

THE LAWYER'S PROFESSIONAL INDEPENDENCE

By Alexander, Brown, McKay and Cox
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This book comprises four essays by Robert S. Alexander, Q.C., a Bencher of the Inner Temple; Peter Megargee Brown, a Fellow of the American College of Trial Lawyers; Robert B. McKay, a Professor of Law at New York University; and Archibald Cox, a Professor of Law at Harvard University (and former Watergate Special Prosecutor). The book is sub-titled *Present Threats/Future Challenges*. Its message is clear and concise — the law as a “profession” is on the endangered species list. We have all heard that (or something like it) before, but never, I think, expressed in such convincing terms. There can be no independence absent professionalism and vice versa, and both are being eroded apace. A halt must be called and obeyed. The threats to the lawyer’s professional independence must be dealt with, and the challenges must be met. Alexander, Brown, McKay and Cox deserve to be listened to, very carefully. What they say should be acted upon, especially by law students and those newly called to the Bar and admitted to practice, while hope remains for professional independence. It must not be taken for granted. It is not so much as mentioned in the Constitution; nor is it spelled out in legislation. Rather, it is found in the work of such lawyers as John Adams who defended the British Soldiers following the Boston Massacre, Thomas Erskine who defended Tom Paine, and Andrew Hamilton who defended John Peter Zenger, not overlooking that of Frank Scott in *Roncarelli v. Duplessis*. It is found in the best traditions of the legal profession. It is found in countless cases, reported and unreported, over the course of many years. That, I believe, is the only candid answer which can be given to the bright student who asks, in the class on legal ethics, “When is the legal profession going to move into the 20th century?”

Alexander’s essay is entitled “The History of the Law As an Independent Profession and the Present English Legal System”. He takes us back to ancient Greece and Rome, tracing the ideal of professional independence of the lawyer through to the present — not history merely for history’s sake, but to warn about what has happened before, and that it could happen again, absent vigilance. The idea of the lawyer’s independence does not exist merely for the benefit of the lawyer. It is a necessary and integral part of the rule of law in a democratic society. The duty of the lawyer to the client is “tempered by his duty to the court . . . A lawyer is not a hired representative who does solely the bidding of his client.” This is a principle taken up in the essay by Brown: — “The lawyer must be free to tell his client no”; and by Cox in his essay — the antithesis of the independent lawyer is “hired gun”. As Alexander puts it: “A profession that aspires to independence must owe its allegiance and discipline in at

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least the last resort to standards other than just the service of the client for whom the work is carried out." He gives a number of examples and, in his conclusion, states: "An independent legal profession can exist fully only in a democratic society, whose existence is in turn sustained by a strong profession."

The point of Brown's essay, entitled "The Decline of Lawyers' Professional Independence", is that cumulative evidence indicates a serious decline in the American lawyer's professionalism and independence in the last ten years. "This erosion has brought about a crisis in the American legal community and may, unless checked, bring about a crisis in American life." He attributes this to the "shortsighted *attitudes* and *perspectives* of a growing number of American lawyers that practice law as a business rather than as a profession." Lawyers are spending too much of their time and energy on management techniques, marketing, and technology and not enough on the obligations of professional independence and responsibility. He cites aggressiveness, incivility, advertising, soliciting, hucksterism, and the like. With deference, Brown is absolutely right and the *attitudinal* and *perspective* problems are not indigenous to the U.S.A.

The notes to the text of this essay are very informative, and in particular his reference to Lord Moulton's *dictum* on "obedience to the unenforceable" (quoted, also, in Chief Justice Cartwright's foreword to Orkin on Legal Ethics) deserves renewed and constant attention on both sides of the border.

The third essay in the book, "The Future of Professional Independence for Lawyers" by McKay, has as its thesis the assertion that the independence of the legal profession need not be left entirely to the vagaries of a future sometimes thought to be out of control. This, I believe, is the challenge which faces today's law students and new members of the profession. "The comforting fact" the author says, "is that the legal profession itself can do much to shape its own future, if it but has the wit and will to do so." To do this, however, the computer billing bottom-line mentality of a significant number of lawyers (referred to by Brown) will have to be contained, if not indeed reformed.

McKay maintains that, "The independence of the legal profession is less at risk for the reasons customarily assigned — uncontrolled growth, economic pressures, and legal bureaucracies — than for the profession's lack of discipline in response to the concerns about lawyers expressed by the public. If the profession is not attentive to their concerns and does not respond promptly and effectively, professional independence will be in jeopardy. The public can and will then impose controls on lawyer activity to restrict independence, perhaps severely."

In his conclusion McKay says: — "My optimism for the future of the profession depends upon my assumption that the profession will *relearn* the basic propositions that the sole justification for its existence is to serve *the public interest* through *ethical* fulfilment of its problem-solving functions on behalf of clients, whether they be individuals, organizations, or units of government" [Emphasis added].

I believe Cox's essay on "The Conditions of Independence for the Legal Profession", the concluding essay, serves admirably to bring together and

point up the principal issues laid bare in the three preceding essays. For Cox there are two different sets of ideas evoked by "independence" for the legal profession. There is "the independent lawyer". There is "independence of the legal profession". The first pertains to the lawyer's duty to the client, but with a degree of detachment, i.e. antithesis of "hired gun". The second pertains to freedom from government control, i.e. self-governance. The question, "What are the conditions upon which the independence of the legal profession depends?" comes down to the questions, "How can we strengthen and spread among our own ranks the ideal of the lawyer as a follower of an independent public calling? How can we assure better and wide realization of that ideal?"

Cox gets down to some concrete cases that deserve close, very close, attention and reflection. He quotes from a letter written to him shortly after the Watergate affair: — "A law professor told me recently that there are three basic characteristics of lawyers a law school education has done nothing to correct: (1) lawyers are generalists who really believe they know what is best for everybody; (2) lawyers are technicians who make no moral judgments, who are hired to hear a client's predicament and set to work figuring out the techniques needed to extricate the client from his bind; (3) lawyers going into government service carry with them their technical, extricating competence and strict devotion to each client's predicament, and cannot conceive of themselves as serving 'all' those people who make up the 'public.'" Cox says, "I believe that the ideal of the great lawyers of whom Peter Megargee Brown has written — of the truly 'independent' lawyers — was quite different."

Concluding, he writes: — "... our independence from government regulation depends upon how well we perform as individuals the responsibilities of an independent public calling." He asks: — "Is it possible in this context to give meaningful form to the ideal of the independent lawyer? Is it possible to rally members of the profession for its realization?" I discern affirmative answers, albeit tentative and qualified — and for good reasons. "The leaders of the bar and particular law firms can make an enormous difference by personal example."

Too often, far too often, it seems to me, too many individual lawyers point to the governing body (the Benchers), as well as to the administration of that body, to do their work in so far as professional independence is concerned. Rarely, if ever, do they attend the meetings of their governing body, although informed thereof in writing on an almost monthly basis. This book should be in every law office, and should be read and re-read by every member of the profession.

Morris Harrell, in his introductory remarks to the book, wrote: — "It may not be possible to return to those days when the lawyer's representation was more personal, but if we are to retain our status as a respected profession, the essential independence of the lawyer must not change. Even as we adapt to change, our professionalism and independence must not be compromised. This collection of articles is an important step in recognizing our potential problem and a beginning in discussing ways to deal with it." I wholeheartedly agree — and God forbid that we should think that the problem is one peculiar to our American cousins.