Lawyers, Legal Ethics, and Real Ethics

J. Charles Mokriski

Ethics casebooks can be daunting for budding lawyers. Not only do they present ethics rules and codes of excruciating, almost Talmudic complexity. They also contain court decisions in which lawyers who conscientiously tried to follow those rules, and serve the interests of clients, the cause of justice, and the demands of honesty as faithfully as they could, ran into trouble anyway. In some cases, they were forced to quit or be fired for standing up for principle and trying to do the right thing, Such cases throw into bold relief the tensions sometimes faced by real world lawyers. All lawyers have to deal with the occasional tension or conflict between their obligations of loyalty, confidentiality and zealous advocacy for clients and their obligations of honesty and candor to the court. But many lawyers—unless they hang out their shingle as a solo practitioner, which has its own daunting challenges—may face tensions and conflicts at different levels as well.

Inevitable Ethical Tensions of Law Practice

Lawyers in private practice have to balance their fiduciary obligations to clients with their duty of loyalty to their law firm employers. In-house counsel at a corporation must navigate the shoals of different, sometimes sharply diverging agendas of business unit clients, immediate lawyer supervisors, and corporate top management. Just reading the text and comments of ABA Model Rule 1.13 can unnerve a conscientious lawyer. A lawyer going to work for a governmental agency or a non-profit organization shares the Rule 1.13 concerns of in-house lawyers complicated by the political realities that affect governmental agencies and the eleemosynary considerations introduced by the charitable and educational missions of non-profit organizations.

Lawyers must cope with these overlapping and cascading obligations in the context of having to hold onto their jobs and earn a living and provide for their families. This reality weighs heavily when a lawyer is faced with the ethical and moral obligation to contest or resist wrongdoing by clients or colleagues. Whether it is a partner who doesn't want to rock the boat with an important client about to perjure himself, or a general counsel who doesn't want to challenge legally questionable decisions by the CEO or CFO, or by a law firm supervisor who is padding a bill, milking a file, or spending client money profligately, such situations force lawyers to probe the depths of their ethical core.

I customarily begin my professional responsibility course with the case of *People v. Casey*[1], in which a young Colorado lawyer, under the eyes of and possibly at the instigation of a firm partner, perpetuated a fraud on the court. Asked by the partner to represent the daughter of an important firm client, the lawyer learned that the young woman, arrested for underage drinking and disorderly conduct, had presented the police with the driver's license of a friend and was booked under that false identity. Instead of correcting the record with the court, Casey perpetuated the masquerade all the way through the conclusion of the matter. It finally caught up with him when the person whose identity was misused reported the situation to the court.

In the disciplinary proceeding that ensued, Casey argued that his conduct was justified by his obligations of confidentiality and he acted as he did as a zealous advocate, and that, in any event, Rule 5.2 should exonerate or at least mitigate his improper conduct. The Colorado Supreme Court made short work of both arguments. Zealous advocacy cannot justify a fraud on the court, and not only did Casey fail to offer sufficient evidence that his supervisory lawyer had instructed him to refrain from disclosing his client's real name to the court, but even had the partner done so, Rule 5.2(b) would not have protected Casey, because it only applies when a subordinate lawyer "acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." Perpetuating the masquerade before the court was not such a reasonable resolution. Not even close.[2]

Later in the course we consider the hapless in-house counsel in *Balla v. Gambro*[3], fired by his corporate employer for reporting company wrongdoing that endangered lives. The Illinois Supreme Court refused to grant him a remedy for retaliatory discharge, based in part on the rationale that he had no choice whether to follow his ethical obligations and needed no remedy to do so. Toward the end of the course, I bring to the class's attention the plight of a young, idealistic government lawyer who acted courageously in the face of ethical violations, cover-up, and discovery abuse by the U.S. Department of Justice. She not only lost her job but also was persecuted and hounded from her next job with a private law firm.[4]

The average lawyer may never be called upon to deal with situations quite like the ones described above. Inevitably, however, lawyers are called upon many times in less momentous matters, to do the right thing:

- to persuade a client or witness inclined to alter or suppress his recollection to be honest in his testimony
- to resist a client's desire to bully an adversary with tactics on the fringe of propriety
- to deal with unrepresented persons fairly and in full compliance with Rule 4.3
- to turn down or seek assistance in cases in areas where they have no experience or that otherwise exceed their competence
- to spend their clients' and firms' money as carefully—more carefully—than they would their own
- to be scrupulously honest in their timekeeping habits

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And so on and so forth. Above all, lawyers would do well to heed the injunction of one of my law professors of 40 years ago: "Never sell your soul for a buck."

Lawyers can make mistakes—they can blow it big time. But they can recognize and come to grips with their mistakes, acknowledge them, and move on. If Attorney Gladwell in *Seltzer v. Morton, Gibson Dunn & Crutcher and Gladwell*[5] had stepped back, taken a deep breath, and counseled his client to back off from continuing to assert a meritless claim against an art critic, rather than forging ahead, using abusive and outrageous tactics, he and his law firm would not have suffered the $20 million verdict (reduced to a *mere* $11 million by the trial judge), and found himself and his elite firm rebuked for "legal thuggery" by the Montana Supreme Court. If the once respected and respectable respondent lawyers in

> Real ethics is doing the right thing when no one is watching and no one will find out.

the infamous Massachusetts disciplinary case of *In re Crossen*[6], who tried to bully a law clerk into giving an affidavit accusing the Superior Court judge for whom he worked of bias, had instead abandoned the effort after a second sham interview with the clerk turned up no evidence of bias, the matter would have ended quietly and without their disgrace and disbarment. Instead, their conduct became a celebrated, soap opera like saga of arrogance, deceit and convoluted machinations capped by extortion when they resorted to threatening the clerk with exposure of embarrassing but irrelevant facts about his bar admission. The protestations of the lawyers involved that they were motivated by a warm zeal for their client did not play any better before the Supreme Judicial Court than it did before the Chair of the Massachusetts Board of Bar Overseers, who sat as a Special Hearing Officer in a marathon disciplinary complaint and handed down a Report and Findings of epic length, which was adopted almost in its entirety by the Board[7] and affirmed by the SJC.

Ethical Entropy

I see the watering down of ethical and moral norms, the "go along, get along", "don't rock the boat" attitude that too often prevails in today's world, as ethical *entropy*. A one word definition of entropy is "disorder" or "randomness." The word comes from physics and is usually identified with the Second Law of Thermodynamics. As I was evolving my concept of ethical entropy, a science-savvy law student explained to me that in an isolated physical system, tendency toward disorder is inevitable. He explained that the neatly organized water molecules in an ice cube will disperse into a random liquid state if left alone at room temperature. But, he explained, systems can overcome entropy if they are not isolated—not left on their own—but are instead subjected to energy. Ice in a freezer, despite its tendency to melt, does not melt because the electricity powered refrigerator coils cool the interior of the freezer.

Ethical entropy can be described as what happens when too many people, including lawyers, look the other way or keep their heads down, thereby disregarding, tolerating, and enabling ethical misconduct. When too many people opt to go with the flow and ignore ethical lapses, ethical entropy prevails. But, lawyers and others who put in the intellectual effort to identify ethical imperatives and have the intestinal fortitude to follow them and encourage others to do so, can inject ethical energy into the system and arrest the tendency towards disorder. Maintaining professional ethics is an active process.

This concept of ethical entropy, and the need for vigorous, principled action essential to forestall its ascendancy, can be discerned in the traditional formulation our courts have given to the kind of activity that violates Massachusetts General Laws chapter 93A. Chapter 93A prohibits unfair and deceptive trade practices and entitles victims of such practices to recover treble damages and attorneys' fees. Finding a violation of 93A requires, one court said, identifying conduct with "an extortionate quality that gives it the rancid flavor of unfairness"[8], or action that, another court declared "attains a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce."[9] Rejecting that entropic view, Appeals Court's Judge Frederick Brown declared that "[t]he notion that the law is simply a mirror of the manners and mores of the marketplace should not be our lodestar." Instead, he continued, Chapter 93A establishes "in general, for businesses as well as for consumers, a path of conduct higher than that trod by the crowd in the past."[10] Judge Brown's clarion call to resist ethical entropy and a regime in which courts would find unfair and deceptive practices only at the margins, received ringing and unequivocal affirmation by Justice Herbert Wilkins, writing for the Massachusetts Supreme Judicial Court in upholding a trial court's ruling that a defendant had violated Chapter 93A. Justice Wilkins expressly rejected the view that only objectionable conduct involving "rascality" or a "rancid flavor of unfairness" could be found to constitute unfair and deceptive conduct under the statute.[11]

I'm a parent, and from my two youngest I often hear the argument—an argument grounded in ethical entropy—"Dad, everyone else does it." Lawyers may hear this expression or close derivatives from clients, colleagues, corporate officers, highly ranked public officials, and respected corporate leaders. It's no more valid when intoned by a partner in a law firm than when whined by an adolescent. And it constitutes a surrender to ethical entropy.

Real Ethics

Following the rules, acting properly, morally, and ethically when someone is looking or likely to find out what you are doing, is fine; it is prudent. But it isn't real ethics—it is

expediency. Real ethics—professional and personal—is doing the right thing when no one is watching and no one will find out whether you acted badly or with integrity, fairness and morality. Real ethics often involves acting contrary to your personal self-interest. It involves abjuring self-serving expediency in favor of taking the high road. Real ethics does not look for approbation of others to validate it. It is its own reward.

An example can be found in the wildly popular musical based on a novel by Victor Hugo, *Les Miserables*. Jean Valjean, despite his new and respectable life as mayor of the town of Montreuil sur Mer, fears he may be recognized by Inspector Javert as an ex-convict who broke parole. Javert's suspicion is aroused by Valjean's display of incredible strength in rescuing a man trapped under a heavy wagon. Then, as suddenly as he is put in jeopardy, Valjean is offered a way out. Javert learns that another man has been arrested and identified as Jean Valjean, convict number 24601, whom he has hunted relentlessly for years. Javert is thrown off the trail by the mistaken identification. If Jean Valjean remains silent, his pursuit by Javert will come to an end. Valjean's moving soliloquy ensues:

> They think that man is me. They knew him at a glance. That stranger he is found. This man could be my chance. Why should I save his hide? Why should I right this wrong, when I have come so far and struggled for so long? If I speak, I am condemned. If I stay silent I am damned….
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> Who am I? Can I conceal myself for evermore, pretend I'm not the man I was before. And must my name until I die be no more than an alibi? Must I lie? How can I ever face my fellow man? How can I face myself again. Who am I? I'm Jean Valjean….I'm 2 4 6 0 1.

Endnotes

1. 948 P. 2d 1014 (Col. 1997).
2. Because of concerns that junior lawyers may be led astray by an overly sanguine view of the protection offered by Rule 5.2(b), Connecticut deleted the subsection from its rules in 2006. See Daniels v. Alander, 844 A.2d 182 (Conn. 2004), a chilling case that could unhinge the most robust associate.
3. 584 N.E. 2d 104 (Ill. 1991).
4. *Lost in Jihad*, The New Yorker, March 10, 2003.
5. 154 P. 3d 561 (Mont. 2007).
6. 880 N.E. 2d 352 (Mass. 2008).
7. The author of this piece sat as a member of the Mass. Board of Bar Overseers when this matter was decided.
8. Atkinson v. Rosenthal, 598 N.E.2d 666, 670 (Mass. App. Ct. 1992).
9. Levings v. Forbes & Wallace Inc., 396 N.E.2d 149, 153 (Mass. App. 1979).
10. Picciuto v. Dwyer, 586 N.E.2d 38, 40 (Mass. App. Ct. 1992).
11. Massachusetts Employees Insurance Exchange v. Propac-Mass, Inc. 648 N.E.2d 435, 438 (Mass. 1995) quoting Levings v. Forbes & Wallace, Inc., *supra* note 9 and Atkinson v. Rosenthal, *supra* note 8.

A Short History of Conflicts of Interest. The Future?

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U.S. Dist. LEXIS 17686, at *3 (W.D. Mich. Mar. 1, 2010).
89. Model Rules of Prof'l Conduct R. 1.11 & 1.12 (2009).
90. *Id.* R. 1.18(d)(2).
91. Wyeth v. Abbott Labs., 692 F. Supp. 2d 453, at *21 (D.N.J. Feb. 8, 2010); Air Prods. & Chems., Inc. v. Airgas, Inc., No. 5249-CC, 2010 Del. Ch. LEXIS 35, at *10 (Del. Ch. Mar. 5, 2010).
92. 522 F. Supp. 1179 (S.D.N.Y. 1981).
93. *Id*. at 1181 (footnote omitted).
94. No. 600340/2007, 2007 N.Y. Misc. LEXIS 6543 (N.Y. Misc. Sept. 27, 2007).
95. *Id*. at *1.
96. *Id*.
97. *Id*. at *2.
98. *Id*.
99. *Id*. at *3.
100. Model Rules of Prof'l Conduct R. 1.7 cmt. 22 (2009).
101. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 05-436 (2005).
102. *See, e.g.*, Unified Sewerage Agency of Washington County, Or. v. Jelco Corp., 646 F.2d 1339 (9th Cir. 1981); Zador Corp. v. Kwan, 37 Cal. Rptr. 2d 754 (Cal. Ct. App. 1995).
103. 60 A.D.3d 506, 875 N.Y.S.2d 466 (N.Y.A.D. 1 Dept., 2009).
104. *Id*.
105. No. 2006CV1110 (Super. Ct. Fulton Co., Ga. Nov. 8, 2006).
106. *Id*. at 12-13.
107. *Id*. at 11.
108. McKesson Info. Solutions, Inc. v. Duane Morris LLP, No. 2006CV1110, at 8 (Super. Ct. Fulton Co., Ga. Mar. 6, 2007).
109. No. 07-5819 (SDW), 2008 U.S. Dist. LEXIS 58735 (D.N.J. July 29, 2008).
110. *Id*. at *1.
111. *Id*. at *2.
112. *Id*. at *1.
113. *Id*. at **3-5.
114. *Id*. at *31.
115. *Id*. at *22.
116. *Id*. at *23.
117. Rotunda & Dzienkowski, *supra* note 44, § 1.9-1(b)(3), at 475-480.
118. 182 F.3d 578 (7th Cir. 1999).
119. *Id*. at 581.
120. *Id*. at 582-583.
121. *d*. at 584.
122. *Id*. at 584-585.
123. 565 N.E.2d 1319 (Ill. 1990).
124. *Id*. at 1320.
125. *Id*. at 1321.
126. *Id*. at 1321-1322.
127. *Id*. at 1322.
128. *Id*.
129. People v. Scharlau, 565 N.E.2d 1319 (Ill. 1990).
130. Wright v. DeArmond, 977 F.2d 339 (7th Cir. 1992).
131. *Id*. at 349-350.