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# Water Runs Uphill Here: Navigating Legal Ethics

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The summer of 1972 brought an experience on a Colorado mountainside that would, years later, provide me the metaphor for navigating the legal ethics system. Here's how that came to be.

Like thousands of others back then who hit the highways seeking adventure and self, I rode my thumb toward Mexico, savoring new experiences at every turn. Near Denver, I got a lift from a young man who showed me some stuff of local legend. With his car pointing downhill on a sloping mountain road, he stopped and shifted into neutral. "Now watch this," he said, lifting his foot from the brake. Immediately, the car began rolling backward up the hill and didn't stop until he hit the brake. I couldn't figure out what had happened. Every instinct and my own two eyes told me the car rolled uphill, and that we had just defied gravity. My ride called it Gravity Hill, and explained that it was an optical illusion. I would later learn that such gravity hills or mystery hills are not uncommon. They occur where the interplay of features such as horizons, treetops and cloud lines, roadways, ridgelines, streams, strata and other topographical features cause our eyes to deceive our brains into misperceiving a slope.

Flash forward 40 years. Camping with my son near the headwaters of the Arkansas River, again in Colorado, we were panning for gold at a picturesque bend in a mountain stream. After a few minutes, I stepped back to admire the beauty of the place. Suddenly, a mild malaise swept across me. Something seemed wrong. Something *felt* wrong. Something was out of synch. Then I realized—the little river was gurgling uphill! There was only one explanation. I summoned my son, who has camped and hiked alongside a hundred streams, to share my perspective, and his jaw dropped.

Our ability to sense slope, like our sense of balance or the ability to discern hot from cold, resides within us from birth and rarely deceives us. Our experiences refine these senses, and we learn to trust them. As lawyers, we use them as tools. They may tell us it's okay to lower our guard with an adversary or that we'd better hide some cards from our friends. They tell us a witness is truthful, or the other side is getting ready to capitulate, or it's time to fold a bluff hand. We need our experience and our instinct to lead us through the precarious passes of our careers.

An ethics matter is different from our usual cases, but the differences are not always apparent. Beyond different, much about an ethics matter is counter-intuitive, especially for litigators. Understand that you are in a different dimension at every interface you have with the OAE. What you have learned from being lawyers, negotiators, arbitrators and tacticians is as likely to deceive as to guide you. I warn attorneys that water flows uphill in this universe, and it's a bit tricky to pour your first glass. It might not take you long to acquire the right mindset to succeed, but it begins by defying your instinct, and it would be extraordinary to get it right the first time.

Even the nomenclature of ethics is misleading. Consider the penal system; its purpose is penal. In contrast, the goal of the attorney disciplinary system is *not* discipline; it's consumer protection—preventing the recurrence of bad acts and fostering confidence in the legal system and its practitioners. Arguments that ignore this may fall on deaf ears or ignore your strongest point. And speaking of arguments, whenever an attorney—either respondent or counsel—says or writes anything in an ethics matter, it is as if under oath. And don't forget that you are not dealing with a typical adversary. This is your licensing authority, and they never forget that you have no right to be a lawyer; you only have a license, and they write the rules. Accordingly, there is never a pleadings war or typical motion practice, and there is almost no discovery. Besides, all pleadings, responses or applications that are submitted must be complete, honest and responsive. Subsequent amendment or supplementation may suggest you had not been fully cooperative with the investigation the first time around. That could put you afoul of at least one additional RPC and perhaps trigger an audit. And, by the way, there is a rule forbidding counsel from filing any paper or taking any action for a dilatory reason, even if we can construct a plausible reason, too. Moreover, at a hearing or interview, or even an audit (except a random audit), expect that the OAE will have more documents than you, having obtained without your knowledge evidence you had forgotten about or didn't know to exist. Most importantly, if the evidence against you may suggest a crime, you still may plead the Fifth, but your refusal to provide evidence against yourself will probably result in new ethics charges for lack of cooperation with an ethics investigation. These cases usually proceed to temporary suspension and ultimately, disbarment.

More differences abound, to the consternation of many of us. For example, in an ethics matter, there is no plea bargaining. Either your defenses prevail or they don't. And while technically attacking allegations to reduce the number of counts is often good practice, the true battlefield is the ultimate quantum of discipline to be imposed, which, counter-intuitively, is often not a function of the number of counts or victims or the amounts involved. For example, we all know that stealing a dime from trust is no different from stealing a million dollars, as far as our license is concerned. Moreover, in an ethics case the ultimate discipline emerges from a far broader range of possibilities than we might imagine. Essentially, the entire panoply of discipline is available for almost every violation, and, in deciding the quantum, the DRB relies on prior cases not so much for precedent as for guidance. As if to further disorient seasoned practitioners, consent agreements between respondents and the Ethics Committee are subject to such review and approvals that, in practice, they mean something other than "consent agreement." Consider the case a few years ago, of the attorney who accepted the OAE's offer of consent to Censure as discipline. He was delighted to have the opportunity to avoid suspension. On mandatory review, the DRB recommended a three-month suspension, which brought the matter to the Supreme Court, who agreed with suspension, but suspended the attorney for a year. Consent is not a two-way street, here. Timing is different in ethics, too. We rarely ask for adjournments or extensions of 30 or 45 or 90 days. Our requests are usually more modest—a few days or a week or two. On the other hand, the delays on the OAE side between the stages of an ethics matter (e.g., the lag time between a hearing and a decision, or reconvening an adjourned hearing), seem incomprehensibly long. Attorneys are also frustrated when the OAE appears deaf to arguments that appear to have great merit, but sometimes they reward us richly for an argument that might seem like a makeweight.

Our instinct may further deceive us in ethics. At an audit or interview or hearing, you may think you know the point of a question, but you could be a mile off the mark. You may believe that an investigator or committee member is "out to get" you when s/he is really on your side. When questioned about wrongdoing, instinct may tell you to breast your cards, but the better practice may be to reveal, or vice-versa. Lawyers who have served on District Ethics Committees understand this. It is even difficult for newer committee members to internalize the different perspective that an ethics case demands.

Lawyer that you are, when you appear as respondent in an ethics matter, you are still pro se to the OAE. Lawyers learn early on that most tribunals prefer that litigants have counsel. Ethics is not much

different. Years ago, I was chatting with an experienced ethics attorney who had just come back from a DRB hearing where a well-known and gifted trial lawyer had argued, pro se, to save his license. "How'd he do?" I asked. Came the response: "He only opened his mouth to change feet."

We all have plenary licenses. Most of us have legal specialties. Within those specialties, our toolboxes full of instinct and experience serve us well. In the world of legal ethics, however, beware. If you have any interface at all with the OAE, even if you decide to represent yourself, you would do well to first consult with an ethics attorney to get the lay of this strangely foreign land. Water runs uphill there. •

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