

ETHICS ACCELERATION

***THE CHALLENGE OF
KEEPING PACE WITH
PROFESSIONAL ETHICS
IN TIMES OF RAPID CHANGE***

An Interactive Legal Ethics Seminar
Developed by
Jack Marshall & ProEthics, Ltd.
For
The U.S. District Court - Puerto Rico
June 27, 2014 - San Juan, Puerto Rico

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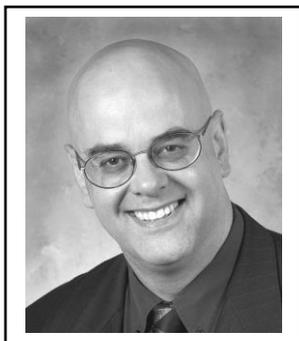
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TODAY'S SCHEDULE

1. Introduction: Civility, Ethical Culture and Ethics Alarms
2. Warm-Up Hypothetical: “Mirage”
3. Systems, Tools, and Impediments to Ethical Conduct
 - The Virtuous Lawyer’s Ethical Systems
 - Pre-Unethical Conditions
 - Rationalizations for Unethical Conduct
4. Hypothetical: “*Sonny Boy*”
5. Accelerating Developments
6. Hypothetical: “*The Sounds of Silence*”
7. Hypothetical: “*The Limits of Loyalty*”
8. Hypothetical: “*Founder*”
9. Dr. Z’s Laws: Staying Ethical When Everything Is Moving Too Fast
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11. Hypothetical: “*The Unpopular Client*”
12. Tech Acceleration: “*Speed Test*”
13. Dual Hypothetical: “*Pressure Points*”
 - “*Unintended Consequences*”
 - “*The Case of the Zealous, Careless, Dishonest, Ethical, Unethical Lawyer*”
14. Hypothetical: “*Flexibility*”
15. Concluding Remarks and Discussion



YOUR FACILITATOR
JACK MARSHALL, ESQ.
PRESIDENT, PROETHICS, LTD.

Jack Marshall is the president and founder of ProEthics, Ltd., and the primary writer and editor of the ethics commentary blog, Ethics Alarms (www.ethicsalarms.com). He has taken the experience gleaned from a diverse career in law, public policy, academia and theater and applied it to the field of legal, business and organizational ethics. He has developed more than 150 programs for bar associations, law firms, government agencies, Fortune 500 companies, and non-profit organizations. He has worked to develop rules of professional responsibility for attorneys in emerging African democracies through the International Bar Association, and for the new judiciary of the Republic of Mongolia through USAID. With Pulitzer Prize-winning historian Edward Larson, Marshall compiled and edited *The Essential Words and Writing of Clarence Darrow* (Random House, 2007), and he was recently named to the “Top 100 Thought Leaders in Trustworthy Business” (www.trustacrossamerica.com).

A member of the Massachusetts and D.C. Bars, Mr. Marshall has been on the adjunct faculty of the Washington College of Law at the American University in Washington, DC. Marshall is a graduate of Harvard College and Georgetown University Law Center. His articles and essays on topics ranging from leadership and ethics to popular culture have appeared in numerous national and regional publications, and he has appeared on a variety of talk shows to discuss ethics and public policy, from “The O’Reilly Factor” to National Public Radio’s “Tell Me More.”

He is also an award-winning stage director, and is the artistic director of The American Century Theater, a professional non-profit theater company dedicated to producing classic American plays. He lives in Alexandria, Virginia with his wife and business partner, Grace Marshall, their son Grant, and their Jack Russell Terrier, Rugby. Like many who are interested in the nature of good, evil, justice, and chaos, Marshall is a lifetime fan of the Boston Red Sox.

1. INTRODUCTION

CIVILITY, ETHICAL CULTURE AND ETHICS ALARMS

A. Civility and Rule 8.4 d.

B. The importance of the legal ethics culture.

C. Setting the Ethics Alarms.

- The Darley-Batson Experiment
- Ben Franklin's two questions

2. WARM-UP HYPOTHETICAL

"MIRAGE"

Mirage Realty retains your firm to assist Mirage redevelop property it owns in the lovely city of Bliss, with a new hotel, and luxury condominiums.

Mirage is eager that the lead firm attorney be partner Reed Smith, who is an expert in civic matters and a well-respected, influential leader in Bliss. Smith was president of the Bliss Homeowners Association, and had appeared before the City Council many times to address other development projects in the area. You know, though Mirage may not, that his wife is also a prominent activist in the city, and has organized many successful protests against what she sees as over-development and outside threats to the city's charm, leisurely pace and beauty.

The project requires the approval of the Bliss City Council. Mirage retains your firm to render advice, strategic planning and assistance in the formulation of the project, and to coordinate with the city officials from whom Mirage seeks support. Smith has overall responsibility for the matter, for Mirage believes his statements and perceived opinions on city development matters have significant influence on City Council members and the local citizens.

For more than a year, your firm, though mainly Smith, is deeply involved in the formulation of the plan for Mirage's development of the property, its overall strategy to secure all necessary approvals from the city and its efforts to obtain public support for the project, including representing Mirage in dealings with Bliss officials, and the Planning Commission. The Council and the city's Planning Commission review the project, hold hearings, and certify the development, introducing an ordinance approving an agreement between Bliss and Mirage. Then Smith suddenly asks to leave the representation for unstated personal reasons.

A political action committee is formed by Bliss residents opposing the measure, and Smith, no longer involved in the representation, addresses the City Council, actively opposing various political maneuvers designed to

circumvent the committee's efforts to put the proposed ordinance on a ballot referendum. Next, Smith and his wife solicit signatures on the referendum petition, going to their neighbors' homes to express concern about the project's negative effects on the community, and indicating that they would sign the referendum petition and urging the neighbor to do the same.

QUESTION 1: *Was there anything unethical about Smith accepting the representation initially?*

1. No. Lawyers don't have to agree with their clients' objectives.
2. Yes. He had a personal conflict, and it needed to be waived by the client.
3. No. The client waived that "conflict" by hiring him.
4. For anyone but a lawyer, yes: it's disloyal.
5. He should have disclosed his wife's opposition to such projects.

QUESTION 2: *Is Smith's conduct after quitting the representation unethical?*

1. Yes. He switched sides, which is a conflict of interest.
2. As long as he didn't use any confidences, no.
3. Maybe not, but I sure wouldn't do this.
4. Yes, he's attacking his own work.
5. The Rules don't apply to this scenario.

ABA Model Rules of Professional Conduct: 1.2, 1.3, 1.4, 1.6, 1.7, 1.9, 1.10, 8.4

REFERENCE

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK: FORMAL OPINION 1997~3

***TOPIC:** Lawyer's right to engage in activity or express a personal viewpoint which is not in accordance with a client's interests.*

QUESTION:

May a lawyer publicly engage in activity or take a position (for example, as a member of a bar association) that differs from a view that would best serve the interests of one or more of his or her clients?

OPINION:

... We take this opportunity to reaffirm that a lawyer may resist a client's efforts to curb expression of his or her personal views on public issues, assuming the lawyer does not reveal a confidence or take a position that would adversely affect the lawyer's specific representation of a client in a direct way.

*"The leaders of law in America, historically, have been men who could say no, who preserved their autonomy, who served their clients with their hearts, their skills, their advice, their advocacy and their friendship - but not with their souls or with their citizenship." Sol M. Linowitz, *The Betrayed Profession* 227 (1994). As the President of the American Law Institute, Charles Alan Wright, stated, "our end product is the honest conviction of disinterested people about what the law is and should be. Our only sure protection against those who would seek to sway us to serve particular interests is the independence and objectivity of our members." *Id.* at 3. Indeed the Council of the American Law Institute recently promulgated a new Council Rule reaffirming such independence:*

*To maintain the Institute's reputation for thoughtful, disinterested analysis of legal issues, members are expected to leave client interests at the door. Members should speak and vote on the basis of their personal and professional convictions and experience without regard to client interest or self-interest. It is improper under Institute principles to represent a client in Institute proceedings (ALI Council Rule 9.04, quoted in *The President's Letter, The ALI Reporter* (American Law Institute, Philadelphia, PA), Winter 1997 at 1.)*

As these respected commentators make clear, when an attorney becomes a member of the Bar, he or she is not thereby stripped of a personal viewpoint or the freedom of expression. Our legal system has long recognized that a lawyer is not required to adopt a client's viewpoint in all professional and personal activities outside the scope of the lawyer's representation of the client.

Lawyers are entitled, and in fact encouraged, to take part in the resolution of complex public questions or lobbying for or against legislation concerning the legal system. New York's Ethical Considerations make this clear:

By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients.

*EC 8-1; see also Restatement (Third) of the Law Governing Lawyers § 206, cmt. e (Proposed Final Draft No. 1 1996) ("Restatement") ("Resolution of many public questions is benefited when independent legal minds are brought to bear on them."). Finally, a lawyer has a First Amendment right to freedom of expression. See *id.*; *Johnston v. Koppes*, 850 F.2d 594, 596-97 (9th Cir. 1988) ("[L]oyalty to a client does not require extinguishment of a lawyer's deepest convictions; and there are occasions where exercise of these convictions . . . is protected by the Constitution.").*

It follows that a lawyer does not need to obtain a client's permission or consent to engage in public discourse about an issue which differs from the view of a client. In general a lawyer may publicly take personal positions on controversial issues without regard to whether the positions are consistent with those of some or all of the lawyer's clients. Consent of the lawyer's clients is not required. Lawyers usually represent many clients, and professional detachment is one of the qualities a lawyer brings to each client. (Restatement § 206, cmt. e.)

At the same time, a lawyer remains obliged to comply with the relevant provisions of the Code of Professional Responsibility concerning past and pending engagements. Therefore a lawyer may not, in the course of discussing his or her view on a public issue, misuse or reveal a client confidence. DR 4-101(B). Nor may a lawyer publicly take a policy position adverse to a current client if taking that stance would materially and adversely affect the lawyer's representation of the client in a pending matter. n1 DR 5-101(A) provides that a lawyer shall not accept employment in the absence of informed consent if the exercise of professional judgment will or reasonably may be affected by personal, as well as financial or business, interests

[See EC 5-1 ("Neither the lawyer's personal interest, the interests of other clients, nor desires of third persons should be permitted to dilute the lawyer's loyalty to the client."); EC 5-2 ("A lawyer should not accept proffered employment if the lawyer's personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client."); Restatement § 206, cmt. e.]

For example, it is difficult to see how a lawyer could speak publicly on one side of an issue knowing that he or she must personally argue the opposing side of that issue in front of a tribunal in a pending case. The possibility that a lawyer's publicly

proclaimed personal opinion would become known to the tribunal, undermining his or her credibility and thereby jeopardizing the client representation, does warrant some curtailment on public expression of a personal viewpoint to preserve the integrity of a lawyer's advocacy. Of course, the question of whether zealous advocacy may be compromised can arise in numerous situations. A lawyer must exercise sound judgment in determining whether publicly and openly espousing his or her personal opinion would be directly deleterious to a representation of a particular client. n2 In certain cases, while client consent may not be required, it may nevertheless be desirable to give the client an opportunity to terminate the representation before the lawyer openly takes an opposing personal position on the same subject...

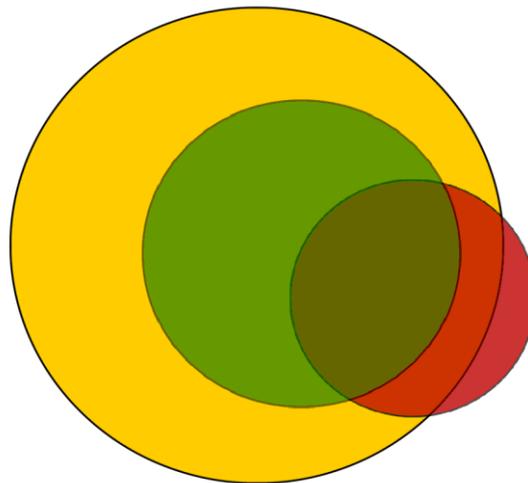
*... the interests of the legal system are best served by encouraging lawyers to speak out about their personal convictions, even if they are not always in harmony with the interest of a client. "The good lawyer should also be able to tell private from public duty. He should be able to represent the corporation which hires him and still advocate the public interest as he sees it, either in his voting or in his private conversations or in his community leadership. He must have a sense of the right, and confidence to act on it." Lee E. Hejmanowski, *An Ethical Treatment of Attorneys' Personal Conflicts of Interest*, 66 S. Cal. L. Rev. 881, 895 (1993) (quoting John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 Stan. L. Rev. 683, 709 (1965))...*

CONCLUSION

As long as client confidences and zealous advocacy in a pending matter are not compromised, a lawyer is entitled to participate in bar association activities and speak publicly on issues which may be contrary to the interest of a former or current client without obtaining client consent.

3. SYSTEMS, TOOLS AND IMPEDIMENTS TO ETHICAL CONDUCT

A. THE VIRTUOUS ATTORNEY'S ETHICAL SYSTEMS



YELLOW: The Big Circle

- Society, family, peer group, history, experience, literature, religion, education, popular attitudes, role models, opinion leaders
- Basic ethical systems: Reciprocity, Absolutism, Utilitarianism

RED: The Compliance Circle -- Laws, regulations, professional codes and rules.

GREEN: The Core Circle -- Conscience; personal ethical boundaries and priorities.

B. PRE-UNETHICAL CONDITIONS

1. Relying on consent to alleviate conflicts.
(ABA Model Rules 1.2, 1.3, 1.7, 1.9, 1.10, 1.8, 8.4)

2. Getting too close to clients.
(ABA Model Rules 1.2, 1.3, 1.7, 1.8, 8.4)

3. Failing to properly train non-lawyer assistants.
(ABA Model Rules 1.1, 5.3, 8.4)

4. Getting creative.
(ABA Model Rules 1.1, 1.2, 1.3, 3.5, 8.4)

5. Being rushed, pressured, or distracted.
(ABA Model Rules 1.1, 1.2, 1.4, 1.14, 2.1, 8.4)

6. Forgetting you are a professional.
(ABA Model Rules 1.2, 1.3, 1.7, 5.1, 5.2, 8.4)

7. Being possessed.
(ABA Model Rules 1.1, 1.4, 1.5, 1.6, 1.7, 1.8, 5.5, 8.4)

C. RATIONALIZATIONS FOR UNETHICAL CONDUCT

The Ten Most Tempting Rationalizations For Lawyers

- *Everybody Does It.*
- *Ethics Balancing*
- *“Don’t sweat the small stuff.”*
- *The Unethical Tree In The Forest*
- *“Tit for Tat”*
- *The Star Syndrome*
- *The Saint’s Excuse*
- *Consequentialism*
- *“He/she would have done the same thing.”*
- *“It’s not the worst thing.”*

4. HYPOTHETICAL **"SONNY BOY"**

Infuriated by his mother's cruelty to his father, attorney Midas Touch has decided to represent his father in the divorce action initiated by her. Midas had spent many hours listening to his mother's complaints as she sought his advice, and has also observed her outrageous treatment of his father in recent months. She challenges the representation on ethical grounds.

QUESTION: *Should his representation be barred?*

1. Yes. There is a conflict of interest.
2. Yes. She has shared confidential information with him.
3. Yes. He may have to be a witness.
4. No. No ethics rules are violated by the representation.
5. It may be permitted by the Rules, but it's still unethical.

ABA Model Rules of Professional Conduct:
1.2, 1.3, 1.4, 1.6, 1.7, 1.8, 1.9, 3.7, 8.4

5. ACCELERATING DEVELOPMENTS

- Texas on non-lawyer firm titles
- California's proposed negotiation guidelines
- The political attack on the essence of lawyering
- The Sanctionably Sophomoric prosecutor
- Gibson Dunn's "Catch 22"
- "Go ahead and disbar me."
- Law firms and compliance
- "Captain Justice"

6. HYPOTHETICAL **"THE SOUNDS OF SILENCE"**

Hedda Cabbage hasn't heard back from opposing counsel regarding a settlement offer, and has reason to suspect that it hasn't been communicated by the attorney, Bert Sleazy, to his client. When questioned, Sleazy indignantly insists that the client rejected the offer. Hedda's client suggests that he contact the opposing party and confirm if this is true. Hedda agrees, and drafts some additional talking points and instructions for the meeting.

QUESTION: *Is this....*

1. Ethical in some states and not in others?
2. Always ethical?
3. Not a violation, but still wrong?
4. Ethical to the ABA, but they are out of their minds!
5. I have a different answer.

ABA Model Rules of Professional Conduct:
1.1, 1.2, 1.3, 1.4, 4.2, 2.1, 8.4, 8.5

REFERENCE

AMERICAN BAR ASSOCIATION Formal Opinion 11-461 August 4, 2011

“Advising Clients Regarding Direct Contacts with Represented Persons”

Parties to a legal matter have the right to communicate directly with each other. A lawyer may advise a client of that right and may assist the client regarding the substance of any proposed communication. The lawyer’s assistance need not be prompted by a request from the client. Such assistance may not, however, result in overreaching by the lawyer.

A lawyer may not communicate with a person the lawyer knows is represented by counsel, unless that person’s counsel has consented to the communication or the communication is authorized by law or court order. ABA Model Rule 4.2 (sometimes called the “no contact” rule). Further, a lawyer may not use an intermediary, i.e., an agent or another, to communicate directly with a represented person in violation of the “no contact” rule.²

It sometimes is desirable for parties to a litigation or transactional matter to communicate directly with each other even though they are represented by counsel. Two examples may be where the parties wish to cement a settlement or break an impasse in settlement negotiations. In this opinion, the Committee explores the limits within which it is ethically proper under the Model Rules of Professional Conduct for a lawyer to assist a client regarding communications the client has a right to have with a person the lawyer knows is represented by counsel. Even though parties to a matter are represented by counsel, they have the right to communicate directly with each other.³ In addition, a client may require the lawyer’s assistance and a lawyer may be reasonably expected to advise or assist the client regarding communications the client desires to have with a represented person. A client may ask the lawyer for advice on whether the client may lawfully communicate directly with a represented person without their lawyer’s consent or their lawyer being present. The comments to Rules 4.2 and 8.4(a) state that such advice is proper.⁴ Even if the client has not asked for the advice, the lawyer may take the initiative and advise the client that it may be desirable at a particular time for the client to communicate directly with the other party.

...The language of Rule 4.2 Comment [4] raises the primary question addressed in this opinion, to what extent may the lawyer advise and assist the client in communicating directly with the represented husband without violating Rule 4.2 through the acts of another, i.e., the client. However, there is tension between Comment [1] to Rule 4.2 and Rule 8.4(a). In ABA Formal Op. 92-362

(1992), this Committee opined that, without violating Rules 4.2 and 8.4 (a), a lawyer may ethically advise the client to communicate directly with a represented adversary to determine if the adverse party's lawyer had informed them that a settlement offer was pending.⁶ The inquiring lawyer in the opinion represented the plaintiff in a civil case in which the defendant also was represented by counsel. Previously, the plaintiff's lawyer made a settlement offer to opposing counsel. Plaintiff's lawyer had received no response, and the case was set for trial in two weeks. Plaintiff's lawyer suspected that opposing counsel had not informed the defendant of the offer. In that opinion, the Committee concluded that, although the plaintiff's lawyer could not communicate the settlement offer directly to the defendant without violating Rule 4.2, the plaintiff's lawyer had an ethical duty under Rules 1.1, 1.2(a), and 1.4(b) to advise the client that the lawyer believed his settlement offer had not been communicated by defendant's counsel to the defendant and that the plaintiff had the right to speak directly with the defendant to determine whether the settlement offer had been communicated...

ABA Formal Op. 92-362 acknowledged tension between the lawyer's decision to advise the client of the right to communicate directly with a represented adversary and Rule 8.4(a)'s prohibition against the lawyer's doing indirectly what the lawyer cannot do directly. Nevertheless, the Committee concluded that "where the purpose of the communication is to ascertain whether a settlement offer has been communicated to the other party, Rule 8.4(a) should not be read to preclude the lawyer's fulfilling the lawyer's duty, reasonably expected by the client, fully and fairly to advise the client of the lawyer's best professional judgment as to the exercise of the client's rights in furtherance of the representation."⁷ The Committee expressly indicated that it was not addressing what the lawyer might tell the client to say to the other party and where the line might be crossed before running afoul of Rule 8.4(a). The Committee was careful to note that if the client was only going to find out if the other party had been told of the offer, there would be no violation of the rules. Several bar ethics committees likewise have concluded that it is not a violation of the professional conduct rules for a lawyer to suggest or recommend that the client communicate directly with a represented person.⁸

The decision to communicate directly with a represented person may be the client's idea or the lawyer's. Some decisions and opinions suggest that counsel may be violating the rules prohibiting communication with a represented party by the other party. The "no contact" rules applied in these opinions, however, differ from the Model Rules in that they do not contain the relevant language in Rule 4.2 Comment [4] that "a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." As the Committee observed in Formal Op. 92-362, other rules may require that, in some situations, a lawyer advise the client to consider communicating directly with her represented adversary about a matter related to the representation.

Rule 1.1 requires that “[a] lawyer shall provide competent representation to a client.” Rule 1.4(a)(2) requires the lawyer to consult with the client as to the means by which the client’s objectives are to be accomplished.¹⁰ These fundamental ethical principles, coupled with the comments to Rules 4.2 and 8.4(a), suggest that the assistance a lawyer may give to a client extends beyond advising her of her right to communicate with her adversary...

7. HYPOTHETICAL

"THE LIMITS OF LOYALTY"

Melvin Deft is a partner with Archaic & Proud, an Ohio firm with offices in New York. He works in Ohio, but is a member of the Ohio and New York bars.

Melvin drafted a contract for The Exemplary Corporation, an Ohio-based company doing business nationally, relating to its business with All-Snake, a large insurance company.

Melvin leaves the firm in a partnership dispute and takes several firm clients with him, including Exemplary, as he joins the large New York firm, Sodden Urps. No one remaining at the Ohio office of Archaic & Proud has any confidential information that is material to the contract or the business relationship.

Now All-Snake retains Melvin's old firm, A&P, in New York over a dispute with the Exemplary regarding the meaning of the contract. Exemplary wants the firm excluded on ethical grounds.

QUESTION 1: Can A & P ethically represent the party over the meaning of the contract provisions drafted by Michael while at your firm?

1. Rule 1.10 says it can, if no confidences are involved.
2. No, it's a substantially related matter.
3. Not without the former client's waiver.
4. Yes, because the matter is being litigated in New York.
5. I have another answer.

QUESTION 2: *If the court doesn't exclude A & P, can it then represent All-Snake as it claims that the contract is void as against public policy?*

1. No, it's attacking one's own work.
2. No, it's a substantially related matter.
3. Not without the former client's waiver.
4. I have another answer.

ABA Model Rules of Professional Conduct:
1.1, 1.3, 1.6, 1.7, 1.9, 1.10, 1.13, 2.1, 8.4

REFERENCES

- New York Rule of Professional Conduct 1.10

Imputation of Conflicts of Interest

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

- ABA Model Rules of Professional Conduct 1.10

Imputation of Conflicts of Interest

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

8. HYPOTHETICAL ***"FOUNDER"***

Dr. Bryce hadn't been looking so good, and no wonder: the president and founder of the innovative health insurance company known as DUH ("Doctor-Insurers Unified for Healthiness") had been working hard to engineer the acquisition of his struggling company by the larger and better capitalized Reluctant Insurance Company. But he walked into outside counsel Maria Nonplust's office looking more relaxed than he had in months.

"I'm ready to bring the acquisition deal to our Board," he said. "We will still have our independence, substantially; I'll still be able to develop health insurance innovations, and we'll finally have some cash to work with. And I got some other good news today, too, though with the acquisition and all, it's not as critical as it was when I started the process. Got the key man insurance for \$10 million! Gullible Insurers accepted the physical I supervised myself, the fools, given my rep as a cardiologist! The money isn't as necessary now, but it won't hurt!"

"What do you mean?" asked Maria, who also served as Dr. Bryce's personal attorney, and his family's attorney as well.

"I mean I'll be dead in six months, maybe less," Bryce smiles. "I did my own diagnosis over a year ago. That's why I've been pushing to get the company financed. You can't tell my wife or the kids, of course... they don't need to know, and the deal with the Reluctant will fall through if they find out, too. No, my sudden death from a heart attack will be a surprise to everyone but you and me. The internist assisting me on my physical was just a kid, looking where I told him to look... and most important, signing what he needed to sign. I didn't tell 'em anything that wasn't true, though. Just didn't tell them the one big thing that is true: I have an untreatable cardiac condition that's going to kill me. The big thing is, my company will survive!"

QUESTION: *Assuming Maria cannot talk the Doctor into divulging his condition to the board, what should she do?*

1. Withdraw.
2. She has to tell the board about his heart condition, but not about the fraud on Gullible.
3. She may choose to tell the Board about both his heart problems and his fraud, but she doesn't have to.
4. Since she can't divulge the fraud without divulging the Doctor's condition, she can't reveal anything.
5. The company's best interests dictate that she say nothing.

ABA Model Rules of Professional Conduct:
1.2, 1.3 , 1.6, 1.7, 1.13, 1.16, 8.4

9. DR. Z'S LAWS: *STAYING ETHICAL WHEN EVERYTHING IS MOVING TOO FAST*

[Adapted from Prof. Phillip Zimbardo's writings and teachings on ethics and group dynamics.]

- Do not fall for the rationalization of “personal invulnerability.” If it can happen to them, then it can happen to you, too. Perceive yourself as vulnerable and try to make choices that don't court temptation or require unusual virtue.
- Engage in life as fully as possible, yet be aware, attentive, and prepared to change direction.
- Trust, but not too much. Most people are good and trustworthy, but manipulators seem good and trustworthy, too. That's what they're good at.
- Be aware of the roots of compliance and persuasion: reciprocity, commitment, majority conduct, authority, liking, and perceived scarcity/need. Know why you are being persuaded.
- Be willing to say “*I was wrong,*” “*I made a mistake,*” and “*I've changed my mind.*” Don't fear honesty, or to accept the consequences of what is already done.
- Separate your ego from your actions; maintain a sense of positive self-esteem that is independent of the occasional failure and stupidity.
- Separate the messenger from the message in your mind.

- Beware of mental fatigue and half-baked decisions.
- Insist on a second opinion, and delay when under pressure.
- Train your mental and intuitive systems to sense when something isn't right before you know what or why.
- Play devil's advocate when being persuaded.
- Avoid situations where you lose contact with your social support and informational networks, for the most powerful forces of social influence thrive then. Never allow yourself to be cut off emotionally from your familiar and trusted reference groups of family, friends, neighbors, co-workers.
- Remember that all ideologies are just words, abstractions used for particular political, social, economic purposes; be wary taking actions proposed as necessary to sustain that ideology – always question if the means justify the ends, and suggest alternatives.
- Think hard before putting abstract principles before real people in following the advice of others.
- Rules are abstractions for controlling behavior and eliciting compliance and conformity – challenge them when necessary. Ask: *Who made the rule? What purpose does it serve? Who maintains it? Does it make sense in this specific situation? What happens if you violate it?* Insist that the rule be made explicit, so it cannot be modified and altered over time to suit the influence agent.

10. QUIZ

"DISCLOSURE THRESHOLD"

A. "NICK AND THE NANNY"

Nick, married with six kids, had an affair with Poppins, his nanny. Mel represented Nick in defending against divorce and domestic violence charges by his wife, Nora. They reconciled, and the action was terminated.

Then Mel, Nick's lawyer, agreed to represent Poppins in a divorce action against *her* husband, Bert. Bert was ultimately ordered to pay temporary support for their child. Poppins testified that Bert was the father.

But the child's father was really *Nick*. Mel discovered the truth subsequent to the hearing in which Bert had been ordered by the court to pay child support. He informed Bert's attorney -- but not the court -- and advised Poppins that she could no longer collect child support from Bert, that she would be required to reimburse him, and that it would be necessary to file an action to legally establish Nick as the father. They worked out a settlement, agreeable to both Poppins and Bert, accomplishing these ends.

Mel represented Nick at the hearing where his paternity for Poppins's child was established.

Now Nora filed a new divorce action; the reconciliation didn't last. Her lawyer attempted to intervene in Nick's child support matter requiring him to pay for the nanny's child, claiming that the arrangement had been made to ensure that Nick's child support payments to Poppins took precedence over any financial obligations to Nora. The judge in the case contacted the judge who made the original child support order burdening Bert with paying for the child that wasn't his. The judge was furious that nobody, including Mel, had told that judge that Poppins had lied in his courtroom. He filed a complaint with the bar against Mel.

B. "THE FLEXIBLE CLIENT"

Sheila Mazue refused to let her habitually dishonest client testify in the civil matter, and was shocked when he was called by opposing counsel as an adverse witness. Sure enough, the liar lied his head off, and opposing counsel couldn't put a dent in his testimony. Indeed, his testimony was helpful, probably decisive to Sheila's case. "All I have to do is leave it alone and we win," she thought. "Probably can't refer to his testimony in my closing, though. Or can I? Never mind -- don't need to."

QUESTION: *Is Mel's and Sheila's conduct consistent with their ethical obligations?*

1. Yes. Neither had an obligation to disclose to the court under those circumstances.
2. No. They are both in violation of Rule 3.3.
3. Mel is in the clear, but Sheila had to disclose.
4. Sheila had no obligation to disclose, but Mel did.
5. I have another answer.

ABA Rules of Professional Conduct:
1.2, 1.3, 1.4, 1.6, 1.7, 1.9, 1.16, 2.1, 3.3, 4.1, 8.4

REFERENCE

New York City Bar Formal Opinion 2013-2: A lawyer's obligation to take action if, after the conclusion of a proceeding, the lawyer comes to know that material evidence offered by the lawyer, the lawyer's client or a witness called by the lawyer during the proceeding was false.

***DIGEST:** When counsel learns that material evidence offered by the lawyer, the lawyer's client or a witness called by a lawyer during a now-concluded civil or criminal proceeding was false, whether intentionally or due to mistake, the lawyer is obligated, under Rule 3.3(a)(3), to take "reasonable remedial measures," which includes disclosing the false evidence to the tribunal to which the evidence was presented as long as it is still possible to reopen the proceeding based on this disclosure, or disclosing the false evidence to opposing counsel where another tribunal could amend, modify or vacate the prior judgment.*

***QUESTION:** If a lawyer, a lawyer's client or a witness called by the lawyer offered material, false evidence in a proceeding before a tribunal, and the lawyer comes to know of the falsity after the proceeding has concluded, is the lawyer obligated to take action and, if so, what action must the lawyer take?*

OPINION:

Rule 1.6 of the New York Rules of Professional Conduct (the "Rules"), with limited specified exceptions, prohibits a lawyer from revealing "confidential information," which the rule defines as "information gained during or relating to the representation of a client, whatever its source" that is protected by the attorney client privilege, or that is likely to embarrass or harm the client if disclosed, or that the client has asked to be kept confidential. Rule 3.3(a)(3) creates a disclosure obligation: "If a lawyer, a lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." (Emphasis added.)¹ Rule 3.3(c) makes clear that this obligation trumps a lawyer's duty of confidentiality. Specifically, Rule 3.3(c) states that the remedial obligation in Rule 3.3(a) applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6." To "know" of the falsity of proffered evidence, the lawyer must have "actual knowledge of the fact in question," but such knowledge "may be inferred from circumstances." Rule 1.0(k).

Rather than imposing a duty to remedy every possible falsity that might later be discovered after the close of a proceeding, Rule 3.3(a)(3) imposes a duty to act only when evidence that was "material" to the underlying proceeding is later discovered to be false. Determining whether the evidence is material is fact specific, depending on the factors relevant to the ruling in the particular matter, and particularly whether the evidence is of a kind that could have changed the result. If the false evidence is material, it makes no difference if the falsity was intentional or inadvertent – in either instance, the lawyer who discovers the falsity has a duty to act under the Rule.

Rule 3.3 represents a significant change from the predecessor rule in the Code of Professional Responsibility, which provided that the lawyer was required to “reveal the fraud to the ... tribunal, except when the information is protected as a confidence or secret.”² Before April 1, 2009, when New York adopted the Model Rules format and amended a number of its rules, a lawyer’s obligation to make disclosure to the tribunal was subordinate to the lawyer’s duty of confidentiality to the client. Since April 1, 2009, when the courts promulgated Rule 3.3(c), under certain narrow circumstances the lawyer’s duty to protect the integrity of the adjudicative process trumps the lawyer’s duties of confidentiality and loyalty to the client. Indeed, Rule 1.1(c)(2) acknowledges that a lawyer has a duty not to harm the client “except as permitted or required by these Rules,” and Rule 1.6(b)(6) expressly allows a lawyer to reveal confidential information “when permitted or required under these Rules or to comply with other law or court order.”

Moreover, unlike in other jurisdictions, Rule 3.3 is the only mandatory exception in New York to the obligation of confidentiality contained in Rule 1.6.³ As the unique nature of Rule 3.3 suggests, the obligation to take reasonable remedial measures is premised on “the lawyer’s obligation as an officer of the court to prevent the trier of fact from being misled by false evidence.” Rule 3.3, cmt. [5] (emphasis added.) This exception to the lawyers’ obligation of confidentiality, which is one of a lawyer’s bedrock obligations, is intended to protect the integrity of the adjudicative process. Significantly, the adjudicative process is not limited to proceedings before courts. Instead, Rule 1.0(w) defines a “tribunal” as including not only courts, but also arbitral panels, and legislative, administrative and other bodies acting in an adjudicative capacity. Indeed, the adjudicative process includes proceedings before the tribunals listed in Rule 1.0(w) as well as ancillary proceedings conducted pursuant to the tribunal’s adjudicative authority, such as depositions. Rule 3.3, cmt. [1]. The obligation to make disclosure set forth in Rule 3.3, therefore, applies across a broad spectrum of settings and should be parsed carefully.

Finally, Rule 3.3 is silent on when the obligation to take remedial action ends. ABA Model Rule 3.3(c) states that the obligation to take remedial action required by Rule 3.3(a)(3) only continues “to the conclusion of the proceeding,”⁴ but that phrase is absent from New York’s formulation. Although the rules of professional conduct for lawyers that have been adopted in most states include the ABA endpoint language in their version of Rule 3.3, a few (Florida, Illinois and Texas⁵) explicitly extend the obligation beyond the conclusion of a proceeding. Only Virginia and Wisconsin have, like New York, adopted versions of Rule 3.3 that are silent on whether the obligation survives beyond the proceeding.⁶

ANALYSIS

1. How Long Does the Obligation Under Rule 3.3(a)(3) Last?

As a preliminary matter, we conclude that the obligations under Rule 3.3(a)(3) survive the “conclusion of a proceeding” where the false evidence was presented... The State Bar ethics committee has reached the same conclusion. See N.Y. State 831 n. 4(2009) (obligation continues “for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding – but not forever.”) and N.Y. State 837 at ¶16 (2010) (“the endpoint of the obligation

nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3.”). We agree with the State Bar and conclude that the obligations under Rule 3.3 do not continue forever. Instead, because the rule only requires an attorney to take reasonable remedial measures, the duties imposed by Rule 3.3(a)(3) should end when a reasonable “remedial” measure is no longer available....

2. What Measures Should a Lawyer Take Upon Discovering that Material False Evidence was Presented?

...Before making any disclosure pursuant to Rule 3.3(a)(3), the lawyer should first remonstrate with the client and seek the client’s cooperation in making a disclosure that will correct the record. See Rule 3.3, cmt. [10] (upon learning of the falsity of material evidence, the “proper course is to remonstrate with the client confidentially, advise the client of the lawyer’s duty of candor to the tribunal, and seek the client’s cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action.”).

Disclosure to the tribunal under Rule 3.3(a)(3) is only appropriate “if necessary.” See N.Y. State 837 at ¶20 (2010) (affirming lawyer’s withdrawal of false evidence where practical so that explicit disclosure is not necessary). Once a proceeding is concluded, it is too late for an attorney to withdraw the material evidence or make clear that the evidence is not being relied upon. ...Accordingly, disclosure to the tribunal is the ultimate step that the rule requires an attorney to take, but must be narrowly-tailored to limit the disclosure to that information “reasonably necessary to remedy” the fraud on the tribunal created by the tribunal’s reliance on false evidence...

11. HYPOTHETICAL "THE UNPOPULAR CLIENT"

Your firm is approached about taking on a high profile case of national, constitutional, social and political significance. The position you will be representing is highly controversial and generally unpopular, indeed regarded as a breach of decency and human rights by the majority of the legal profession and your community. The client is a Committee of the U.S. House of Representatives.

PART 1

As part of the retainer agreement, the client insists on the following provision:

"All of the firm's partners and employees who do not perform services pursuant to this agreement will not engage in lobbying or advocacy for or against any legislation (i) that is pending before the Committee during the term of this Agreement or (ii) that would alter or amend in any way the Act in question and is pending before the U.S. House of Representatives, the U.S. Senate, or any committee of either body during the term of the Agreement."

QUESTION: *Should the firm accept the representation under these conditions?*

1. No. This is an attempt to dictate the conduct of the firm's lawyers and employees outside the scope of the representation.
2. It could, but the provision provides an honorable excuse to avoid taking the case.
3. I don't see a problem.
4. I have another answer.

PART 2

When the firm announces that it has taken on the case, its largest client contacts it and asks for an immediate meeting. The client says that it is being threatened by boycotts from several well-funded and influential groups, and tells the firm that if it does not drop the controversial representation, it will have to take its business elsewhere. The firm is also aware of a boycott effort being aimed at the firm itself.

QUESTION: *Should the firm drop the representation?*

1. Are you kidding? Drop the case!
2. Having accepted the case, it must refuse to drop the new client under these conditions.

ABA Model Rules of Professional Conduct:
1.2, 1.3, 1.4, 1.6, 1.7, 1.16, 1.18, 2.1, 8.4

12. TECH ACCELERATION

SPEED TEST

A. POTHoles

- Trouble with Siri, gmail, and more.
- Facebook research on potential jurors
- A new use for Rule 1.15
- More...

B. STANDARDS OF COMPETENCE FOR AN ATTORNEY USING TECHNOLOGY

- ABA Formal Opinion 11-459 (August 4, 2011)

Duty to Protect the Confidentiality of E-mail
Communications with One's Client

A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party.

13. DUAL HYPOTHETICAL

"PRESSURE POINTS"

The true test of a lawyer's ethics is often how he or she behaves when an unexpected and unprecedented crisis arrives, and decisions have to be made quickly and without consultation with others. Here are two situations real attorneys faced, fictionalized to protect the innocent (or guilty).

A. "UNINTENDED CONSEQUENCES"

Criminal defense attorney Ken O'Worms was furious. The judge had been biased and disrespectful to his client throughout the trial; worse, she was biased and disrespectful, even hostile, to *him*. To top it off, she threw the book at his defendant after the verdict was in, far exceeding what a fair sentence would have been.

Ken went back to his office, had a couple of stiff drinks and drafted a personal letter of protest to the judge, accusing her of being unprofessional and unfair, in addition to being a rotten judge. He signed it, but left it on his desk over the weekend, just to see if he felt any differently Monday morning.

He did. Wiping his brow in relief that he hadn't mailed the screed, he came into the office only to find the letter missing. Sure enough, his helpful secretary had put it in an envelope on Saturday and mailed it.

After cursing her efficiency and his stupidity, Ken decided to take his medicine. He called the judge, reaching her in her chambers, and explained about his impulsive letter. "Please don't read it," he said. "I was just letting off steam, and I never intended to mail it."

There was a long pause.

“I already read it,” she said as Ken’s heart sank. “And I think you were right: I was unfair, to you and your client. I apologize.”

Ken’s heart soared like a hawk -- until he heard this:

“So I’m going to reduce your client’s sentence; I have the paperwork here. But whatever you do, don’t tell the DA. Gotta go! “

And she hung up.

QUESTION: *If you were Ken, what would you do?*

1. Nothing.
2. Alert the DA immediately.
3. Report the misconduct to the judicial committee right away.
4. Wait until the reduction of sentence goes through, then report the judge.
5. I have another answer.

B. "THE CASE OF THE ZEALOUS, CARELESS, DISHONEST, ETHICAL, UNETHICAL LAWYER"

Mel Lancholy’s client was in a bad way, the victim of a closed head injury made worse by an unlatched ambulance door, a steep hill, and a rolling gurney. He listened to his lawyer argue his negligence case in court, but he didn’t look like he understood much... all the better for the jury to see. His mother was there to explain things to him, but she wasn’t a native English speaker: she looked pretty bewildered too.

Mel had just asked the jury for 26 million dollars in damages from the hospital and ambulance company, and the jury retired to deliberate. Then, maybe 30 minutes later, they announced that they had reached a verdict.

Uh-oh. That meant a defense verdict, based on his experience. Time for a salvage operation.

Mel asked the judge to wait a few minutes while he conferred with defense counsel in the hall. “*Just a few,*” cranky old Judge Lassiter said. “I don’t have all day.”

Mel took his client, and Mom, of course, with him as he proceeded to beg for a settlement before, as he feared, the jury announced goose eggs.

“Please,” Mel said, as his client looked on in his typical fog. “Neither of us knows what the jury will say. Let’s agree on one million for my client. That’s fair.”

Defense counsel shrugged and relayed the offer, via cell phone, to her client. No dice.

“Mr. Lancholy!” The bailiff was calling. “The Judge wants you in the court room now. No more time. He said he’ll hold you in contempt if you’re not there in ten seconds!”

“PLEASE!” shouted Mel, now turning back to defense counsel. “\$500,000? Can you agree to a lousy half-mil?”

The defendant’s in-house counsel was still on the line, and heard Mel’s plea. “Tell him no!” he directed defense counsel.

Now the bailiff was doing a count-down.

“6...7...”

“\$350, 000! For the love of God, just look at the poor guy!”

Defense counsel nodded. “He says okay,” she said, surprised. “It’s a deal.”

“TEN! Time’s up!” said the bailiff.

“We have a deal!” said Mel. Dashing into court, he informed the judge of the settlement. “Good,” said the judge. “Took you long enough. The jury is discharged with the court’s thanks.”

As Mel, his shambling client and his mother left the court, a member of the jury grabbed his elbow.

“Why did you do that?” he asked. “We were going to award your client \$9 million!”

Mel stared in shock. He looked at his client, thought a second, and ran back into court, shouting “Your Honor! Call back the jury! That settlement is invalid, because I never got the informed consent of my client!”

QUESTION: *Assuming that the attorney’s gambit works, and he gets a new trial and a higher settlement, was his conduct ethical or unethical?*

1. Ethical. He was doing what was necessary to protect the rights of a disabled client.
2. Unethical. He is renegeing on apparent authority to settle.
3. Ethical. This is zealous representation at great personal risk.
4. Unethical. The attorney is deceptive and untrustworthy.

ABA Model Rules of Professional Conduct:
1.1, 1.2, 1.3, 1.4, 1.6, 1.14, 3.3, 3.4, 3.5, 4.1, 8.3, 8.4

14. HYPOTHETICAL "FLEXIBILITY"

You serve as outside counsel for Goldbrick Slax on board and governance matters, a large investment firm. On the company's website, a section entitled, "Our Pledge to Our Clients" reads in part...

"A critical part of any relationship of trust between company and client is acting consistently and playing fairly and honestly the game. Our real product, we believe, is trust. Our investment management clients trust us to do the right thing; they trust that we're going to handle their assets as if they were our own. In a real sense, we must not only operate by the Golden Rule, but make certain that the people who trust us have confidence that we care about our ethics as much as we care about our success."

You receive a call from Goldbick's general counsel, your primary contact with the client.

"Our firm's executive committee, in charge of Corporate Compliance, is proposing that the firm's Code of Ethics be amended to have included the provision I just faxed to your office. Give it a read, then call and tell me what you think. Are there any legal problems that you can see? Let me know, and quick -- this is on a fast track."

You look at the proposed amendment. It reads...

SECTION III Waivers of This Code

From time to time, the firm may waive certain provisions of this Code. Any employee or director who believes that a waiver may be called for should discuss the matter with an Appropriate Ethics Contact. Waivers for executive officers (including Senior Financial Officers) or Directors of the firm may be made only by the Board of Directors or a committee of the Board...

You call the GC back immediately, and express grave reservations about the change.

“This gives us needed flexibility,” the CEO explains, brushing off your objections. “We don’t want to have a Code of Ethics that we have to violate when we have to nick it a bit to take advantage of a major opportunity. I asked you if there were any legal problems with it. Are there?”

“Well, I think it raises issues of misrepresentation and...”

“But it’s legal. And we’re not hiding it, exactly... nobody will be able to say that, because we’ll have it on the website, waaaaay down on at the bottom of the Code of Ethics after all the boiler plate and boring stuff,” he says. “I checked: nobody reads that the Code... hell, our own staff doesn’t read it! It’s boring! But we will still be able to say that everything was transparent. All I want from you is a memorandum confirming that the provision is legal.”

You write the memo, and but add that the provision may violate the Board’s fiduciary duty, and cause the company’s ethics program to fail to meet Federal Sentencing Commission guidelines.

“Noted,” the General Counsel says after he read your memo, clearly not pleased. “The provision is a done deal.”

QUESTION: *What is your proper course under the ethics rules?*

1. There is nothing more for you to do
2. You are ethically obligated to bring your concerns about the provision to the audit committee.
3. The provision is license to pursue unethical conduct, but you should wait until there is an actual waiver before taking action.
4. I have another answer.

ABA Model Rules of Professional Conduct: 1.1, 1.2, 1.3, 1.4, 1.13, 2.1, 8.4

15. CONCLUDING REMARKS AND DISCUSSION