





# ACTING IN THE BEST INTERESTS OF CLIENT AND “KING”

A Marquette lawyer’s new book, examining the duties and obligations of lawyers past and present, prompts a conversation, three reflections, and one look back.

In his 1776 revolutionary pamphlet, *Common Sense*, Thomas Paine wrote, “In America THE LAW IS KING.” In 1937, former Harvard Law School Dean Roscoe Pound maintained, “[T]here is no law without lawyers.”

Taken together, these statements help capture the outsized role that American lawyers have played in shaping American society. This has often left the general public uneasy, if not anxious. A new book by Michael S. Ariens, L’82—*The Lawyer’s Conscience: A History of American Lawyer Ethics* (University Press of Kansas 2022)—tells how, over time, American lawyers have attempted to justify the exercise of their power, often in the face of allegations that lawyers acted as their clients’ corrupted agents.

Ariens is a longtime student of American lawyers, serving as the Aloysius A. Leopold Professor at St. Mary’s University School of Law in San Antonio, Texas, where he has taught since 1987. His book’s provocative and extensive examination of American lawyer ethics merits attention.

*Marquette Lawyer* takes up *The Lawyer’s Conscience*, or engages with



Professor Michael S. Ariens, L’82

the topic, in the following five entries. First is a description of Ariens’s book and its conclusions, drawing also on a conversation with the author. In the next three entries, reflections prompted by the book are offered by Marquette Law Professors Peter K. Rofes, Rebecca K. Blemberg, and Nathaniel Romano, S.J.; these are excerpts from their posts on the Marquette Law School Faculty Blog. The final section here is a portion of a 1982 *Marquette Law Review* essay by the late Robert F. Boden—dean of Marquette Law School during Ariens’s days as a student.

## A GLIMPSE INTO *THE LAWYER'S CONSCIENCE: A HISTORY OF AMERICAN LAWYER ETHICS* AND A CONVERSATION WITH THE AUTHOR, MICHAEL ARIENS

Over 200 years, American lawyers attempted to assuage the public's worries by noting that lawyers served both as loyal agents to their clients and as “officers of the court” or “servants of the law.”

Michael Ariens wrote the book for both lawyers and nonlawyers interested in how the profession became so powerful. *The Lawyer's Conscience* is divided into seven chronological chapters, beginning in 1760 and ending in 2015. Each chapter includes a number of short stories intended to exemplify one or more of the book's themes. The work grew out of a question to which the author has found himself regularly returning in his teaching and writing: “How is it that lawyers are so powerful?” Ariens also mulled this follow-up: “How do lawyers justify possessing such power?”

Ariens cited Paine's phrase that “the law is king” in response to the first question. And Ariens found the answer to the follow-up question in similar justifications made by lawyers from the late 18th century through the end of the 20th century. Over 200 years, American lawyers attempted to assuage the public's worries by noting that lawyers served both as loyal agents to their clients and as “officers of the court” or “servants of the law.”

In addition, the ideal of a legal profession distinguished the lawyer from the ordinary agent of a business. The ordinary business agent was permitted to undertake any lawful action on behalf of his or her principal. Lawyers, by contrast, could not just do anything lawful on behalf of their clients; instead, they were constrained by their duties as “officers of the court” or as dedicated to the interests of the public. Although lawyers have often written to minimize the difficulty this dual role creates, Ariens argues that the duty to serve both the client and the public places lawyers in an impossible position. He sees no wholly satisfactory solution to this problem, but he suggests that some approaches are worse than others.

The Model Rules of Professional Conduct, promulgated by the American Bar Association (ABA) in 1983, were, in Ariens's telling, a step in the wrong direction, and that project itself became a story about a deeply fractured legal profession.

Why Ariens reached this conclusion helped frame the book's structure. Why did the ABA decide in 1977 to create a committee that crafted the Model Rules, especially when it had approved the widely adopted Code of Professional Responsibility just eight years earlier, in 1969? And why, by contrast, had it taken more than 60 years for the ABA to replace the 1908 Canons of Professional Ethics with that 1969 Code? What had driven the ABA even to draft the Canons in the early 20th century?

The move backward in time prompted Ariens to open the book with the (true) story of a young lawyer, writing in his diary in 1760 and fulminating about “pettifoggers.” A decade later, that lawyer—John Adams—successfully defended an officer, Captain Thomas Preston, and eight British soldiers accused of murder, in Boston Massacre trials. Adams privately noted the price he paid for his defending unpopular clients, which only decades later would be celebrated as a service tying the lawyer's duty to both client and public. But Adams's defense of the soldiers relied in part on attacking the character of those killed in the massacre, a point that often goes unmentioned during praise of Adams's willingness to represent vilified defendants. The trials were an early American demonstration that lawyers sought to win—and that zealous advocacy helped them do so.

The examples of Adams in 1760 and 1770 generated several themes that course through *The Lawyer's Conscience*. First, what standards should lawyers use to defend their work? In Adams's time, for example, lawyers maintained that they acted honorably, whereas pettifoggers were dishonorable. Ariens argues that honor, an external standard, was displaced by conscience, an internal standard, beginning no later than the 1830s. Eventually, conscience was both supplemented and supplanted by ethics “rules.”

Second, the ideal of the defense of an unpopular client was honored by later lawyers, both in



the breach and in the observance. For example, during both the second “red scare” of the early 1950s and the civil rights movement of the early 1960s, the lawyer’s (and lawyers’) ostensible duty to represent unpopular clients, in order to help secure the rule of law, was widely debated. What, if any, repercussions existed if lawyers refused to represent an unpopular client, and what consequences was a lawyer expected to shoulder if representing such clients disrupted or even destroyed a lawyer’s ability to make a living? This debate segued into the question of cases and causes. In one framing of this issue, did the lawyer best represent a client by thinking of the matter as a *case* or as a *cause*?

Third, what limits, if any, did lawyers (or the law) place on zealous advocacy? This question has been answered differently at different times—before the Civil War and after it; between the two World Wars and after the Second; and during the 1970s and since the early 1980s. On this question, the ABA’s 1908 Canons, 1969 Code, and 1983 Model Rules offered different conclusions. Ariens, adapting Justice Oliver Wendell Holmes’s phrase about the common law, said that these disparate answers reflect the “felt necessities of the times” among lawyers.

The final chapter of *The Lawyer’s Conscience* is titled “The Professionalism Crisis and Legal Ethics

in a Time of Rapid Change, 1983–2015.” Ariens argues that the vociferous debates concerning the content of the Model Rules were a harbinger of a debate about identity. Were lawyers still members of a profession, as distinguished from

a business, or were they better characterized as part of the legal “industry”?

The book’s conclusion notes not only Dean Roscoe Pound’s 1937 assertion that “there is no law without lawyers,” but also the conclusion, a half century later, by legal ethicist David Luban that “the lawyers are the law.” On such thinking, lawyers possess even more power than they may imagine.

It is the lot of lawyers, as one member of the profession suggested in an 1896 speech to ABA members, that they seek both to demand justice and yet to represent any paying client and “do [their] best to make that case prevail,” even when prevailing may appear unjust. So lawyers always act under a “strain of conscience.” That is the weight that lawyers have long carried in trying to serve both client and community. In what he calls a “love letter” to American lawyers, Ariens concludes that conscience is an imperfect guide on this journey, but that it is the only guide worth attending to.

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## The Lawyer’s Conscience

### A History of American Lawyer Ethics

MICHAEL S. ARIENS

## MICHAEL ARIENS—LAW SCHOOL CLASS OF '82—IS A DEEP AND DEFT THINKER

Peter K. Rofes



Peter K. Rofes

Ariens's attention turns, finally, to the stretch of time from the end of World War II to today. A smorgasbord of developments within the profession gets discussed here. Two consume much of Ariens's attention.

The first, led by Virginia lawyer Lewis Powell (yup: that Lewis Powell) beginning in 1964, concerns events leading up to and in the decade following the ABA's adoption of the Code of Professional Responsibility in 1969. The second focuses on the surprisingly swift supersession of the Code with the ABA's 1983 promulgation of the Model Rules of Professional Conduct.

Ariens admires the Code, in no small measure because, after each of its nine overarching canons, the Code enumerated a series of ethical considerations. The ethical considerations, as Ariens reminds us the Code's preamble itself reported, were “aspirational in character and represent the objectives toward which every member of the profession should strive.” He praises the aspirational structure of the Code, contending that such a structure conveyed to practicing lawyers that their professional lives should be devoted at least in part to grappling with the moral challenges of law practice and examining their consciences for answers to such challenges—as opposed to, say, merely ensuring that their conduct met the minimum prescribed standards.

Yet as quickly as 1977, with no fewer than 44 jurisdictions already having adopted the Code, the ABA began the process of supplanting it. Ariens claims that the debate triggered by what eventually would become the 1983 Model Rules reflected “a clear sign of the unraveling of a unified profession.” That bit of anthropological hyperbole aside, the volume presses forward to expose a range of more contemporary phenomena and developments—both real and alleged—that Ariens deems undesirable. A few of the author's many grievances include:

- The problem of professional (in)competence. Ariens cites a 1973 statement by then Chief Justice Warren Burger (the temptation to observe that this indeed was a man with more

than a passing familiarity with incompetence strikes me as too powerful to resist) to the effect that between one third and one half of lawyers “who appear in serious cases are not really qualified to render fully adequate representation.”

- The evolution—or as Ariens views it the devolution—of the Kutak Commission's early drafts of the Model Rules. Regrettably to Ariens, later drafts moved from a vision of the lawyer with substantial duties to the public entirely apart from client interests to a vision of the lawyer whose duties were too strongly linked to, too dependent on, those narrow client interests.
- The profession's treatment of the lawyer's duty of confidentiality. In particular, Ariens's ideal professional world would have lawyers required to disclose otherwise confidential information in more, apparently considerably more, circumstances than the 1983 Rules provide. Here too, in short, the current set of duties reflects what to Ariens bespeaks an insufficient level of independence from client interests.
- Whether it be the action for legal malpractice, the system of statewide discipline, or the motion to disqualify counsel on the basis of a conflict of interests, Ariens expresses a consistent gloom as to whether such mechanisms designed to police the substandard conduct of individual lawyers and their institutions are accomplishing very much constructive.

To be sure, Professor Ariens employs his keen critical and selective analysis to probe a good deal more than the items noted above. Yet the leitmotif remains undeniable.

Professor Ariens yearns for an American legal profession whose members speak in a unified voice about matters beyond the trivial or indisputable. That yearning perhaps seeks too much. A group whose membership numbers approach a million and a half individuals—with the current membership representing folks refreshingly more



diverse from the profession's membership in any previous generation—should be expected to have a difficult time coalescing around a particular solution to a particular problem. (Every now and then throughout my reading of the volume, I gleaned the sense that Ariens wishes the American legal profession more greatly resembled the National Football League, with about three dozen owners who experience strikingly little difficulty

reaching decisions such as, say, extending the regular season to 17 games notwithstanding the increase in the number of serious player injuries expected to accompany the expansion.) Sometimes the challenge of achieving consensus represents a strength rather than a shortcoming.

*Peter K. Rofes is professor of law at Marquette University. The full post is available on the Marquette Law School Faculty Blog (February 13, 2023).*

## PROFESSOR MICHAEL ARIENS'S NEW BOOK AS A TEACHING TOOL

Rebecca K. Blemberg

Through classroom discussions in courses such as The Law Governing Lawyers and Professional Identity Formation (and even Legal Writing and Research), I know that students yearn to practice in an age marked by the public's perception of lawyers as esteemed community members safeguarding the public good. Michael Ariens's *The Lawyer's Conscience: A History of American Lawyer Ethics* has inspired me to bring more historical perspective into these discussions. I want my students to know, for example, that the problem of lawyer misuse of power is not new and not reserved for the modern age, even if modern developments have introduced new and different problems. For a very long time, lawyers have had to embody conflicting roles, serving as advocate and counselor but also as an officer of the court and legal system reformer.

After reading the early chapters of Ariens's new book, I made a note to tell students in future classes that lawyers have always had a "PR problem"—not professional responsibility but public relations. The age in which lawyers were universally respected and revered does not seem to have existed. In fact, in early American history, many feared the power lawyers could have in society. Members of the public have always distrusted lawyers (if they gave any regard to lawyers). Moreover, lawyers have always distrusted other lawyers. (I'm going to teach students the

term *pettifogger* in the hope that this term might be useful should they ever need a pejorative term for lawyers who are untrustworthy and prone to quibbling over inconsequential matters.)

Although *The Lawyer's Conscience* does build to conclusions about modern lawyers and the ways in which legal ethics codes have failed to stop lawyer abuse of power in a changed profession, this book is inspiring me especially to add more historical context to classroom discussion. To give just one example, I plan to share with my students that in 1786 Benjamin Austin, Jr., under the pen name Honestus, wrote several essays (later published as a book) that derided lawyers and English common law, noting that lawyers were "useless" and "dangerous" and that they were "daily growing rich" by collecting "enormous fees," as Ariens recounts. Lawyer responses to this writing at the time articulated what ideals lawyers should hold, and Austin eventually changed his position such that instead of calling for the annihilation of lawyers, he called for regulation. (Austin's young adult son was later killed by a lawyer who was offended by Benjamin Austin's criticisms of lawyers. The struggle over honor and reputation had tragic consequences there.)

Ariens's book sets forth many more historical lawyer scandals that I plan to share with students. We may benefit in class from comparing the earlier instances to lawyer scandals and public response today. I will also have students consider how lawyers in the past tried to reconcile the tension inherent in the multiple roles served by lawyers and ask them to compare that tension to pressures of modern lawyering. *The Lawyer's Conscience* details the various ways lawyers have tried to earn public trust and establish lawyer standards, including appeals to honor and conscience and integrity, deep discussion about the nature of professionalism, and creation of oaths, canons, codes, and regulations. Despite all these attempts, the legal profession continues to face pressing



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problems. The book raises big questions worth pondering in class.

I'll be interested in student response to the questions on a smaller scale, too. I want to know what kind of lawyer my students want to be. I want them to consider how ideas such as honor, conscience, integrity, and professionalism will play a role in their formation. Students are starting to forge professional lawyer identities for themselves, and it is an excellent time to reflect upon who they aspire to be and why. Daily choices will inform the

legal professionals they will become. They will face pressure in balancing lawyer roles and their own needs to earn a living and maintain good health and enjoy life. I've had these discussions in class before, but I look forward to doing so again with reference to more historical context now that I've read Michael Ariens's book.

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Nathaniel  
Romano, S.J.

## MISSION, VOCATION, AND ETHICS: A REFLECTION ON *THE LAWYER'S CONSCIENCE*

**Nathaniel Romano, S.J.**

**A**s a Catholic priest and member of the Society of Jesus (that is, the Jesuits), my life is defined by mission. I may be a professor, a campus minister, even a lawyer, but these professional lives are founded upon—and to an extent dependent upon—that deeper vocational life. While there has been a role for personal judgment and discretion, specific performance of any job comes only subsequent to the religious judgment and discernment of my major superior, who formally “missions” every Jesuit to his particular assignment. I am not merely wafting through whatever I fancy or have some minimal technical proficiency in, and what makes me “good” (or not) stems not from proficiency but from the fact of mission. Vocation begets mission begets profession.

I am put in mind of this dynamic as I reflect upon Michael S. Ariens's recently published *The Lawyer's Conscience: A History of American Lawyer Ethics*. Ariens surveys the history of how lawyers imagined themselves and how competing images have been synthesized into a multifaceted, perhaps self-contradictory conception of the modern lawyer. Throughout this survey, from the eve of the American Revolution to the crises of the early 21st century, the core tension has always revolved around this same dynamic: what is the vocation of the lawyer, and, thus, what is the lawyer's mission, and how does any of this define the lawyer's profession?

Leave any group of lawyers alone for long enough, and they will inevitably begin reflecting amongst themselves on the nature of “the profession” (idle hands, devil's workshops, and all that). Some will reflect wistfully on an earlier era of civility or professionalism, which may or may not have ever actually existed. Others will focus on how to leverage modern trends to better serve clients or their own interests. A particularly enterprising few will form a committee or even a commission, pushing forward the collective sense of identity and mission. None of this is inherently bad or wrong. It reflects, ultimately, a sense, nurtured from admission to law school through the passing of the bar and into practice, that the legal profession is distinct in some way from many other professions, even other “learned” professions. What sets lawyers apart is not that they have studied for many years (health care professionals or university academics often have far longer courses of study) or that their fields are particularly more complex than others. (Most professions appear obtuse and byzantine to those who do not understand their methodologies and jargons.) Rather, lawyers are set apart by the type of work in which they engage, work that is fundamentally political not in the sense of partisan debates, but in that it is fundamentally tied into the ways we live together as a community, as a nation, as a people.

Even cursory familiarity with the legal system demonstrates that this is not purely professional ego. Much of our common life in the United



States depends upon legal professionals and the systems they operate and operate in. We could, of course, look at the work of the Supreme Court, which regularly renders determinative decisions on major questions in our public life. But even beyond the high politics of the Court, the role of lawyers in how we live together is evident. When marriages break down, it is lawyers and judges who aid spouses and parents in making (or at least attempting to make) equitable divisions of property and assets as well as fair arrangements for the care, custody, and support of minor children. Disputes with neighbors, employers, and even strangers are resolved through civil or criminal systems managed by lawyers. Anticipating the end of life, we rely on lawyers to settle our affairs for both dying and beyond, through wills, powers of attorney, and other forms of estate planning. The examples can continue. Daily enmeshed in these decisions, lawyers are aware of the role they can play in how we live and how we live together. And so, they are regularly concerned with “the profession”—what it means to be a lawyer.

We can see this clearly in the Model Rules of Professional Conduct published by the American Bar Association (ABA). The Model Rules, versions or adaptations of which have been adopted by nearly every American jurisdiction, not only set

out standards of behavior and professionalism for lawyers, but also proclaim a vision or model of what a “good lawyer” is. These rules begin with a “Preamble” which, while not binding in the sense the rules proper may be, clearly sets out this model. “A lawyer,” the very first sentence declares, “as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” Thus, we see that, for the ABA at least, the lawyer is not simply a technocratic legal specialist, nor simply an agent of the client’s will, but a “public citizen” bearing some measure of responsibility for the common weal. The balance of the preamble attempts to explain what each of these phrases means, particularly its conception of the lawyer as a public citizen. The lawyer’s obligations are beyond simply obtaining the best outcome for a client; they extend to making the legal system function for all of society’s members, including those unable to afford the lawyer’s services at the usual rates, and building up the institutions of our constitutional democracy.

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# “AN ETHICAL PERSPECTIVE UPON THE CURRENT STATE OF THE LAW OF LAWYER ADVERTISING” — A LOOK BACK



The final entry in this series inspired by Michael Arians's new book—*The Lawyer's Conscience: A History of American Lawyer Ethics*—is drawn from the past. Robert F. Boden, L'52, was dean of Marquette Law School during Arians's time as a student. Boden taught and wrote about legal ethics, and the following excerpt from one of his articles provides a close-in-time perspective on *Bates v. State Bar of Arizona*, the landmark 1977 decision of the Supreme Court of the United States concerning the First Amendment. Boden's article—*Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*—appears at 65 Marq. L. Rev. 547 (1982). The following is section IX of the article, with footnotes omitted.

## Robert F. Boden

The profession has suffered over the past 19 years from a long line of constitutional decisions about lawyer advertising and solicitation. This is not to judge that those decisions were wrong or unnecessary, but only to assert that this series of developments has left many lawyers of good will and good faith wondering whether the underpinnings of professionalism were being knocked out from under the American bar in the name of the constitutional rights of clients and some colleagues. There is no reason for any lawyer to fear that these constitutional decisions, or the changes in the rules brought about as a result of these decisions, have adversely affected lawyers' ethics as that term ought to be understood.

We have for a long time confused the law governing the manner in which we practice with the principles of ethics. Perhaps this is the natural result of the legal positivism which has pervaded legal education and the practice for a good portion of the 20th century. The 1908 Code, while not expressly declaring itself to be a set of ethical principles, was nevertheless denominated *Canons of Professional Ethics*, and in time came to be regarded as a statement of principle rather than of law. The word *ethics* was taken out of the 1969 Code, and an effort was made in its text to

differentiate between “ethical considerations” and “disciplinary rules.” However, these rules were denominated thus in the past, and for that reason, lawyers have come to think of the rules of the prevailing code as the principles of ethics. The Kutak Commission, by attempting to rewrite a code for the American Bar Association in the 1980s, is trying (perhaps too hard) to write a set of rules which will be merely rules of professional conduct.

The job of the American lawyer, facing the incursions of constitutional law into his old set of rules as well as the efforts of the Kutak Commission to write ethical considerations out of the new Code, is to realize and understand that the body of doctrine under which we have been operating, whether the 1908 version or the 1969 version, was a “mixed bag.” Of course there are principles of ethics to be found in the old and the present Code, as well as in anything being offered by the Kutak Commission. But a great deal of what appears in those codes in “black letter” rules represents legislation that is morally indifferent.

The rules of advertising, or such of them as remain, need to be distinguished from principles of ethics relating to advertising by lawyers. We can no longer disguise all of those rules as principles of ethics. The Supreme Court itself recognized this in *Bates*, saying:

It appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on “trade” as unseemly . . . . Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession . . . . But habit and tradition are not in themselves an adequate answer to a constitutional challenge. In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow “above” trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.



The rules declared unconstitutional by the U.S. Supreme Court in *Bates v. State Bar of Arizona* (1977) and *In re R.M.J.* (1982) were not, by virtue of placement in a code of professional responsibility, made into principles of ethics. *Bates* and *R.M.J.* have left our professional regulation of the morals of advertising quite intact, probably stronger, and certainly more visible than heretofore. Until recently that regulation was barnacled over by more than 70 years of attempts to define “habit and tradition.” Consider the Court’s summation in *R.M.J.* of the current state of the law:

Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading advertising, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. . . . Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception. Those are not the words of a court attempting to subvert moral or ethical principle in order

to extend constitutional protection to a form of speech. They are words which enshrine the true moral principle in a constitutional doctrine and extend its protection to our efforts at preventing misleading or deceptive advertising. The ancient injunction, expressed in the Judeo-Christian tradition as “Thou shalt not bear false witness,” not only remains intact but emerges, when applied to lawyer advertising, with a constitutional stamp of approval.

In this, as in all things pertaining to changes rapidly occurring in the profession and to the criticism and clamor which swirl about it, we must individually devise plans which will preserve our pride in being lawyers and our devotion to professional ideals. This may have been easier for our predecessors than it is for those of us who live and practice in the 1980s. We must not let the stripping away of some of the trappings of professionalism, as we were used to them, lead us to despair or to the conclusion that professionalism has been lost. Observing the wreckage of the elaborate system devised over the past 75 years to regulate in detail the subject of advertising, there is a greater danger in this, than in other areas of change, that some who revere the professional image of the lawyer and whose support is essential to continue it, may lose faith. This cannot be allowed to happen. The legal profession can no more afford the loss of professional idealists because of a change to morally indifferent rules regulating advertising than the Catholic Church could afford to lose a large segment of the faithful because of the change in the time-honored rules of fast and abstinence. ■

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