not a corporate defendant with an evil motive in a civil action. This distinction serves two purposes. First, by representing a criminal defendant, the lawyer plays a role in limiting state power and coercion. Second, by declining to represent a corporate defendant, the lawyer avoids a situation where she may be more likely to participate in the evil. The group acknowledged, however, that not all corporate representation should be avoided. For example, one participant suggested that where a lawyer could only accept one case, choosing to represent a corporate client with a good motive, over a needy pro bono client, could be reconciled by using the corporate fees to assist the indigent client.

The group also identified several issues present in the criminal context. One example is when a junior prosecutor is pressured to prosecute a defendant who the lawyer believes is innocent. Another scenario is where the lawyer becomes aware that her criminal defendant client has committed crimes other than the one charged. This situation illustrates the tension between the attorney-client privilege and both a lawyer's religious beliefs and her duties as an officer of the court.

These scenarios evoked the question of whether there is a point at which a religious attorney must decide that she cannot practice law. The group responded by suggesting methods to avoid situations that place a lawyer's religious beliefs in conflict with professional obligations. One suggestion was disclosing the lawyer's religious perspective to prospective clients before agreeing to accept the case. This approach would put the client on notice that the lawyer's beliefs may play a role in her representation. Another possibility raised was including in the engagement letter an option for the attorney to withdraw from the case should the client lie to the lawyer. Both of these options suggest that not only does a lawyer have a choice of whom to represent, but also that the prospective client may choose to engage another attorney. By disclosing a religious perspective before accepting representation, a lawyer may be able to avoid some difficult future situations. Not surprisingly, there were questions that accompanied these suggestions. For example, was it always necessary for a lawyer to disclose her religious beliefs? When disclosure is appropriate, to what extent should she explain her beliefs? The group raised, but did not consider, whether it would ever be appropriate for the lawyer to inquire into the beliefs of the prospective client.

As mentioned above, all participants agreed that a lawyer's religious beliefs could properly be considered in deciding whether to represent a client. To explore the boundaries of that premise, a participant raised the question of whether a religiously motivated attorney who had decided not to accept representation of a client could convince other attorneys not to represent the client. Some group members expressed that the answer may be influenced by whether the other lawyers were in the same religious community. This distinction led to a follow-up question: If lawyers may convince other attorneys not to take a case for religious reasons, would a lawyer be permitted to convince every attorney in an area—for example, in a small town or city—such that the potential client could not retain a lawyer and, as a result, be effectively denied access to the courts?

The Working Group shaped the agenda to address the problems that were raised in the Group's sessions. Participants placed great emphasis on education and communication, both in the law schools and among practicing attorneys. Members of the group disagreed, however, over whether to include in the agenda the word *moral* in the

term “a lawyer’s spiritual and moral understandings.” This dispute identifies an undercurrent that ran throughout the group’s meetings. Many participants wanted their concerns about religion to be addressed specifically and directly. Some of these participants did not want the inclusion of the more general concept of morality to dilute attention and respect given to spiritual issues. Others in the group advocated for the inclusion of a lawyer’s morality as a more inclusive term capable of encompassing more ethical challenges faced by lawyers.

The sessions of the Working Group were characterized by lively discussion. Although participants did not always agree, the group was enthusiastic about exchanging ideas and developing the agenda.

CLIENT SELECTION: OUTLINE OF QUESTIONS
GROUP #5

I. *Relevance of Religion, Generally*

A. *Extent of lawyer autonomy in choosing clients and matters.*

To what extent are decisions about which *clients* to represent and which *matters* to represent them in (*i.e.*, the scope of the representation) a matter of personal autonomy or discretion, so that the lawyer would be justified/obligated to make this decision in whole or in part on the basis of religious convictions?

1. Must a lawyer accept every client who walks in the door (whom the lawyer is qualified to represent)? If not, is the answer different if one is the proverbial “last lawyer in town?” How are these questions addressed by (a) the legal profession’s norms; (b) particular religious norms; and (c) other societal norms?
2. Assuming that the lawyer generally has autonomy in choosing clients and matters, to what extent is it appropriate to make this choice on the basis of religious convictions (as distinguished from moral, financial or other considerations)? Lawyers are often characterized as “officers of the court;” de Toqueville referred to lawyers as members of the “governing class.” If one gives full force to these metaphors, then might arguments for strict separation of church and state, traditionally offered in the context of government officials, be extended to lawyers? Should religion should be kept out of lawyers’ decision-making, as Professor Hoffman suggests, in order to protect the profession from becoming a battlefield of ideological warfare?

3. On a personal level (*e.g.*, as a matter of the lawyer's spiritual, psychological, moral development), what is the effect of making or not making choices on the basis of one's religious convictions?
4. How are similar questions answered by other professionals—*e.g.*, medical professionals and members of the clergy—and to what extent is the situation for lawyers similar or different? For example, what is the relevance of religion in decisions by doctors or members of the clergy concerning whom to serve, and do the answers have any relevance to lawyers?

B. *Influence of practice settings.*

To what extent is the lawyer's autonomy limited by the setting in which the lawyer practices? Assuming that a solo practitioner has complete autonomy in deciding whom to represent, is the same true of a lawyer serving in a law firm, as in-house counsel, or as a prosecutor? (For example, may/must an associate in a law firm refuse to work on a particular case that is in conflict with his or her religious convictions or do the lawyer's fiduciary duties to the law firm require the lawyer to undertake this work? May a prosecutor refuse to bring a death penalty case or refuse to prosecute the victim of spousal abuse out of religious conviction? For a prosecutor who exercises discretion on behalf of the sovereign, may religious convictions enter into decisions about whom to investigate and what charges to bring and, if not, how is this avoidable?)

C. *Court appointments.*

To what extent is the lawyer's autonomy subject to the court's authority to appoint the lawyer to represent a particular litigant? *I.e.*, assuming that on religious grounds the lawyer would have turned down a particular client if he had walked in the door, may/must the lawyer nevertheless represent that client if the court asks/orders the lawyer to do so?

D. *Withdrawal from the representation.*

Accepting that religious convictions properly may influence or determine a lawyer's choices about what clients and matters to accept, is the same true about the decision whether to continue in the representation? When a lawyer experiences a conflict between the representation and his or her religious convictions that had not been anticipated at the outset, may/must the lawyer seek to withdraw from the representation? Should the law permit the lawyer to do so?

E. *Lawyer competence: the relevance of the CLIENT'S religion*

The legal profession's norms tell lawyers not to undertake work for which they are not competent or capable of becom-

ing competent. To what extent must a competent lawyer become familiar with the religious and cultural norms, practices and traditions of the client, in order competently to counsel the client and to make or suggest appropriate decisions regarding the representation?

II. *Relevance of Particular Religious Traditions to Particular Choices About Clients and Matters*

A. *Particular Choices Made By Lawyers*

What are the ways in which one's religious convictions might influence choices about clients and matters?

1. Might it be appropriate to *prefer* certain types of clients or legal matters? *E.g.*, (a) serving the homeless, the poor, the sick; (b) serving members of one's own religious faith.
2. Might it be appropriate/obligatory to *refuse* certain clients and matters for religious reasons. *E.g.*, (a) evil individuals/entities (such as murderers or tobacco companies); (b) individuals/entities seeking "evil" ends (such as a party seeking to renege on a contract or, in Teresa Collett's example, a donor seeking sexual services in exchange for a gift or a farm owner seeking a clause in a contract that would permit him to exclude others from migrant workers' premises); (c) individuals/entities seeking ends unworthy of one's talents and time (such as landlords seeking evictions, corporations seeking to increase their wealth, businesses seeking to avoid or delay payment of a debt).
3. If one's position is that it is obligatory to refuse certain clients or matters, does that mean that no lawyer should take on the client or the matter? Or does that simply mean that the particular lawyer should not do so, but that another lawyer with a different set of beliefs may or should do so?
4. Does the opportunity to provide *moral counseling*, and thereby to influence the client's conduct, suggest that the religious lawyer should represent evil/unworthy clients? Since bad clients will almost inevitably find lawyers, isn't it better that they have moral lawyers rather than indifferent ones? Or is there too great a risk that the lawyer will be unsuccessful in counseling the client and end up aiding the client in an unworthy or evil purpose and doing so half-heartedly? And, does undertaking the representation with the aim of influencing the client's conduct in this way unduly encroach on the client's autonomy?

B. *Relevance of Religious Traditions and Beliefs*

1. *Relevance of Particular Religious Traditions and Beliefs*
How would particular religious convictions guide the decision of whether to undertake the representation in particular situations (*e.g.*, evil or unworthy clients and matters; clients with the same or different religious preferences; etc.)?
2. *Relevance of Religion Generally*
Should religiously observant lawyers, as Mr. Lewin suggests, promote legal protection for religious practices?