

 [Click to Print](#) or Select 'Print' in your browser menu to print this document.

Page printed from: [New Jersey Law Journal](#)

Reversing the Tide: Restoring Public Confidence in Lawyers

Marc Garfinkle, New Jersey Law Journal

January 23, 2017

As lawyers, we are charged with recognizing many lines of demarcation, such as those between what is legal and illegal, ethical and unethical, prudent and imprudent. Not unlike clergy, we are presumed to have the knowledge, experience and inner compasses that inform us instantly to discern right from wrong, permissible from prohibited, and risky from risk-free. Consequently, clients call on lawyers to learn what they can and cannot do regarding their businesses, their families and their property. Whether they are launching a commercial endeavor, redefining a familial situation or creating a relationship between parties, our clients come to us to learn where the lines are. Usually, clients want to walk as closely as possible to that line, or even to bend the line. When they cross such a line, clients come to us for advice and defense. They need us to keep them or get them out of trouble, to rework their documents or modify their relationships so as to put them in the right. They need us to shine a bright light on the line and to show them how to walk the edge. Attorneys don't fear those precarious lines of demarcation; rather, we take pride in negotiating the edgiest paths for our clients. We would do well to take fewer such risks for ourselves.

In a practice that advises and defends only lawyers and those who would be lawyers, my clients are surprisingly little different from lay clients. Despite years of law school, decades of experience and centuries of precedent, some attorneys still don't know, or perhaps have forgotten, where the lines are and how to walk them. They need help structuring their own professional relationships and managing their practices to comport with the letter and spirit of the law, keeping their lawyerly activities safely within the boundaries set by the Rules of Professional Conduct—that small collection of rules that is the crown jewel of American jurisprudence.

Few professions are subject to ethical parameters quite like those that apply to judges and lawyers. While all persons must respect the criminal laws, register motor vehicles and operate them legally, honor their contracts, pay their just debts and leash their dogs, lawyers are held to a higher standard. Our rules set forth a code of ethics. We are unequivocally required to act ethically in our professional lives, and, to a large extent, in our private lives, as well. Lawyers must always act in a manner that puts client before self, fairness before profit, and the law above all. The RPCs advise all legal practitioners, and those who employ or otherwise interact with us, exactly what can or cannot be done, at the peril of jeopardizing our valuable and coveted license to practice. They establish baselines for the professional relationships attorneys maintain and set standards that our clients, courts and adversaries can expect of all of us.

But they do more than that. The RPCs were devised to protect lawyers as well as those who employ us. They keep us from crossing lines that would sully our reputations, offend societal notions of fair play or jeopardize the confidence that any society must have in the men and women who provide

access to jurisprudence. Deviation from the rules earns us disrepute and disdain, in addition to inviting a confrontation with our licensing authority. We all know this, yet violations continue, grievances mount, and discipline is levied against even some of our most celebrated and accomplished colleagues.

The RPCs do not make us ethical; they only make us act that way. For lawyers, that is sufficient. The RPCs represent the distinction between ethical behavior and professional morality, which is merely the difference between action and thought. We cannot make a person wish to treat his brother as he, in turn, would like to be treated. In a money-driven world, we cannot inculcate into the finder of a lost wallet a strong desire to return it to the owner with its contents intact any more than we can make a lawyer want to withdraw from a lucrative case where her conflict of interest is certain to go undiscovered. We can neither create nor enforce a law that would reset our moral compasses to always point to Right. Because of this inability to fathom and guarantee the content of a lawyer's character, we suffer from lawyers that act as they shouldn't and a public that no longer trusts the bar upon whom it depends. The existentialist's creed, "*On est ce qu'on fait,*" means we are what we do. That is how the OAE sees us. Our clients don't need to look probingly into our hearts and minds; it is enough that they can trust us to be honest and to play by the rules.

In an effort to stem the tide, in 1994 the Supreme Court ordered that all bar candidates who pass the bar exam must be certified to be of good character. They must demonstrate to the Orwellian-sounding Committee on Character that they will probably act ethically once admitted, or their admission will be denied or delayed. Candidates whose history or responses include evidence of criminality, financial or civic irresponsibility, lack of candor, dishonesty, substance abuse or dependency, or serious mental defect are scrutinized, and often interrogated, by the COC to determine their fitness to practice. The committee operates on the assumption that it is better to identify bad apples before they go into the basket than it is to pull them out afterwards. It is impossible to judge the efficacy of this hard-working committee of volunteers. No one can quantify the fruits of their efforts. Not one of us can say with certainty that the incidence of unethical lawyering has declined since 1994. We will never know how much damage has been averted or that our futures will be brighter because of the COC. We know, however, that our collective public image and the future of our profession depend on reversing the negativity, suspicion and distrust that have bedeviled us. We need the RPCs. They are central to this effort.

Rules of ethics do not necessarily make us think ethically, nor do they filter out unethical impulses; sometimes they just get us to toe the line. Until recently, almost all lawyers were assumed to toe the line, walking a straight and narrow path. Some observers have pointed to the Watergate scandal during the Nixon years, in which many of the worst culprits were lawyers, as the point in history where our professional descent into disrepute became precipitous. While that unfortunate historical episode put the spotlight on wrongdoing by lawyers, it is certain that the ugliness did not begin there. It is equally certain that it will not end with the imprisonment of the John Deans, David Samsons or Paul Bergins or any of our other colleagues who have abused the title and privileges of our office.

The solution may be for attorneys to back away from the edges in our professional lives. Perhaps we should not strive for minimal or marginal or compelled compliance. Our goal should be to elevate ourselves above reproach, to be better than others expect us to be. It is not too late to return to a time and place where people think that an attorney would never act outside the law. We can return to a place where trust accounts are sacrosanct, a lawyer's word is her bond, and handshakes can seal a deal. We can instill public trust in lawyers that is unequivocal, and make the rare lawyer who steps over the line, even a jot, a pariah. There was a time when colleagues distanced themselves from attorneys who were disciplined, and judges and adversaries took note. Today, the stigma from most ethical violations is diminished, and, except in cases of theft from trust, acceptance and understanding by colleagues is the growing norm. This bodes ill for all of us. As we increase tolerance for our colleagues' violations, we give traction to the school of thought that the rest of us are violators as well.

To stem the tide, our actions must be beyond reproach; our intentions always good. We must speak well of our colleagues and show our profession in a better light. Our promises must be solid gold, and our supporters must vastly outnumber and outweigh our detractors. Above all, we should back away from the edge. Let us treat the RPCs with the respect they require. Our adherence to them must be closer to their heart than to their edges. It will take generations to stem the tide unleashed by unethical colleagues, but the power is in each of us to do it. In this effort, we must all remember that if we walk too close to the edge, one high tide can carry us all away. •

Next Week...

Legal Malpractice

Garfinkle practices in Morristown, focusing exclusively on legal ethics, attorney discipline, bar admission and judicial misconduct. He is also an adjunct professor at Seton Hall University School of Law.

Copyright 2017. ALM Media Properties, LLC. All rights reserved.