Chapter 5
The Standard Conception and the Client-Professional Relationship

Introduction

I was concerned in the previous chapter to argue that the role of law in pluralist communities had significance for the ethical obligations of lawyers working within those communities. More particularly, I claimed that an appreciation of the role of law should lead us to prefer the standard conception's account of the lawyer's ethical obligations over less role-differentiated alternatives. In this chapter I continue the defence of the standard conception, but turn attention from the broader social context and function of law to the nature of the relationship between lawyers and their clients. I shall suggest that the nature of those relationships gives us another reason to reject accounts of the lawyer's role that diminish the significance of role-differentiated obligations. I shall argue, that is, that the nature of the relationship between lawyers and their clients should lead us to favour some version of the standard conception.

The relationship between clients and professionals

I begin by setting out the relevant features of the relationships between clients and professionals. There are a number of such features that seem especially significant to our inquiry:

The imbalance of expertise and power

First, professionals almost always have specialised knowledge and expertise, which their clients lack. The physician has a specialised knowledge of medicine and human health, which allows them to diagnose and treat illness. The lawyer has specialised knowledge of the 'artificial reason of law'.[1] They either know what

1 The phrase is taken from Lord Coke's famous reply to James I's claim that since law was founded upon reason, the King could decide cases as well as judges: '[T]rue it was,' said Coke, 'that God endowed his Majesty with excellent Science, and great Endowments of Nature; but his Majesty was not learned in the Laws of his realm of England, and Causes which concern the Life, or Inheritance, or Goods, or Fortunes of his Subjects, are not to be decided by natural Reason but by the artificial Reason and Judgement of Law, which Law

rights their client has, or how to go about determining what they are. They know how the complex mechanisms of law must be operated to ensure that their client's lawful interests are protected and furthered.

The imbalance of expertise between the client and the professional gives rise to an imbalance of power, generating a de facto monopoly over many professional services. Few clients could perform complex professional tasks for themselves. It is unrealistic, for instance, to expect many non-professionals to find out enough about the law and its procedures to effectively pursue their own interests or the interests of others. This de facto monopoly is often reinforced *de jure*, by regulation making it unlawful to practise as a lawyer without being a member of the appropriate professional body. Many jurisdictions, for instance, require even fairly routine legal services – wills, probate applications, real estate transactions, uncontested marriage dissolutions, and the like – to be handled by lawyers. Thus clients typically have little real choice as to whether to consult a professional. They will be either unable to help themselves or be prohibited from doing so if they could.

People do manage to get by without consulting lawyers. Some people avoid the law altogether, and some of those who do not manage to do that represent themselves despite the difficulties. But in general the possible costs of not consulting a lawyer are so high that lay-people effectively have no choice in the matter. Both because of their specialised knowledge and expertise, and because of their institutional power, professionals can do things for clients – things that clients must have done – that clients cannot do for themselves.

The importance of the matters about which clients consult professionals

Second, the matters about which clients consult professionals such as physicians and lawyers are typically of considerable importance to the client. We see professionals about matters such as our health, our social and political rights and the security of the assets upon which we rely to provide for ourselves and those who depend upon us. The importance of such matters both reinforces the power of professionals – there is normally a considerable cost to simply ignoring the needs to which professionals cater – and makes it important that those matters are addressed expertly and diligently.

Of course, we do use the term professional in trivial contexts. We speak of professional sports players, for instance, to distinguish them from their amateur counterparts. But the sense of 'professional' in these sporting contexts is not the same as that we employ when speaking of professionals such as lawyers, physicians and engineers. Rugby players who play the game for nothing are not professionals, but physicians who donate their expertise are no less professionals

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is an Act which requires long Study and Experience, before that a Man can attain to the cognizance of it ...' *Coke Reports* (1738), 63, 65 (pt. 12, 4th edn 1738), reprinted in 77 *Eng Rep* 1342, 1343 (1907).

than their colleagues who charge. It is a somewhat interesting question whether there could be a profession, in the sense that medicine and the law are professions, which dealt with trivial matters. I suspect not, but it is not a question we need to settle here. It seems clear enough that when we see professionals such as lawyers and physicians, we typically see them over matters that are important to us.

The opacity of professional diligence and expertise

Third, the ability of clients to assess the expertise or diligence with which professionals pursue the professional task is often limited. From the client's perspective, a considerable 'opacity' surrounds the professional's work. My physician tells me that I am ill and should undergo a course of treatment. Often, no matter how carefully I enquire into their professional methods, I must simply accept their word for that. The engineer tells me that a dam built in a specified manner will be safe. I cannot assess the engineering information myself. I must simply accept that they know what they are talking about. My lawyer tells me that if I follow the instructions they provide, and have them execute the arrangement in question, my property will be safe from business creditors. I must simply accept their advice.

Perhaps it will seem that clients can easily remedy this opacity by seeking a 'second opinion'. No doubt this is an option that sometimes operates as a genuine check upon professional competence and diligence. But we should not over-estimate its usefulness. For one thing, it will often be expensive. Having borne the cost of consulting one professional, clients may be understandably reluctant to consult another over the same matter. For another, just as clients cannot reliably judge the diligence or expertise with which a professional pursues their interests, nor can they reliably judge when a second opinion would be appropriate. The opacity of professional expertise and diligence itself makes it difficult for clients to know when they *should* seek a second opinion. And the second opinion may not help much in any event, since the second professional's diligence and expertise will be no less opaque to the client than that of the first. One commentator summarises the client's position in these terms:

> In a professional relationship ... the professional dictates what is good or evil for the client, who has no choice but to accede to professional judgement. Here the premise is that, because he lacks the requisite theoretical background, the client cannot diagnose his own needs or discriminate among the range of possibilities for meeting them. Nor is the client considered able to evaluate the calibre of the professional services he receives.[2]

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2 E. Greenwood, 'Attributes of a profession', *Social Work*, vol. 2 (1957) pp. 45–55, p. 45.

Professionals have knowledge and expertise that the client lacks. That makes it difficult if not impossible for the client to do the original task without consulting the professional, and it makes it equally difficult if not impossible for the client to assess how well the task has been done – whether in order to judge the need for a second opinion, or to assess the accuracy of a second opinion if one is sought. I cannot check everything my professional does: I would need to be a 'professional-of-all-trades' to do so.

The limited nature of the relationship between clients and professionals

The three features set out so far are, I think, fairly commonly taken to be distinctive of the relationship between clients and professionals.[3] I believe that there is another important feature, which does not appear in the standard characterisation of such relationships. Professionals and clients, typically, enjoy only limited relationships. The client is likely to know very little about the professional as an individual. I know my physician *is* a physician – he has his degrees on his surgery wall – and I know a few other things about him garnered from our conversations and from the photographs on his desk.[4] But I know almost nothing about his personal life or his personal moral views. I do not know what he values; I do not know what motivates him; I do not know his views on the fundamental questions we encountered in the previous chapter as to what constitutes human flourishing, what basic goals are intrinsically most worthy of pursuit, and what is the best way for individuals to live their lives.

Popular portrayals of professionals often suggest otherwise, and people speak as though community members almost always know their professionals very well indeed. Popular literature is full of examples of the local physician who has delivered most of the children in the district and whose own life is as well-known to his patients as theirs are to him. More recent television shows about professionals invariably disclose both professional and private aspects of their characters' lives, and a significant portion of their plots rely upon a simple blurring of the professional and the private. But whether this is or was typical, it is not the reality for most contemporary clients. Most of us deal with professionals we hardly know at all. We know *that* they are professionals and little else. Yet we walk

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3 Note, however, that there is little consensus on which features are common to the professions or indeed, on whether there are common features at all. I do not intend to enter into this debate. The features of typical client-professional relationships are not offered as part of a definition of 'professional', but as features typically encountered in client-professional relationships. As to the definitional debate, however, it seems likely that 'professional' is a family-resemblance term: see Ludwig Wittgenstein, *Philosophical Investigations* 1953, para. 66.

4 Though, since almost all physicians seem to have photographs of children on their desks, one wonders whether the photographs are supplied along with white coats and stethoscopes.

into their offices or surgeries and – sometimes literally, sometimes figuratively – lay ourselves and our children before them.

Ethics and the client-professional relationship

Relationships between clients and professionals, then, are typically characterised by these four features: an imbalance of expertise and power, the importance of the matters about which clients consult professionals, the client's limited ability to assess the professional's expertise or diligence and the client's limited knowledge of the professional as a person. The features make relationships between clients and professionals quite remarkable. Given these features, the clients of professionals are typically obliged to rely upon relative strangers for things of considerable importance when they cannot assess the expertise or diligence with which their interests have been pursued. What follows for the ethical obligations of lawyers from this analysis of relationships between clients and professionals?

Significance for particular obligations

First, the nature of the client-professional relationship explains many of the particular ethical obligations to which lawyers are subject. Full treatment of these obligations would include an account of duties such as confidentiality and conflict of interest. For current purposes, however, an obvious but fundamental example will suffice to make the point.

The analysis of the client-professional relationship just offered highlights the grounds for regarding such relationships as paradigmatically fiduciary. It is necessary, though not sufficient, for a fiduciary relationship that one party, the fiduciary, has dominance or ascendancy over another who must nevertheless repose confidence or trust in the fiduciary. In such circumstances, the law may impose duties upon the fiduciary in order to prevent the abuse of the confidence. It does so as a matter of course in lawyer-client relationships: '[T]he reposing of trust by the client is automatically assumed', so that the relationship 'automatically gives rise to the [fiduciary] duty'.[5] The discussion of lawyers as fiduciaries anticipates many of the features highlighted above. Consider the following passage from Story's classic equity text:

> The situation of the attorney or solicitor puts it in his power to avail himself not only of the necessity of his client, but of his good nature, liberality and credulity to obtain undue advantages, bargains and gratuities. By establishing the principle

5 *Sim* v *Craig Bell and Bond* [1991] NZLR 535, 543 per Richardson J. See, as well, New Zealand Rules of Professional Conduct for Barristers and Solicitors, Rule 1.01: 'The relationship between practitioners and client is one of confidence and trust which must never be abused.'

> **that while the relation of client and attorney is in full vigor the latter shall derive no benefit to himself ... [the law] supersedes the need of any inquiry into the particular means, extent and exertion of influence in a given case; a task often difficult, and ill supported by the evidence which can be drawn from any satisfactory sources.[6]**

In this passage we find recognition of the imbalance of power and expertise ('The situation of the attorney or solicitor puts it in his power to avail himself ... '), of the importance of the issues and the lack of choice as to whether to consult a professional (' ... of the necessity of his client ... '), of the opacity of professional expertise and diligence ('... a task often difficult, and ill supported by the evidence which can be drawn from any satisfactory sources ... '), and of the appropriateness and point of publicly accessible standards of professional conduct ('By establishing the principle...[the law] supercedes the need of any inquiry ... '). Similar themes are to be found in the many other treatments of the lawyer as fiduciary.[7]

Equity imposes a number of specific duties in response to the treatment of the client-professional relationship as fiduciary: the duties to protect and further the client's interests, to avoid conflicts of interest, to maintain confidences, to refrain from using the relationship for personal gain, to act with absolute fairness and openness toward the client. All these duties flow from the classification of the relationship as fiduciary, which flows in turn from the identification within those relationships of the features set out in the previous section. The upshot is that, given the nature of their relationships with clients, lawyers should regard themselves as bound by antecedently-specified rules of conduct designed to protect clients who are vulnerable to them, who are obliged to rely upon them and who cannot assess the diligence or expertise with which they carry out their tasks. This is to say that the nature of the client-professional relationship favours the standard conception of the lawyer's role, which is concerned to secure just this model of professional obligation.

Significance for the standard conception

The analysis of client-professional relationships offered above has more general significance for the ethical position of lawyers as well, which significance we can see by comparing such relationships with others in which we commonly make ourselves vulnerable. Perhaps there is nothing very remarkable about our decisions to make ourselves vulnerable to professionals. After all, we constantly make ourselves vulnerable to friends, to lovers, to family members, and so on: we bare our souls to our lovers, we rely on family members and we trust our

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6 J. Story, *Equity Jurisprudence* (1918) 14th edn. Vol. 1, Section 433.

7 See, for instance, *Bray* v *Ford* [1896] AC 44, 51-2, per Lord Herschell (Deemed expedient to lay down positive rules protecting clients); *Green and Clara Pty Ltd* v *Bestobel Industries Pty Ltd* [1982] WAR 1 at 6 (difficulty of proving that a fiduciary has improperly used his position).

friends with our children. Perhaps our decisions to make ourselves vulnerable to professionals are neither more nor less remarkable than our decisions to make ourselves vulnerable to these more 'natural' intimates. But I believe that it is remarkable that we so commonly make ourselves vulnerable to professionals. It is remarkable because our relationships with intimates such as friends and lovers differ from our relationships with professionals in ways that bear precisely upon the wisdom of making ourselves vulnerable.

When we make ourselves vulnerable to our friends we have grounds – our intimate or personal knowledge of the individual to whom we are vulnerable – to make assessments of what that person is likely to do. The intimacy of our relationship gives us access to their motivations, to their priorities, to their views on the fundamental questions noted in the last chapter, and so forth. This knowledge explains our willingness to place ourselves in their hands. From time to time, I trust my friend Hugh with my children's welfare. An important factor in my willingness to do so is the fact I know enough about him, about what he cares about, about what he is likely to do in the face of an offer to abandon my children and go for a beer, to feel secure that my children will be safe with him.[8]

Most of us do not have this kind of detailed knowledge about our professionals. Yet we leave ourselves (and our children) vulnerable to them in ways that are not dissimilar to the ways we leave ourselves vulnerable to friends, partners, family-members and other 'natural' intimates. If I am right that one important reason we happily make ourselves vulnerable to these intimates is our knowledge about them, our knowledge about what they value and what they are likely to do, then if it is to make sense to adopt similar positions of vulnerability to our professionals, we need similar knowledge about them – we need grounds to judge what they value, what they care about, what they are likely to do. If we cannot make these assessments by reference to our knowledge of the character of our professionals we need another way.

Given the nature of the relationships between clients and professionals, these interests in obtaining grounds to trust our professionals should lead us to favour the standard conception and the idea of role-differentiated obligation. The adoption and promulgation of a distinct and public professional morality is a way of making the ethics of the profession available in a way that the personal ethical views of its members cannot be. Of course, clients get the benefit of this 'public ethics' only if it is indeed given priority over personal ethics in members' dealings with the public. The client need only know that the professional is a role-occupant, and what values the professional role requires the professional to adopt; to know what values at least should govern the professional's conduct in the relationship.

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8 I do not mean to suggest that all of these relationships involve 'decisions' to make ourselves vulnerable. My children's vulnerability to me is a natural and almost unavoidable incident of being my child. But the child's position may be unusual. I do choose my friends, I do choose when to make myself vulnerable to them, and normally I will choose to do so only after I have the kind of knowledge of them remarked upon in the text.

Thus the nature of the relationship between clients and professionals supports the standard conception and the idea of role-differentiated obligation. They offer just this 'public' account of professional ethics.

This argument from the nature of the relationship between clients and professionals turns upon the idea that the client is vulnerable to the professional, given the imbalance of power and the opacity of diligence and expertise which normally accompany client-professional relationships, and given the fact that the personal ethical views of professionals are rarely available to clients. Sometimes, of course, these features are absent. Sooner or later every lawyer will experience the rather uncomfortable consultation in which the client clearly knows more than the lawyer. The client may have incorporated or wound up dozens of companies, or divorced as many spouses, and seek only the signature of a member of the bar on the appropriate form – a form to which the client is both keen and able to direct the lawyer. In such cases, there seems little imbalance of expertise and only a slight imbalance of institutional power. In addition, of course, some people do know their professionals' personal moral views. They may have chosen their lawyer because she is a member of their congregation, or because she is a friend. Perhaps the personal life and views of the small town lawyer are well known about the district, and the big city lawyer may have gone out of his way to publicise his own ethical views.

But I do not think such cases detract from the general argument. Even if it is true that some clients suffer no particular inequality of power and expertise, and even if some clients know the ethical views of their professionals well, these relationships cannot be adopted as the 'standard'. To do so would be to impose an enormous and unpredictable burden upon those clients not so situated. This is not just a matter of catering to the majority, though of course most clients do not enjoy the degree of expertise or intimacy that marks the anomalous cases. Rather, it is to recognise that an arrangement which assumes equality of expertise and power and close personal relationships between clients and professionals would severely disadvantage typical clients, who know little about law and less about their lawyers as individuals, while benefiting the anomalous clients only marginally. Ideally, any client should be able to walk into any lawyer's office and know the ethical principles that will govern the lawyer's conduct. It is not reasonable – not least because it is probably impossible – to expect clients to make the kinds of inquiry which would allow professionals to conduct their professional lives by appeal to their personal views. To do so would be to place an extraordinary burden on the weaker party to an already unequal relationship.

Charles Fried: The lawyer as the client's 'special purpose friend'

I suggested in the last section that we could usefully compare client-professional relationships with those enjoyed with more natural intimates such as family-members, lovers and friends. I was concerned to highlight the differences between

the two kinds of relationships. Though we make ourselves vulnerable to lawyers and friends alike, the relationships are significantly different. Typically we lack the sort of knowledge about our professionals which explains our willingness to make ourselves vulnerable to our friends.

Charles Fried also compares lawyers with friends in an attempt to defend the standard conception of the lawyer's role. According to Fried, the key question in the legal ethics debate is, 'How can it be that it is not only permissible, but indeed morally right, to favour the interests of a particular person in a way which we can be fairly sure is either harmful to another particular individual or not maximally conducive to the welfare of society as a whole?'[9] His answer to this restatement of Macaulay's question starts from the observation that there are other familiar cases in which we take ourselves to be entitled to exercise just this sort of moral favouritism or 'agent-relativism', namely, in our dealings with family and friends. If we can see why the special preference for the interests of family and friends is justified, Fried maintains, we will find the justification for the analogous obligations and permissions within professional relationships.

Fried considers and rejects utilitarian justifications for giving priority to friends and family. Such justifications would only allow us to prefer the interests of family and friends if we promoted the general good by doing so. 'But,' insists Fried, 'we are not required, indeed sometimes not even authorized' to make this inquiry as to whether we promote the greatest good for the greatest number by distributing our efforts and affections unevenly: when we decide to care for our children, to assure our own comforts...we do not do so as the result of a cost-benefit inquiry...'[10] Fried's non-utilitarian account of such relationships proceeds from the premise that the very idea of morality – even by utilitarian lights – requires that we are able 'to posit choosing, valuing entities'.[11] Fried believes that we can do so only if we take ourselves to have a kind of moral priority: a 'responsible, valuable, and valuing agent ... must first of all be dear to himself'.[12] And now, armed with an appropriately valued self, we can relate to others in the way an adequate morality requires. The moral agent should 'generalize and attribute in equal degree to all persons the value which he naturally attributes to himself'. Therefore, Fried concludes:

> ... it is not only consonant with, but also required by, an ethics for human beings that one be entitled first of all to reserve an area of concern for oneself and then move out freely from that area if one wishes to lavish that concern on others to whom one stands in concrete, personal relations.[13]

9 Fried, Charles 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation', *Yale Law Journal*. Vol. 85 (1976) pp. 1060–1089, p. 1066.

10 Ibid., p. 1067.

11 Ibid., p. 1069.

12 Ibid.

13 Ibid., pp. 1070–71.

At this point Fried takes himself to have shown how it can be morally right to favour the interests of a particular person even though doing so threatens harm to another or is not maximally conducive to the common good. Pace the utilitarian, relationships such as friendship are valuable not because they promote some other value such as the common good or the greatest happiness of the greatest number, but instead in their own right, or as an end in themselves, because they are an essential precondition of morality itself. And now Fried argues that this justification for the preference of some individuals over others can be applied to the relationship between the lawyer and the client. It is permitted and perhaps required for the lawyer to prefer the interests of the client over the interests of others, even when doing so fails to promote the general good or threatens harm to another, because the lawyer is the client's 'special purpose friend': 'As a professional person,' writes Fried, 'one has a special care for the interests of those accepted as clients, just as his friends, his family and he himself have a very general claim to his special concern.'[14]

Many of the conclusions Fried goes on to draw from the friendship analogy are similar to those advanced in this book. Considering the question why we should allow the lawyer the obligations and permissions of friendship, for instance, he offers a familiar appeal to the role of law. 'It is,' he writes, 'because the law must respect the rights of individuals that the law must also create and support the specific role of the legal friend.'

> For the social nexus has become so complex that without the assistance of an expert advisor an ordinary layman cannot exercise that autonomy which the system must allow him. Without such an advisor, the law would impose constraints on the lay citizen (unequally at that) which it is not entitled to impose explicitly.[15]

Similarly, although he does not employ the language of mere- and hyper-zeal, he believes that the friendship analogy gives him a response to the concern that lawyers may be required to go beyond the law for their clients. The lawyer is the client's friend 'relative to the legal system', hence it is false, he writes, 'to assume that the lawyer fails to have the proper zeal if he does for his client only what the law allows'.[16] Again, this seems not dramatically different from the position on hyper-zeal defended in this book.

However, there is at least one important difference between our strategies. To see the difference and its significance, note that once Fried has advanced his analogy between friendship and the lawyer-client relationship, it does not seem to do a great deal of work. Most of Fried's arguments are similar to those just sketched: they appeal to the role of law, or the complexity of legal institutions, or

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14 Ibid., p. 1073.
15 Ibid, p. 1067.
16 Ibid., p. 1081.

to the idea that we might attribute wrongs to institutions rather than to individuals who occupy roles within those institutions. In the end, if Fried convinces us that lawyers are not committed to what I have called hyper-zealous advocacy, for instance, it is not because of the friendship analogy. It is because he mounts a compelling independent argument by appeal to the role of law.

Furthermore, Fried's attempt to defend a very close analogy between lawyers and friends may actually be counterproductive. Most responses to his argument attack the analogy, claiming, for instance, that 'we do not expect gross immorality of our friends', and that 'we don't think much of the moral quality of friendship that can be bought, even if Fried's suggestion does catch the idea of law as the second oldest profession'.[17] But there are important lessons to be gained from the comparison of friendships and client-professional relationships. Fried's insistence upon the analogy distracts from those lessons.

I suggested earlier that what stood out in the comparison of friendships and client-professional relationships were similarities between the vulnerabilities we assume in the two cases, notwithstanding that the intimate knowledge which marks friendships is absent in relationships with professionals. The comparison of the two sorts of relationships is not significant because of a close analogy between friendships and client-professional relationships. Indeed, it is the disanalogous degree of knowledge that is crucial. Given the similarity of the vulnerability, we can look to friendships for guidance as to what features we need to build into professional relationships to protect clients. We can see what it is about relationships of friendship that explains our willingness to make ourselves vulnerable in those relationships. And from here, it is useful to conceive of many of the ethical constraints upon professionals as aimed at reproducing in professional relationships the central features of those more intimate relationships in which the vulnerability of the client would more naturally be found. We can understand these features as designed to turn the professional into the client's 'artificial' and 'special purpose' friend. If we take this view of the comparison of friendships and client-professional relationships, we need not be surprised that in many respects they differ, in the role of the fee for instance, or in the failure of the client to have reciprocal feelings of loyalty for the lawyer. These matters trouble Fried and prompt criticism of his analogy, but they are quite irrelevant to an approach that asserts the usefulness of the comparison for the purposes of institutional design. Fried's attempt to show that the professional is allowed to prefer the interests of the client, not because of institutional structure, but by virtue of the moral character of friendship itself, distracts from the real and valuable lesson to be drawn from the comparison of lawyers and friends.

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17 R.E. Ewin, 'Personal morality and professional ethics: The lawyer's duty of zeal', *International Journal of Applied Philosophy*, vol. 6 (1991) pp. 35–45, p. 44.