Practical Wisdom

THE RIGHT WAY TO DO THE RIGHT THING

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even think about them as choices, let alone ethical choices. When a friend asks us "How do I look?" we need to balance honesty and kindness, and know how to be honest and kind. When we reveal the confidences of a friend because we are worried about his well-being, we're balancing loyalty and care. Care for our child demands we correct his mistakes—how else will he learn? But *all* of his mistakes, *all* the time? Do we try to protect him from making mistakes that will harm him? Of course. But we also need to avoid being overprotective. The child needs the freedom to fall if he is to learn to be responsible and stand on his own. As commonplace as these balancing acts are, doing them well is essential. We're always performing balancing acts. We're always interpreting principles, aims, and rules in the light of a specific context. We're constantly called upon to exercise practical wisdom in our most fundamental human decisions, and we trust ourselves—and others—to do so. There is no reason this shouldn't apply in broader contexts.

Who Decides? Balancing Asking and Telling

At the heart of any code of professional ethics is the injunction to put the client's interests first. It's a good principle: serving a patient or a student or a client is the primary duty of a professional. But what does following this principle mean in practice?

When young lawyer William Simon took on the case of Mrs. Jones, the housekeeper of a senior partner, he wanted to work assiduously on her behalf. Mrs. Jones was a home owner, a churchgoer, and, at sixty-five, a well-respected member of a lower-middle-class black community outside Boston. Her car had been hit in the rear—a minor traffic accident. Mrs. Jones stopped to identify herself, but the other driver, a white woman, fled the scene, called the police, and reported Mrs. Jones as the one who fled. Without investigating, the police called in Mrs. Jones. "They reprimanded her like a child," says Simon, "addressing

her—a sixty-five-year-old woman—by her first name, while referring to the much younger complainant as 'Mrs. Strelski.'" Mrs. Strelski eventually withdrew her complaint, but the police insisted on prosecuting Mrs. Jones for leaving the scene of the accident.

Simon wanted to prove Mrs. Jones innocent and also protest the indignity and injustice she had suffered. He planned to expose the racism of the police "through devastating cross-examination." But he had no court experience. He turned to a lawyer friend who was an expert in traffic cases.

They met in a corner of the courtroom, just before the trial. Dismissal on racism charges? His friend rolled his eyes. The judge and the police were repeat players in this process who shared many common interests. If Mrs. Jones lost—unlikely, but possible, said his friend—she would lose her driver's license, be fined, and perhaps even face a jail term of up to six months. Mrs. Jones would also have to experience the anxiety of a trial and of having to testify.

Simon's friend negotiated a deal with the prosecutor. Mrs. Jones would enter a plea of nolo contendere (the defendant neither admits nor disputes the charge). She would get six months' probation, but because this was a first offense, her criminal record could be sealed after a year. Simon was bothered. "The plea bargain would deprive her of any sense of vindication. Mrs. Jones struck me as a person who prized her dignity, deeply resented her recent abuse, and would attach importance to vindication." He presented the plea bargain to Mrs. Jones and her minister, who was there to support her and serve as a character witness. They talked for about ten minutes and ultimately turned to Simon for his advice: "You're the expert. That's what we come to lawyers for."

> I insisted that, because the decision was hers, I couldn't tell her what to do. I then spelled out the pros and cons. . . . However, I mentioned the cons last, and the final thing I said was, "If you took their offer, there probably wouldn't be any bad practical consequences, but it wouldn't

be total justice." Up to that point, Mrs. Jones and her minister seemed ambivalent, but that last phrase seemed to have a dramatic effect on them. In unison, they said, "We want justice."

"No deal," Simon told his friend. "She wants justice."

"Let me talk to her," said his friend. His friend took Mrs. Jones and her minister through the same considerations, but he concluded with a discussion of the disadvantages of going to trial and described the possible consequences of going to jail more fully. And he did not include his thoughts on "total justice." When he was done, Mrs. Jones changed her mind and decided to accept the plea bargain.

In the end, Mrs. Jones got what she said she wanted. But did Simon act successfully on his client's behalf? Simon is now an experienced lawyer and a distinguished professor of law, and his own judgment is: no. Neither he nor his friend was able to exercise the practical wisdom needed to solve a central problem in any legal case like this—figuring out what it means to genuinely work on a client's behalf.

From a classroom perspective, determining a client's interests would seem to be relatively straightforward if we simply follow a fundamental principle of modern ethics: every individual should be free to choose what's best for herself. Respect for persons means respect for them as rational beings capable of determining their own interests. Lack of such respect smacks of paternalism or, worse, manipulation. Codes of professional ethics talk about this as the principle of client or patient "autonomy." Lawyers serve clients by being their advocates, by working on their behalf, and when it comes to the fundamental choices of what to advocate, that choice is the client's. So to help Mrs. Jones, Simon first needed to help Mrs. Jones determine whether what she had done was illegal. When they had determined it wasn't, he then needed to lay out what her legal options were now that she was falsely accused. Then it was up to Mrs. Jones to decide what to do. Simon and his colleague laid out the same options to Mrs. Jones so she could decide "for herself." Yet she decided in two different ways. Why?

A slight change in intonation, and in the way the options were ordered, changed the way Mrs. Jones understood the issues, making the danger of going to jail a bit less and then a bit more salient; making "justice" a bit more and then a bit less salient. Could Simon have come up with a neutral way to frame the issues so that Mrs. Jones *really* could have decided for herself? There are better and worse frames, frames that are more or less manipulative, frames that are well intentioned and ill intentioned. But any way of explaining options to a client will always involve some kind of framing, and any frame will tilt the client in one direction or another. There is no neutral. Leaving the choice to Mrs. Jones after listing the options and the consequences created only the illusion of autonomy. So the ubiquity of framing rules out the simple solution, "Let the client decide."

Good lawyers know that the solution to this problem is not simply finding ways to frame options more neutrally or insisting on more client autonomy. Rather, respecting a client's right and responsibility to choose means providing a client with guidance in making that choice. That guidance demands more than laying out the options and detailing the risks and benefits of each. Mrs. Jones was unclear about what she wanted and about the risks she was willing to incur. She was anxious about going to trial and wanted to avoid being punished for a crime she did not commit. That made the plea bargain attractive. However, she was being falsely accused and she did want justice. That tilted her toward fighting for her innocence in court. Simon knew that it was not up to him to balance these aims for her. But he didn't know how to give her what she needed—the good counsel that would allow her to sort out what was best.

To provide good advice, Simon needed a lot of practical knowledge about the specifics of the situation—of *this* particular judge and court,

these police officers, the local biases of race and class, the mechanics of how deals are made. It was a good thing he brought along a colleague whom he trusted. But Simon also needed other kinds of practical knowledge and skills. He needed to understand Mrs. Jones and not just depend on stereotypes about "oppressed people" and what they want. He did have the good intuition his colleague lacked that Mrs. Jones would likely be concerned about justice. Mrs. Jones *was* concerned about justice and so was her minister. But she needed help deliberating: weighing this concern against the other considerations in her life. To offer wise counsel, Simon needed to help Mrs. Jones perceive her situation and imagine alternatives. To do that he needed the know-how to listen and the skill to ask the kinds of questions that would help her reflect on her situation. He needed the empathy to understand what she was thinking and feeling. Developing that empathy required that Simon get to know Mrs. Jones. This kind of knowledge doesn't come in the five minutes before a hearing begins. Simon did not have this wisdom to counsel, and neither did his friend. So they went through the motions of letting Mrs. Jones choose for herself.

Like Mrs. Jones, many clients may have objectives that are hazy or in conflict. Or a client might be impetuous. He may, says Anthony Kronman, professor and former dean at Yale Law School, be "in the grip of some domineering passion like anger or erotic love," having "made a quick decision to change his life in an important way, for example, by dissolving a long-standing partnership or rewriting his will for a lover's benefit." Or the client may not be clear about the long-term consequences of one or another course of action. Or the short-term and long-term consequences may themselves be in conflict. The desire of one party in a divorce case to get even may make it impossible to create the future relationship needed to share the upbringing of the children in coming years. Kronman argues that lawyers who think of themselves as zealous advocates aiming only to get what clients say they want forget the other half of lawyering: being good counselors. In fact, he says, to be a really good advocate you need the wisdom to be a good counselor because that's the only way to actually work on a client's behalf.

It is not just lawyers who need the wisdom to counsel. Such wisdom is needed by almost anyone who works on another's behalf. Take the hairdressers whom Mike Rose studied in his book *The Mind at Work*. Rose found that they were constantly serving clients who came in with a picture clipped from a beauty magazine and told the stylist, "This is the look I want—cut my hair like this." A stylist could just do the cut and take the money and tell the customer that she got exactly what she wanted. But the good stylist knows that what a customer thinks she wants is often not what she really wants. The "look" in that picture will frequently not be the "look" on this particular customer. Rose found that most of the stylists he studied wanted to do a good job, and those who succeeded knew that the job was not just perfectly executing the cut they had been asked for. It's a challenge, explained one stylist, because you "don't assume you know what they want, because *they* may not know what they want."

The hairdressers' technical expertise and their experience styling hair gave them some of the knowledge they needed. They knew how the face and bone structure and the condition of the hair—its density, texture, and wave pattern—would change the look in the client's favorite picture. They also knew, or quickly found out, some basic things about their client, like how she managed her hair between visits—or didn't. But the good hairdressers could not just let the client choose for herself. And neither could they simply tell the client what was best and do it. These hairdressers had the skill to help the clients figure out what they really wanted. They knew how to listen to the client, hear what the client was thinking and feeling. They knew how to ask questions to help the client decide if what she wanted was more "sassy" or more "demure." The conversations were a delicate interplay of talking and listening, of subtle interpretations—almost an improvised dance by which each steered the other in the right direction. Being a good hair stylist demands the wisdom to be a good counselor.