

New Jersey Law Journal

VOL. 220 - NO 2

MONDAY, APRIL 13, 2015

ESTABLISHED 1878

LEGAL ETHICS

Do We Need the RPCs?

Downloading a moral compass app

By Marc Garfinkle

At least three times in the past two months, I have heard intelligent speakers talk about a person's "moral compass" which, I am told, is innate in all of us. The term has some appeal, and I will use it, but, oddly, I had not known that I was so equipped.

Presumably, one's "moral compass" is like an inborn understanding of right versus wrong, coupled with a compulsion to act rightly. If it exists, it is an ethical guidance system inherent in our species and perhaps unique to us.

Obviously, moral compasses would be handy equipment for attorneys, and I wanted to learn more about them. Handy tools that don't cost a dime are hard to find. Are these compasses learned, imposed or otherwise acquired? Are they immutable over time, or do they grow and change with us? Do they lead the way for us, or do they merely show us the way? Are they intuitive, or do we have to reflect upon them? Are we able to act against these compasses? Is there a penalty if we do?

My particular interest in the notion of a moral compass was in the context of attorney ethics. I was intrigued by the analogy to our Rules of Professional Conduct, and I was curious about the efficacy of the RPCs

Garfinkle practices in Morristown. He counsels and represents New Jersey attorneys and judges in all aspects of legal ethics, professional licensing, bar admission and attorney discipline. He is also an adjunct professor at Seton Hall University School of Law.

as a moral compass for lawyers. I wanted to know whether it is important for lawyers to have moral codes, or at least, moral compasses. First, however, was to ensure that I understood the expression, before I began expounding upon it.

Resisting Webster's, Random House, Black's and The Oxford to discover what is meant by "moral compass," I went directly, as my younger colleagues might, to Dictionary.com. There, from a somewhat circular definition, I learned that a "moral compass" is "anything which serves to guide a person's decisions based on morals or virtues."

Lawyers could use that, I noted, thinking that our RPCs were based neither upon morals nor upon virtues, but upon a practical mixture of elements, including a heavy dose of consumer protection.

Rereading the dictionary entry revealed that the moral compass guides neither our thoughts nor our actions, but our *decisions*. Since well-guided decisions are critically important to lawyers, I was beginning to feel good about my moral compass and the important role it plays in my practice.

Unsure that the "virtue" part of the definition was sufficiently clear, and doubting that certain virtues apply to litigators, (e.g., humility, chastity and meekness), I was about to link to another, more serious, dictionary when I was struck by the example of usage burning on the screen.

It read: "Example: Hopefully, the lawyer has a moral compass." I stopped. Be-moaning that even the dictionary prefers the disfavored use of "hopefully," I stayed on the page, pondering the significance of the lawyer example. I wondered whether my

own clients are hopeful that I have a moral compass.

I have long thought that people expect lawyers be bound to a stout personal code of ethics. They want us to think and act in a manner consistent with their morality, if not ours. They need us to be better people than they, because they want to believe in us, even when they can no longer believe in themselves. Despite so much press to the contrary, they still expect us to exemplify the best values of our society. We should be delighted by this.

Because I am a lawyer, I played the devil's role, questioning just what values were important to lawyers. The New Jersey Bar includes some 42,000 members that come from myriad cultures, disciplines and value systems. They have diverse expectations, educations, fears, beliefs, aspirations and interests. Based on so many different moral compasses, an ethics system would surely sacrifice the consistency essential to effective jurisprudence. I considered that attorneys need a road map more than they need a compass.

I imagined myself a client. As a client, do I want my lawyer to be an honest and fair person? Do I care? Or do I just want to know that s/he will be honest and fair with *me* and will handle my matters competently, diligently and with professionalism? If she cheats at poker, if he steals from his partner or filches on taxes, do I care? As a client, I don't really care about my lawyer's inner gyroscope or moral compass.

I like the RPCs. They are (usually) unambiguous and no-nonsense. All lawyers understand them the same way. The RPCs do not care whether we are good-hearted or evil-hearted, good-natured or ill-spirited, arrogant or creepy. They don't guide our decisions so much as they dictate our actions. They do not tell us what to think or how to react. They

look at what lawyers do, or might do, and set strict guidelines for our comportment. With RPCs, who needs a compass, anyway?

The existentialist mantra, "*On est ce qu'on fait*" ("We are what we do"), reflects the OAE's perspective on attorneys' activities. The OAE is less concerned with our larcenous, lascivious and other base impulses than with how we act upon them. Even the Committee on Character must acknowledge that they can only judge attorney-candidates by their actions and reactions. We cannot yet monitor their thoughts.

According to Jewish tradition, "the rabbi" (ancient people, having more free time than we) debated issues such as this: Who is more praiseworthy—the person who, upon finding something of value with a clue to ownership, is so honest that, with no thought of keeping the item, immediately sets out to find the rightful owner; or the basically larcenous person who is tempted to keep the item, but overcomes the temptation and sets out to find the owner? (*Answer: The second person.*) Our ethics system presents ample opportunity to explore questions such as this.

Some examples may be instructive here. Imagine that you went to your bank to withdraw \$100 from your account. The teller deducts \$100 from your balance and, in a moment of confusion, gives you \$200 instead.

You discover the mistake immediately. What do you do? Now suppose that you discover the mistake two days later. Does that change anything? Or suppose the bank seeks to recoup it. Does that make a difference? Does it make a difference that the camera was broken or that the bank can't prove its case? Does it matter that you returned the money or that the bank will forget the discrepancy? Should it matter?

Now suppose that you went to the bank after hours, and only the ATM was open. You ask for \$100, but two crisp new twenties stuck together, and the machine gives you \$120, instead of \$100. What now? If the bank had just debited \$25 from your account earlier that day for a ridiculous charge, does that change anything?

And suppose that in the ATM room is an envelope on the floor. You pick it up and, it contains \$1,200 and a deposit slip. Or suppose there is no deposit slip. Or suppose there is just a deposit slip. Or suppose there is a diamond earring, and suppose it was just outside the door. Does any of that make a difference?

Imagine 42,000 lawyers and a handful of rabbis offering their moral ruminations on the above. There would be countless thoughts on the subject. Tomes would be written. Ethicists would opine. Moral compasses would spin out of control. But, fortunately, New Jersey jurisprudence is not a compass-tocracy. We

have rules that dictate what attorneys may and may not do. Hard and fast rules. Rules that dictate *conduct*.

Admittedly, we are one of very few states that still pay any homage to the *appearance* of impropriety—proscribing it, though choosing not to discipline offenders—but we have a code of *conduct* that leaves little room for wayward behavior. The usually-honest family lawyer with a moral compass, who succumbs to temptation and pockets the earring, is in trouble. The unsavory schemer who seeks the owner is not.

Every scenario above seems to fall under 2C:20-6 - *Theft of property lost, mislaid, or delivered by mistake*. It is an indictable offense. It may involve moral turpitude. It will cost you your license. There is an RPC or two on point; there is no "moral compass" defense.

Every day, we attorneys have thoughts we are not proud of. Every case offers opportunities for us to act immorally. Temptation lurks behind every fee. For attorneys in the courtroom or in the conference room, at work, at play and at home, the moral compass is irrelevant.

For us there are only the Rules. They are your compass, your lodestar, your guide. They must rule your actions *and* your decisions. Be in compliance, and you will practice without fear. ■