1-1-2001

On the History of French Legal Ethics

John Leubsdorf

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Recommended Citation
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How do a legal system's rules and expectations for the behavior of lawyers develop? Ultimately, answering that question for any legal system requires exploration of many factors, including the history of the legal profession, the history of the legal procedures and rules of law with which lawyers deal, the system's broader social and political context, the development of lawyers' functions and responsibilities, the evolution of society's thoughts about lawyers, and the moral philosophy and ideals of the society. Answering this question also requires a perspective and detachment that most of us find hard to bring to bear on our own legal systems. Considering the development of legal ethics in another system may help us deal with the last difficulty, if not the others.

Seen from the perspective of an individual familiar with the United States system, several factors shaping the growth of the ethics of French avocats stand out. Avocats have traditionally worked within systems of civil and criminal procedure that have shaped their roles and ideals. They have worked with or against members of other legal professions—magistrates, notaries, and others—to form their own professional standards in a kind of ethical division of labor. The avocats' profession has been both actor and victim in French political struggles. Today as the profession faces competition from foreign lawyers and law firms as well as from accounting firms, it has modified some of its traditional principles and struggles to maintain others.

This paper will seek to trace how these and related factors have helped to shape a basic feature of avocat legal ethics, the ideal of independence—from the state, from clients, and from other avocats. Space permits only limited explication of these ideals and of other matters here. For fuller discussion and more extensive supporting citations, I refer anyone interested to my recent book.¹

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¹ Professor of Law, Rutgers Law School-Newark.

I. INDEPENDENCE FROM THE STATE

Avocats as a group have traditionally seen themselves as an intermediary body between the state and its citizens, helping the latter protect their liberties from the former. This is a moral and political aspiration, but one that is embodied in concrete institutions and rules. Since the eighteenth century, France’s local bars (there are now 180 of them) have admitted and disciplined avocats. That is not the function of the state, although nowadays legislation establishes most of the standards for admission and discipline, and although courts can review bar decisions. More strangely, from a United States perspective, avocats may not be judges, prosecutors or government employees because that would imply a subordination to the state inconsistent with their independence.

The roots of the ideology of independence from the state date back to the sixteenth and seventeenth centuries when avocats lost their traditionally close links with the bench. A determining factor was that judicial posts became purchasable and inheritable. As a result, there arose on the one hand the judicial “nobility of the robe” and on the other hand avocats who could (with rare exceptions) no longer hope for promotion to the bench or look up to colleagues who had become judges as professional models. In the late seventeenth century, the Paris bar proceeded to organize itself as a self-governing “order,” followed by bars elsewhere in France.

This scission from the bench has endured ever since, with a few exceptions when a revolution led to the dismissal of politically incorrect judges and their replacement by avocats. Today the magistracy is a separate profession, encompassing not only judges in the American sense but also prosecutors and investigating magistrates. Its members, in addition to receiving the ordinary legal education, attend a national magistrates’ school in Bordeaux where they acquire an esprit de corps that unites them through a lifetime of judging. Magistrates are overworked and underpaid, and the public has tended to see them as subordinate to the state. This makes it easier for avocats (who contend with their own kinds of public distrust) to portray themselves as independent. The two professions often regard each other with suspicion, and avocats have striven with some success to limit judges’ power to discipline avocats for courtroom misconduct.

In the eighteenth century, separation of the bar from the bench led to the bar’s assumption of a political role—paradoxically, often in alliance with the judges. Legal briefs were free from the usual censorship, were used to express more or less oppositional views, and were printed and circulated in substantial

3. See id at 50-58; Lucien Karpik, Les avocats entre l'État, le public et le marché XIIIe-XXe siècle chs 2-3 (Gallimard 1995).
4. Consider Daniel Soulez Larivière, Les juges dans la balance (Seuil 1990); Alain Bancaud, La haute magistrature judiciaire entre politique et sacroce (LGDJ 1993).
numbers. Because the Estates General, France's legislature, was not called into session between 1614 and 1789, the courts known as *parlements* sought to assume some of its functions. The resulting conflicts with the monarchy led several times to strikes by both *avocats* and magistrates. These developments enabled the bar to incorporate its independence from the state into its self-image and to sell it to the public.  

To whatever extent the *avocats* and *parlements* may have paved the way for the Revolution—this is still in dispute—the Revolution showed little gratitude. It abolished the *parlements*, setting up new courts that the executive and legislature kept under their control. It also abolished the organized bar, with only Robespierre speaking in opposition. The reasons for this are largely unclear. However, they probably included revolutionary opposition to monopolies and closed corporations, the bar's division in the late eighteenth century, and the hope of *avocats* in the Constituent Assembly to leave their practices behind for government posts.

For later *avocats*, this encounter with the Revolution only emphasized the importance of independence. The Revolutionary regime's hostility to the bar could easily be confounded with its later imposition of the Terror, the moral being that the bar is an essential safeguard against governmental oppression. Unregulated legal practitioners were, at least in the hindsight of *avocats*, sufficiently sleazy and incompetent to justify the revival of the old bar and all its traditions.

Napoleon's restoration of the organized bar in 1810 inculcated similar teachings, not because it re instituted the bar as it had been under the *ancien régime* but precisely because it did not. Suspicious of *avocats* potential for subversion, Napoleon kept them under tight control by vesting selection of bar leaders in prosecutors, forbidding bar meetings, and imposing strict judicial supervision and a loyalty oath. Once again, the message was that dictators fear an independent bar.

The bar's struggle to reclaim its independence lasted at least until 1870 and further enshrined independence in the ideology of *avocats*. Still, the bar never fully regained its pre-Revolutionary paradise. On the contrary, today's *avocats* are subject to governmental regulation at least as stringent as that governing lawyers in the United States. Modern *avocats* independence from the state is more an ideal than a reality. The continuing menace of the French state teaches the importance of striving for the ideal more effectively than the comparatively wishy-washy and lawyer-pervaded federal and state governments of the United States.

During the nineteenth century, the bar pursued independence not only in its

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internal organization but also in its professional practice. Avocats represented political dissidents assailed by the government in a variety of well publicized trials. Sometimes the avocat's own politics differed from those of his client. Of course, there were many conformist or pro-government lawyers, but much of the bar united in the struggle for basic civil liberties. That was good for the polity but also for the bar, which reaped public approval. When the Third Republic arrived in 1870, it came to be known as the Republic of the avocats, with both the legislature and the ministries dominated by members of the bar.

This second period of political glory was no more lasting than the one preceding the Revolution. Some historians mark the Dreyfus case as the moment when avocats yielded to writers like Émile Zola and Georges Clemenceau as protectors of public liberties. The avocats lost the strong position they had briefly obtained in the government around the turn of the century and were replaced by professional politicians and technocrats. As the bar's economic position worsened, it became more likely to seek protection and assistance from the state than to resist it.

Yet independence from the state remains an important ideal for French lawyers. This ideal may find its best symbol in avocats' representation of defendants in criminal prosecutions, whether the defendant be on the left, on the right, or (nowadays with increasing frequency) a former government official. Because avocats serve as defense counsel but are never prosecutors or government lawyers, the bar constitutes a relatively united, albeit disorganized, lobby for defendants' rights and more adversarial procedures. Occasionally it helps secure liberalization of the traditionally harsh French system of criminal justice, such as the legislation of 2000 that finally made it possible for defense counsel to question witnesses. Other developments, such as the European Court of Human Rights, also have strengthened the notion of law as a protector of rights against the state and hence the bar's role in that protection.

II. INDEPENDENCE FROM CLIENTS

Traditionally the avocat was not considered the agent of his client. His acts did not bind the client, and he was not subject to the client's directives. The

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10. Yves-Henri Gaudemet, Les juristes et la vie politique de la IIIe République (France 1970). Bar rules allowed avocats to hold such positions without forfeiting bar membership by working for the state, ostensibly because legislators and ministers were not considered state employees.
14. Until 1900, women could not be avocates. Today more than 40 percent of the bar is female.
practical and ironic effect of this principle was to give avocats greater control over the client’s case than they would have if deemed to speak for a client; for in the latter case they would be subject to some extent to the client’s control. Further, most bars prohibited avocats from suing their clients to recover a fee.

Each of these legal rules finds a parallel at some point in the history of English barristers. As in the case of barristers, some of what avocats could not do was done for them by members of another legal profession. In France, these professionals were known as procureurs before the Revolution and as avoués thereafter. While solicitors thrived in England, however, the avoués declined in France; in 1971, the profession of avoué was abolished except in the appellate courts. Its members became avocats.

In one respect, the independence of avocats from their clients has exceeded that of barristers. Avocats were, and still are, required to keep communications with other avocats confidential from their own clients. Of course, there are exceptions, such as settlement agreements, which cannot be concealed from the parties who must sign them. The confidentiality rule might to some extent be considered a roundabout equivalent of the United States rule excluding settlement discussions from evidence. Because an avocat may not repeat opposing counsel’s communications to a client, the latter will not be able to write them down and submit them to the court. In this way, as in others, a French professional rule trespasses into what in the United States would be considered the regulation of court procedure. But the French rule’s implications and impact go further, keeping clients outside of the core of a litigation process conducted through collegial relationships between avocats.

The prohibition on suing for a fee likewise took on special significance in France, where it became part of a broader requirement that avocats manifest disinterestedness. Following Roman precedent more than reality, an avocat’s fee was considered the gift of a grateful client. During the nineteenth century, the Paris bar even forbade its members to recover fees from an opposing losing party for legal aid work. Because avocats in training had to do most legal aid work, such restrictions tended to limit entry to the bar to those with independent means. Other rules had a similar exclusionary effect. For example, avocats were forbidden to engage in trades or business and could secure admission to some bars only by demonstrating possession of a properly furnished office.

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16. Law No 71-1130 (Dec 31, 1971).
These aspects of *avocat* independence originate from a pre-Revolution aristocratic ideal. The *avocat* was thought of as a gentleman who freely made his eloquence and learning available to those in distress.²⁰ He was a kind of judge, accepting only those cases in which he believed and lending them his own credibility—a concept diametrically opposed to the American view that a lawyer does not vouch for a client’s case.²¹ An *avocat* could not sully his dignity by taking orders or seeking money. Until a few decades ago, an *avocat* could not even go to a client’s office.

The nostalgia that often dominated the nineteenth-century bar helped preserve the ideal of independence and its associated practices and rules. *Avocats* strove to bridge the gap left by the Revolution by reprinting professional literature from the *ancien régime*, enforcing old practices, and lauding the profession’s antiquity and continuity. Even today discussions of professional ethics are pervaded by historical narratives encompassing not just the eighteenth century but Chancellor D’Aguesseau’s 1693 speech on lawyers’ independence, the great lawyers’ strike of 1602, the capitularies of Charlemagne, Gallic advocates of the Roman era, and sometimes even Greek and Egyptian precedents.²²

The nineteenth-century bar devoted special efforts to exclude itself from the rise of commerce and manufacturing. It went without saying (but was nevertheless said) that no *avocat* could be a corporate director or the salaried employee of a business. To this day, many French corporate employees who perform work that in the United States would be entrusted to lawyers are not members of the bar but constitute a separate, entirely unregulated profession known as *juristes d’entreprise*. The Paris bar sought to exclude even former business agents from practicing and debated whether it was permissible for an *avocat* to sell vegetables from his garden. Advertising was, of course, prohibited; an *avocat* could not even list his office hours on his stationery. The bar was supposed to be dedicated to the pursuit of justice and glory, not clients or money. Somewhat like many nineteenth-century French artists and authors, *avocats* claimed to stand apart from the struggle for wealth, although the prints of Daumier show clearly enough that not everyone in France accepted that claim.²³

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²³ See Damien, *Les avocats du temps passé* 328-32 (cited in note 19); Honoré Daumier, *Lawyers and
The pursuit of independence caused the bar to deny itself almost all transactional and negotiating work and to confine itself to litigation. Many bars forbade their members to handle client funds, to speak to an opposing party in the absence of their own clients, or to participate in transactions about which they might later have to testify. Consequently, the despised business agents grabbed some of this work. Much of it went to notaries, who have a statutory monopoly on documenting certain kinds of transactions. The notarial profession, still thriving today, has its own historical roots and its own professional ethics that derive from the notary’s status as a sort of public official. Notaries, for example, are ordinarily free to act for both parties to a transaction.

Renouncing transactional work, aside from protecting the bar’s reputation for disinterestedness and impairing its future prosperity, confined avocats to work that was consistent with their traditional independence and behavior. It is possible, if not always desirable, for a lawyer to proceed through the mazes of litigation guided only by his or her own judgment as to what will advance the client’s best interests. However, it is hard to imagine a lawyer negotiating an important contract without consulting the client for instructions. Clients conducting business transactions are likely to be wealthy, sophisticated repeat clients who expect to be in charge of their own transactions.

The twentieth century did not leave untouched the bar’s ideal of independence from clients. The decline of avoués and the desire of avocats to appear in courts where avoués did not practice made it necessary for avocats to acquire the power to bind their clients in procedural matters and hence to become agents subject in principle to client control and liability to clients. Belatedly realizing what it had foregone, the bar sought to enter business practice with its inevitable push toward client control. Avocats won the right to sue clients for fees and to enter fee contracts with them. They were even allowed to contract for partially contingent fees, traditionally barred as tending to turn lawyers into economic actors swayed by economic incentives rather than disinterested aristocrats moved by conscience.

Nevertheless, independence from clients remains important to avocats I have interviewed. Avocats still may not be employees of their clients. The rule keeping communications between avocats confidential continues to prevail, albeit with recent clarifications and limitations, as does the rule that the client may not waive the equivalent of the lawyer-client privilege. Rather, it is the avocat who decides when to use client confidences in a case. An avocat still has the right to

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decide whether to accept a client and the right to withdraw (while protecting the client's interests) when continued participation would violate his or her conscience.27

III. INDEPENDENCE FROM OTHER AVOCATS

Each French bar is, in theory, a republic of equals. Traditionally every avocat was a sole practitioner. No form of partnership was allowed until 1954, and until 1990 an avocat could not be the employee of another avocat. Even apprentice avocats (stagiaires) are entitled to have their own clients. “[T]he ethical principle of equality among avocats” is written into the governmental decree regulating the profession.28

Rather than looking to colleagues within a firm, avocats regarded themselves first as members of their local bar. The Paris bar, now numbering more than 13,000, might be too large to count as a family, but familial rhetoric was regularly used to describe both it and the many smaller bars, two thirds of which still have fewer than one hundred members apiece. Avocats typically spent part of each day at the courthouse, where between cases they socialized with colleagues. They were expected to treat other avocats in a spirit of confraternity, to honor promises to them, and to maintain the confidentiality of communications among avocats as against clients (sometimes referred to as les profanes). The members of each bar elected a Council and bâtonnier, or presiding officer. These officers promulgated the bar’s professional rules and enforced them through disciplinary proceedings. Today, the bar provides its members with malpractice insurance, a kind of bank for client funds, a national pension plan, and aid in times of need.

This system and its accompanying ideals originated before the Revolution. That avocats were then sole practitioners is unsurprising because lawyers in other nations were also sole practitioners at that time. As for the organization and corporate ideology of the bar, these originated (as I have already mentioned) in the late seventeenth century, growing out of an earlier religious confraternity. What is hard to explain is the strength that the bar as an organization soon obtained. The English Inns of Court, which are much older than but somewhat similar to the French bars, were never quite as strong or as central to professional ideals, and the organized bar in the United States is even less comparable. The only causes for the strength of the French bar as an organization that I can propose, and these are only suggestions, are the general corporate tendencies of ancien régime France and the esprit de corps that its eighteenth-century struggles infused in the bar.

After the Revolution, avocats again had to struggle to reestablish both an or-

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organized profession and the regulation of that profession through local bars. The bar form of organization became further linked in avocats' minds with the existence of the profession itself so that pre-Revolutionary traditions maintained or increased their luster. In addition, the bar's renunciation of transactional work contributed in two ways to protect the ideal of sole practitioners owing their primary allegiance to their colleagues and the order unifying them. First, the absence of transactional work made it less attractive for avocats to unite in law firms, which tend to arise when lawyers engage in corporate practice for large businesses. Second, French civil and criminal procedure fostered traditional patterns of practice.

To an outsider from the United States, one of the most striking features of French litigation has been the way in which the avocat's role has been limited almost entirely to the presentation of an oral argument. Civil cases in France are decided on the basis of a written record. When a case is heard each avocat presents contracts, letters, witness statements, and other documents to a panel of judges in an extended statement of the facts interspersed with legal argument. This is the heart of the avocat's role. There is virtually no pretrial discovery (although the inquiries of a court-appointed expert sometimes provide a substitute). Ethical concerns tend to prevent avocats from approaching potential witnesses other than their clients. (When avoués still existed, they did much of the preliminary procedural work.)

Although French criminal procedure is very different from French civil procedure, the criminal avocat's role winds up being remarkably similar to what it would be in a civil case. Under the inquisitorial system, the decisive part of a prosecution is the investigation by the police, prosecutor or investigating magistrate. The trial serves mainly to ratify the results of that investigation. When cases are brought to trial, acquittals are rare. Although questioned at trial by a judge, the defendant and witnesses are in practice more or less bound by what they said during pretrial interrogations. Most cases are tried by judges. In the few instances in which the gravity of the alleged crime requires a jury, the judges deliberate and vote together with the jurors. The main function of the avocat is to present a closing argument, which often seeks mercy in sentencing rather than acquittal of the defendant.

These characteristics of civil and criminal procedure have helped maintain a litigating bar whose activities focus on courtroom rhetoric and the analysis of a written file rather than on investigation, procedural maneuvering, or the exami-


nation of witnesses. Rhetoric is an art for individuals, indeed for individualists, not for firms. One avocat could usually handle a case without assistance, resorting when necessary to a collaborator who was, at least in theory, an independent member of the bar. The avocat’s main contacts may have been with opposing counsel rather than with clients or co-counsel. Certainly, professional authors from the seventeenth through the nineteenth centuries praised time and again the fidelity with which avocats exchanged documentary evidence with each other before the hearing of civil cases—not the avocats’ devotion to the interests of their clients. Today this exchange among avocats continues to be a focus of ethical concern in the form of frequent attempts to discipline avocats for alleged delinquencies. The procedural system also ensured that avocats spent much of their time in the courthouse where so many of their activities occurred, favoring sociality among avocats and engagement in bar activities.

This pattern is now changing as the bar seeks to move into transactional practice. The shift requires law firms, sometimes large ones, and may tend to shift avocats’ attention from their colleagues to their clients. In addition, avocats were able in 1990 to secure a monopoly over transactional work31 only by accepting into their number members of another profession who were already doing that work. These were the legal advisors or conseils juridiques who were organized in firms. In fact, some conseils juridiques were lawyers from United States firms who had established themselves in Paris as conseils juridiques when that profession was open to all. Part of the price the conseils juridiques exacted for agreeing to merge with the bar was acceptance of large firms with avocat employees.

Nevertheless, the rules and ideology of the bar continue to protect the independence of salaried avocats, at least on paper. Salaried avocats must have a written contract, which the council of the local bar reviews to ensure that it respects the principle of professional independence. The contract must allow the employee to seek relief from an assignment contrary to her conscience, not hinder her acceptance of legal aid work, and contain no clause compromising her independence. Employers and their employees must submit all disputes under those contracts to the local bar’s elected chief (bâtonnier) for his decision. In Paris, bar regulations provide that a salaried avocat (not his employer) “remains master of the argumentation he develops and the advice he gives,”32 although he is obliged to notify his employer of any divergence from the employer’s views. Salaried avocats are also protected by their own national collective bargaining agreement and by French labor law applicable to all employees. The ideal of independence thus continues to help shape the French bar’s response to the advent of large

31. See Law No 90-1259 (Dec 31, 1990), amending Law No 71-1130 (Dec 31, 1971). The monopoly is only partial. Notaries, accountants and members of certain other professions have their own rights of practice whose extent in some instances is the subject of current struggle.

firms and international competition.33

IV. CONCLUSION

This paper has not even sketched a complete outline of the history of French legal ethics. Nothing has been said about the bars and ethics of other civil law nations, some of which have similarities to their French counterparts, demonstrating that French legal ethics and rules are more than the product of a peculiarly French history.34 Little has been said about the pressures that are now reshaping the French bar and its ethics. (At times while writing the book on which this discussion is based, I have feared that the subject of my research would disappear before I could finish describing it.) Nor have I discussed the French concept of a lawyer’s virtues, which grows out of the bar’s religious heritage and still appears, for example, in the Paris bar’s rule that an avocat is obliged, on pain of discipline, to manifest “dignity, conscience, independence, probity and humanity, honor, uprightness, delicacy, moderation, courtesy, disinterestedness, confraternity and tact.”

Of the factors I have tried to trace, the influence of other legal professions on the ethics and ideology of avocats may be the most unfamiliar to United States readers. Our own bar has faced competition from other professions—today from accounting firms, and in the past from real estate agents and others. None of these professions could be considered legal professions. In England, the relationships between barristers and solicitors are, of course, entwined with the history and ethics of each profession. Even England, however, cannot boast the variety of professions that have entered this brief history of the ethics of avocats: magistrates, notaries, avoués, juristes d’entreprise, and conseils juridiques. Other legal professions might also have been mentioned, for instance the agréés (who appeared in commercial courts) and the huissiers (process servers who also perform certain legal services).

The influence of the work that lawyers do on their ethics is a more familiar notion, but one that comparisons between different national systems may illuminate. We in the United States often take for granted that lawyers occupy government posts, negotiate contracts, plan corporate transactions, give business advice, write wills, serve as trustees and corporate directors, interview witnesses,


and hope to end their careers on the bench. The accepted wisdom has been that legal ethics until recently disregarded much of this activity, sticking close to the profession’s roots in litigation. Surely this is not the whole truth. Professional rules may have focused on litigation, but their authors spoke from a diverse and powerful professional world. As members of other professions increasingly seek to perform many functions that lawyers assume to be their own, consideration of the relationship, if any, between the ethics of lawyers and their functions may become important to practitioners as well as to legal historians.

Finally, it is worth considering that history itself, or at least one version of history, has influenced the history of legal ethics in France. For avocats, their values are bound up with the past struggles and glories of their profession. Their understanding of their rules may depend more on Napoleon than on the adversarial system. The history they retell might be distorted or incomplete; it sometimes omits, for example, the Paris bar’s gross deficiencies in independence and confraternity when, during World War II, it implemented without protest the Vichy régime’s directive to expel its Jewish members. Yet on the whole, understanding how lawyers have behaved and what the bar has done or suffered will surely help us reach better conclusions about what lawyers and the bar should do in the future.