Ethics in Advocacy: Instinct, Insight, and Competing Obligations

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The last quarter of the 20th century was a time of robust prosperity for American lawyers. At the same time, public esteem for lawyers and what they do followed a downward spiral, as respect for lawyers and lawyering sustained body blows starting with Richard Nixon and Watergate, and continuing through the O.J. Simpson trial and the Bill Clinton chronicles. Lawyer jokes became a staple of stand-up comics and late night television

A jaundiced view of lawyers and lawyering is nothing new. Its roots run deep in our culture. In literature, from the Bible to Shakespeare to Swift to Dickens, lawyers have taken a beating. In the Merchant of Venice, Shakespeare's Basanio declares that:

> The world is still deceiv'd with ornament.
> In law, what plea so tainted and corrupt.
> But, being season'd with a gracious voice.
> Obscures the show of evil?

In the same vein, and even more strident, was Jonathan Swift's lacerating indictment:

> …there is a society of men among us, bred up from their youth in the art of proving by words multiplied for the purpose, that white is black, and black is white, according as they are paid. To this society the rest of the people are slaves.

Even Thomas More, the patron saint of lawyers, banished them from his Utopia, writing: "They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters." More gentle critics harbor a particular cynicism about litigation. Robert Frost, for example, observed that "a jury consists of twelve persons chosen to decide who has the better lawyer."[1]

Common perceptions of legal ethics are equally disdainful. Where the phrase is not dismissed outright as an oxymoron, legal ethics is regarded by many as just another word game that lawyers play to justify their actions. At the same time, growing out of Enron, Worldcom and other recent debacles, ethics generally and lawyer ethics in particular are receiving an increasing amount of attention. Corporate lawyers were taken aback by the first draft of rules proposed by the SEC pursuant to the Sarbanes-Oxley Act, an attempt to deputize securities lawyers to help reign in rogue capitalists. This Act transformed certain ethics rules into substantive law, and the SEC's aggressive posture raised grave concerns about lawyer independence and self-regulation across the profession.

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The different levels of ethical awareness and analysis that inform the activities of lawyers range from instinct to intuition to insight. "Instinct", the dictionary tells us, is behavior that is mediated by reactions below the conscious level. You don't really have to think about ethics or rules to know that padding your hours, or lying to a client or judge, is wrong. "Intuition" imports some degree of thinking or reasoning. You have to do some thinking, but not much, to realize that it would be wrong to represent two parties with adverse interests in the same transaction without their express, informed consent.

"Insight" goes deeper, and suggests more rigorous and systematic thought. Its synonym is "discernment," which is the power to see what is not evident. Discernment involves penetrating study into the complexities and niceties of a question, the wrestling with competing values and considerations in reaching a sound conclusion, and the development of sensitive and sophisticated judgment. Understanding the Rules of Professional Conduct, especially complex, nuanced Rules like 1.6, 3.3 and 4.2, applying them to a particular situation, and arriving at the right answer and the proper course of action requires discernment. Unfortunately, there is often not the time to give such issues sufficient thought – or to consult with colleagues whose own experiences and relative detachment from an issue may give them greater insight.

A jaundiced view of lawyers is nothing new.

The inherent tensions that confront a lawyer generally, and a litigator in particular, are addressed in the Preamble to the Model Rules of Professional Conduct. Paragraph 8 of the Preamble tells us that "a lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious." The fly in the ointment is the word "usually." The importance of that word is made explicit in paragraph 9, which declares that "virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."

The purpose of this article is to look at some specific situations in which these conflicts arise in litigation and to see how the Model Rules of Professional Conduct propose to deal with them. These may not be the most frequent ethical problems that are encountered in litigation, but they are typical of situations requiring the resolution of conflicts between different obligations and values.

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Inadvertent Disclosure

Consider the situation where a message suddenly pops up on your computer monitor from Attorney Slick, Re: Jones v. Acme Corporation. As you (the attorney for Acme) open the e-mail, you muse: "Jones's attorney is finally getting back to me on that deposition date." As you start reading through the e-mail, however, you see that it discusses the strengths and weaknesses of Jones's case and possible settlement values, and then goes on to explain some of the strategies that Slick intends to follow. You glance up at the salutation to the message and see that it reads "Dear Mr. Jones." Oops! Slick has done something we all fear. Do you merely hit the print button, and rejoice in your and your client's good luck? Do you immediately close the message and hit the delete button? Probably neither.

If you are a student of recent "misdirected fax" or "inadvertent disclosure" jurisprudence in Massachusetts and elsewhere, you probably close the message but do not delete it, and instead immediately seek ethical guidance. You will doubtless be directed to the Massachusetts Bar Association's Ethics Committee's Opinion 99-4, to U.S. District Court Judge William Young's opinion in January, 2000, in *Amgen Inc. v. Hoechst Marion Roussel, Inc. et al.,*[2] and perhaps to the American Bar Association's 1992 Formal Opinion 92-368 or its recent revision to Rule 4.4 of the Model Rules of Professional Conduct. Unfortunately, clear guidance is not forthcoming from this cacophony of voices.

> *"[T]he obligation to preserve the lawyer-client privilege is indeed an* affirmative obligations share by adversaries. . ."

The Massachusetts Bar's opinion stands for the proposition that it would be a breach of your ethical duty of zealous advocacy to simply delete the e-mail unread and forego the clear benefits that knowing its contents would bestow upon your client.[3] Judge Young's opinion would lead you to seek the guidance of the court (after securing the message, perhaps by printing it and putting it into a sealed envelope) as to whether any privilege that may have attached to the message had been waived because of the negligence of Attorney Slick in accidentally sending it to you. If you were to follow ABA Formal Opinion 92-368 and its progeny, you might delete the message immediately and call to Mr. Slick's attention the fact that you had received and deleted it. The ABA's new Model Rule 4.4(b) would require you promptly to notify Mr. Slick of the errant e-mail, but the new official Comments 2 and 3 to the Rule duck the question of what, beyond notification, must or should be done.

It was Rule 1.3 of the Rules of Professional Conduct, entitled Diligence, on which the Massachusetts Bar based its opinion that the receiving party's ethical obligation to its client precluded it from voluntarily or willy-nilly returning a misdirected communication or inadvertently produced privileged document. The opinion raised the question, without answering it, of whether it is necessary or proper to even notify the other side that you have received such a communication – a question that the ABA's new Rule 4.4(b) clearly addresses by mandating such notification.

Judge Young's *Amgen* opinion struck a middle ground with respect to accidentally produced privileged documents. He held that the circumstances of the production and the degree of culpability of the attorneys responsible for the accidental production determine the result. In the case before him, Judge Young felt that the inadvertent production of 4,000 pages of privileged documents evidenced gross negligence and therefore resulted in waiver. Judge Young cited the Massachusetts Bar opinion in a footnote, but only for the proposition that return of the document to its sender was not compelled. As noted above, the Massachusetts Bar opinion went much further, not only declaring that return of the document was not required, but also adding that voluntary return of the document was prohibited by the duty of zealous advocacy.

The more forgiving approach, precluding a lawyer from taking advantage of a misdirected fax or errant e-mail, is based on the proposition that inadvertent or accidental disclosure, since it is not knowing and voluntary, can never form the basis of waiver. This approach has been followed in a number of cases and opinions from various jurisdictions including New York City, Maine, and Maryland.

The reasoning of the Professional Ethics Commission of the Maine Board of Overseers of the Bar[4], in an opinion issued in March, 2000, moved the dialogue from the substantive law regime of the attorney-client privilege to the ethical realm of lawyers' obligations to the legal system. The Committee's rationale for requiring the return of an inadvertently produced document was based on its view that as a matter of common law "the obligation to preserve the lawyer-client privilege is indeed an *affirmative obligation shared by adversaries*, and that privilege cannot be inadvertently relinquished." (emphasis added) The same reasoning was employed by the New York County Lawyers Association Committee on Professional Ethics in its Opinion 730, rendered in 2002.

The Maryland State Bar Association Ethics Committee took a similar tack in April 2000.[5] It cited to three different parts of the Rules of Professional Conduct as support for its conclusion that a misdirected privileged communication should be returned unread to its sender. It cited the Preamble, which states that the public interest is served by preserving client confidences; Rule 1.15, which obliges an attorney to safeguard the property of another that comes into her possession; and the catch-all Rule 8.4(c), which prohibits a lawyer from "engaging in conduct involving dishonesty, fraud, deceit or misrepresentation." The Maryland Bar's opinion went on to reach a different conclusion with respect to situations where the receiving attorney reads the misdirected communication before discovering that it was a misdirected privileged communication. In such cases, the

Committee opined, the recipient should notify the other side, advise her client, and ask the court to decide whether the misdirected communication should be returned.

Ironically, a recent decision by the Court of Special Appeals of Maryland (Maryland's intermediate appellate court) totally ignored this ethics opinion, failing even to cite and distinguish it. In *Elkton Care Associates v. Quality Care Management*[6], the court ruled that the accidental disclosure of a privileged document was so negligent as to wholly waive the privilege. That result was not surprising in view of the facts surrounding the disclosure. What was surprising was the court's failure to even suggest that the receiving lawyer had an obligation to inform the other side. Indeed, the receiving party used the document, prominently labeled "Attorney/Client Privilege Attorney Work Product", in cross-examination at trial. Oblivious to the ethical considerations articulated by the Maryland Bar's ethics gurus[7], the court declared in a footnote that the receiving lawyer who tabbed the document for copying despite its obvious privileged status, and then went on to use it at trial without first notifying the other side that he had it, "did nothing improper or unethical."

This subject could consume an entire article if not a treatise, since there are many onion-like layers to this problem. What, for example, should be the result if the inadvertently produced document makes it obvious that the sender has been violating his ethical obligations in regard to compliance with discovery or otherwise behaving unfairly and dishonestly in the litigation? There has been some suggestion that a fact pattern containing these elements lay behind the Massachusetts Bar's opinion that the receiving lawyer is obligated *not* to return the misdirected communication.

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What happens if the parties had entered into a stipulated protective order which provides that inadvertently produced documents will be returned? This last question was addressed in a decision by U.S. Magistrate Judge Neiman in the case of *VLT Corp. v. Unitrode Corp.*[8], decided in May 2000. Judge Neiman found such a stipulated protective order controlling and ordered the return of certain negligently produced privileged documents. More recently, in related litigation[9], U.S. District Judge Patty Saris held that gross negligence of the producing attorneys effected a waiver notwithstanding a protective order governing "inadvertent production" because grossly negligent is not "inadvertent" and therefore was not within the ambit of the protective order.

Contact With Employees of Adverse Entities

One prickly Rule that arises frequently in litigation is Rule 4.2, the "no-contact rule", perhaps the most litigated Rule of Professional Conduct. For a brief while, the case of *Messing, Rudavsky & Weliky v. President and Fellows of Harvard College*[10], *P.C.* decided by the Massachusetts Supreme Judicial Court in 2002, was thought to be the last word – in Massachusetts at least – resolving all questions about when and in what circumstances an attorney can communicate with an employee of an adverse corporate entity. The result in *Messing* is consistent with new Comment 7 to Model Rule 4.2, which cuts way back on the restrictions on such communications. Under the old Comment 4 to Model Rule 4.2, which was very similar to the Comment before the court in the *Messing* case, the possibility that employees and former employees could make statements that might constitute admissions against their employers was sufficient to make those persons off limits to ex parte interviews by the opposing lawyer. The Massachusetts Supreme Judicial Court changed that in *Messing*, essentially ignoring the Comment's clause regarding admissions. New Comment 7 to the Model Rules, which replaced Comment 4 pursuant to the Ethics-2000 recommendations, has deleted that clause. New Comment 7 also goes on to make it clear that *former* employees of a corporation may be contacted ex parte by the opposing lawyer, but that issue is still an open one in Massachusetts[11] and other jurisdictions.

Even when the Rule 4.2 issues are really finally resolved, the resolution may well result in a new rash of litigation over a related issue raised by Rule 3.4(f). How far can a lawyer for a corporation go in urging her corporate client's employees or former employees not to talk with the lawyer on the other side? Rule 3.4(f) and Comment 4 to that Rule permit a lawyer to advise employees not to talk to the other side. On the other hand, subparagraph (2) of Rule 3.4(f) puts conditions on that permission. Moreover, it does not permit corporate counsel to try to dissuade *former* employees from talking with lawyers for the opposition. One gambit that certain corporate defense counsel have tried to employ to keep plaintiffs' lawyers away from former corporate employees is to declare that they will be representing these former employees in depositions that they might give, either as Rule 30(b)(6) witnesses[12] or as named individual fact witnesses. Ingenious, but it involves a practice that poses different and very serious ethical issues itself: conflicts of interests arising from a lawyer's dual representation of a company and its constituents.[13] But that's a subject for another day.

Candor Toward the Tribunal

Perhaps the thorniest of ethical issues involves Rule 3.3, entitled Candor Toward the Tribunal. You are defending the deposition of John Smith, the director of marketing of your corporate client. The opposing lawyer asks Smith whether the company ever received a subpoena or civil investigatory demand (CID) from the U.S. Justice Department or the Federal Trade Commission in regard to possible anti-competitive conduct. Smith answers with an unequivocal "no." The interrogator goes onto other subjects. *You* are aware that the company did in fact receive a CID from the government two years before Smith joined the company, because you were involved in responding to it. Indeed, your assistance to the company in dealing with the CID had been

successful, because the investigation was terminated and was never made public.

Rule 3.3 hones in on the conflict between a lawyer's obligation to her client – both her obligation of zealous advocacy and her obligation of confidentiality – and the lawyer's obligation to the legal system, particularly her duty of honesty and candor to the court. Rule 3.3 requires a lawyer to "take remedial measures" when false material evidence has been given by or on behalf of her client. Paragraph 1 of the official Comments to the Rule makes it clear that this obligation applies to deposition testimony. If Smith had answered "not that I know of," instead of simply "no," there would have been no problem, because the answer would be presumptively truthful; but alas, he said what he said.

How should you approach this problem? First, if Smith was really not aware of the CID, his innocent incorrect answer to the question may not have been "false" as the word is used in the Rule. It was the opposing lawyer's job to ask follow-up questions, beginning with how did Smith know that the company had never received a CID? An argument might also be made that the successful compliance with the CID, which terminated that investigation, makes the evidence of it not "material" as that word is used in the rules. It is only with respect to false "material evidence" that a lawyer is obliged by Rule 3.3(a)(3) to take remedial measures.

The ethical lawyer must be prepared to . . . do the difficult but right thing.

The above example suggests the subtleties involved in interpreting and applying this Rule. Sometimes, the situation will be clear-cut. For example, a lawyer's client may testify that he was at a particular meeting and heard his adversary make certain admissions, when the lawyer knows for a fact that the client was not at that meeting. Then the lawyer will be faced with a clear obligation to remedy false testimony, and it will be impossible to wiggle out of that obligation by analyzing and parsing the Rules. Note that Rule 1.6, prohibiting a lawyer from revealing client confidences, is no help in mitigating Rule 3.3's obligations. Rule 3.3(c) expressly trumps Rule 1.6, stating that the obligations of Rule 3.3 "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." The ethical lawyer must be prepared to step up to the plate in those circumstances and do the difficult but right thing (while structuring his remedial measures in a way that will least harm the client).

A frequently cited case dealing with false testimony is *Bronston v. United States*[14], decided in 1973. The defendant Bronston was convicted of perjury for giving a misleading answer at a deposition. The U.S. Supreme Court reversed that conviction because Bronston had answered *literally* truthfully, although the clear implication of his answer was false. The Court based its holding on the fact that Bronston's answer had not only been literally accurate, but it was nonresponsive to the question posed. Had the government's lawyer probed that non-responsive answer, the majority reasoned, it could have discovered and addressed its misleading implication.

The *ethical*, as opposed to legal issues raised by the *Bronston* case were not disposed of by the Supreme Court's holding that Bronston's testimony was not perjurious. Even if it was not perjury as a matter of criminal law, could it still have been "false" as that word is used in Rule 3.3? If so, were Bronston's lawyers somehow obligated to call the misleading nature of that testimony to the attention of the prosecutors or the court? These questions circle back to the fundamentals of what it means to be a lawyer: the duty of loyalty and zealous advocacy owed to clients.

The extreme articulation of this bedrock principle is attributed to Henry Brougham, at one time Lord Chancellor of England: "An advocate in the discharge of his duty knows but one person in all the world, and that person is his client…."[15] Brougham's flowery and extreme statement has been criticized by commentators. Certainly newspaper columnists and reporters strike a responsive chord in their lay readers when they pillory lawyers for putting their clients above all else. At the very least, however, a client-centered frame of mind should cause lawyers to resolve doubts and close questions in favor of their clients. Indeed, Comment 8 to Rule 3.3, added pursuant to the Ethics 2000 recommendations, expressly declares that "a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client." That is a far cry from suborning or assisting obvious perjury or fraud[16], but it is more than a tiebreaker in close questions. It should be kept in mind that Rules 3.3(a) and (b) come into play only when the lawyer *knows* that her client or a witness on behalf of her client has given false testimony. A higher degree of certainty is required before a lawyer "*knows,"* as opposed to only "reasonably believes," that testimony is false. These different levels of knowing are at the center of on-going debates about the Sarbanes-Oxley rules as well as proposals to amend Model Rule 1.13 relating to the representation of corporations.

Conclusion

This discussion of particular problems in litigation has focused on the Model Rules of Professional Conduct. But the Rules do not tell the whole story about lawyer ethics. They are just the lowest common denominator. It may be enough for a lawyer or law firm to keep out of trouble by obeying the Rules, but ethical lawyers should also aspire to respect the spirit and aspirational goals of the Rules.

Being a good lawyer is hard work – not just because it takes sweat and long hours to get the job done – lots of jobs require that – but because the questions and issues raised by a lawyer's ethical obligations are sometimes so difficult that they tax not only your brain but other parts of you as well:

- Your nose – the ubiquitous smell test
- Your gut – that queasy feeling at the bottom of your

stomach when you have to choose between two imperfect answers, and

- Your soul – your loyalty and diligent advocacy for clients, and your commitment to truth, justice and fairness.

Sometimes there will be no clear "right" course of action, and the clash of competing values and competing obligations will require a choice between two goods or two evils. Occasionally loyalty to a client will conflict with the obligation to truth and honesty. But these rocky shoals will be easier to navigate if you have developed reliable ethical instincts, sound ethical intuition, and perceptive ethical insight. The difficulty of sorting out right from wrong in nuanced, ambiguous situations should not deter us from trying to do so, nor should it force us into a cynical relativism or blind us to clear cases of right and wrong.

A little over ten years ago, the British novelist John Le Carre gave a speech before the Boston Bar Association. He opened by declaring that: "Lawyers know that truth is a kind of seeming, a subtle blend of what is demonstrable and what cannot be disproved." His relativistic pronouncement haunted and disturbed me, until I found a rejoinder in a remark attributed to another English writer who preceded Le Carre by a century. "In a fog", observed G.K. Chesterton, "to recognize the edges of the cliff is liberty and vagueness is tyranny." The Rules and reasoning that students and teachers of legal ethics have developed over years of thinking about legal ethics can help form the discernable edges of the cliffs that sometimes get lost in the fog of litigation.

Endnotes

1. The Shakespeare, Swift and Frost excerpts are collected in Professor Stephen Gillers's casebook, THE REGULATION OF LAWYERS (Aspen Press, 6th edition, 2002).
2. 190 F.R.D. 287 (D. Mass.).
3. The MBA seemed unmoved by the sentence in the Comment to Rule 1.3 (the same sentence is in the Massachusetts Rules as in the Model Rules) that declares that "a lawyer is not bound to press for every advantage that might be realized for a client."
4. Opinion No. 172, citing the Maine Supreme Court case of Corey v. Norman, Hanson and DeTroy, 742 A.2d 933 (Me. 1999).
5. State Bar Ass'n Comm. on Ethics, Op. 2000-4.
6. Elkton Care Carter Associates v. Quality Care Management, Inc., 805 A.2d 1177 (Md. App. 2002).
7. The court in *Elkton* did not even mention MD. State Bar Ass'n Comm. on Ethics Op. 2000-4.
8. 197 F.R.D. 8 (D. Mass.).
9. VLT Inc. and Vicor Corporation v. Lucent Technologies, Inc. et al., C.A. No. 00-11049-PBS, 2003 U.S. District LEXIS 723 (D. Mass., Jan. 21, 2003).
10. 764 N.E.2d 825 (Mass. 2002).
11. Almost a year following its decision in *Messing* the Massachusetts Supreme Judicial Court issued its decision in the case of *Patriarca v. Center for Living and Working, Inc.*, 778 N.E.2d 877 (Mass. 2002), a case originally slated to be argued on the same day as *Messing* but postponed because of a bankruptcy stay. *Patriarca* had been expected to address the former employee issue, but the court declined to do so because it concluded that the former employee in question could have been contacted by opposing counsel even if she had been a current employee.
12. See Fed. R. Civ. P. and Mass. R. Civ. P. regarding designation by an organizational party of persons to testify on its behalf in response to notice of deposition.
13. Model Rules 1.7, 1.8(f) and 1.13(d) and (e) are particularly problematic in this regard, and their rigorous application might well curtail such dual representation in all but a handful of cases.
14. 409 U.S. 352.
15. 2 Trial of Queen Caroline 8 (J. Nightingale edition, 1921).
16. To be sure, the just quoted clause from Comment 8 to Rule 3.3 is followed in the very same sentence by the clause "the lawyer cannot ignore an obvious falsehood."

CENTER UPDATE

2003 Gambrell Winners Announced

The ABA Standing Committee on Professionalism has named Campbell University Norman Adrian Wiggins School of Law, the Houston Bar Association and the Nelson Mullins Riley & Scarborough Center of Professionalism at the University of South Carolina School of Law as winners of the 2003 E. Smythe Gambrell Professionalism Awards.

During the fall and spring semesters of Campbell's First-Year *Professionalism Development Series: Talking with Lawyers About Professionalism* students meet regularly with lawyers, clients and law professors to discuss lawyers' roles as fiduciaries, advocates, interviewers, counselors and negotiators. Between semesters, students take part in a three-day interactive simulation exercise to explore ethical and professionalism issues that arise in the context of a marital dissolution.

The Houston Bar's Professionalism Program, formalized in 1989, includes: Professionalism Day, "All Ethics" CLE programs, mentoring and clerkship programs and Bench Bar Conferences. In addition, each issue of the *The Houston Lawyer* includes "Profiles in Professionalism" featuring distinguished members of the legal profession, and each year one of the journal's six issues is devoted to professionalism and ethics.

The Nelson Mullins Riley & Scarborough Center on Professionalism was established in 1999. The Center's initiatives are largely aimed at disseminating information and sharing ideas that will lead students, lawyers, judges and academics to think more frequently and carefully about professionalism issues. The Center has created a professionalism website, organized national conferences on professionalism, published professionalism pamphlets for first-year and graduating law students, presented continuing legal education programs, and sponsored a professionalism essay contest, a professionalism award and law review symposia on professionalism.