Ethics Upon Ethics: The Attorney's Dilemma

Marc Garfinkle, New Jersey Law Journal

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While chatting with my physician/brother-in-law a few years ago, I mentioned my nomination to the Attorney Ethics Committee. He quipped, "attorney ethics—now there's an oxymoron for you." My back stiffened, but then, as if to further prove that God is a trial lawyer, a retort came quickly to my tongue: "What about medical care?" The conversation ended with a chuckle. Afterward, however, I compared his Hippocratic oath, which is essentially limited to the practice of medicine, rarely overflowing into his private life, with the oath that lawyers take, buttressed and supplemented by the Rules of Professional Conduct, whose violation, even outside the practice, can result in certain pain.

In practice, lawyers have two codes of ethics. We have the ethical framework instilled in us by our upbringing and the lessons we have acquired over the years. Our religious beliefs, family culture, economic milieu and a host of other factors blend to form a system of morality and ethics that define who we are. Modern jargon calls this our moral compass. Our Rules of Professional Conduct superimpose upon this moral compass an additional layer that governs our professional actions and relationships, posing its weight upon the older structure below. The result is sometimes incongruous or troubling. I include below a few personal anecdotes which demonstrate the occasional discord between our ethical guides.

1. At a foppish reception in an art gallery years ago, my wife was chatting with a young attorney and her husband. They called me over; my wife introduced us and informed me of our invitation to the couple's home for dinner sometime soon. When the lawyer later asked me about my practice, I mentioned that I handled civil and criminal matters, and that I found criminal defense to be more challenging and satisfying than civil law. She asked whether I defended child molesters and internet predators, and I acknowledged representing people charged with all sorts of sex-related offenses, even mentioning the unique challenge of defending an accused who has effectively lost the presumption of innocence. Depending on my mood, I might have even said that I found child molesters to be more desirable clients than parents who are fighting for custody. She asked me how I could possibly defend people accused of such crimes.

I was nonplussed. Rather than replaying the usual spiel reserved for civilians and invoking half the Bill of Rights, I replied that I'd been asked that same question many times, but never, ever by a lawyer. Saying nothing more, I wondered what she had learned in law school. On the drive home that night, my wife informed me that we had been politely uninvited to the couple's home. For days, I could not stop thinking about that young attorney who really didn't understand what it means to be a lawyer.

2. In a recent column, I lauded the accomplishments of my friend and law school roommate, civil rights advocate Matt Coles. Matt has done more to bring about non-discrimination in gender and sexual orientation than anyone. Now teaching Constitutional Law at UC-Hastings following a storied career at the ACLU, Matt wrote the original municipal ordinances for Berkeley and San Francisco that pushed America along the road toward broad-based gender equality. My friendly relationship with Matt

and my appreciation for his efforts caused me to turn down the only case I ever turned away for reasons of its moral repugnance.

Some 25 years ago, two punks with nothing to do were at the Irvington Bus Terminal around midnight, when another young man, nattily dressed and demonstratively effeminate, stepped off a bus from New York. In a savage attack, the two thugs set upon the young man and pummeled him into unconsciousness, apparently for no reason other than his presumed sexual orientation. When presented with the opportunity to represent one of the assailants, I was in a quandary—I had never refused to represent an accused person because of his/her politics, background or the depravity of the crime, but this case gave me pause. At the time, I had represented rapists and killers, child molesters, parent abusers and arsonists. Despite my Jewish heritage, I had even determined that I would represent a Nazi, given the opportunity. I want to believe that most criminal defense attorneys would do likewise.

As only lawyers seem to remember, the distastefulness of a person's act has little to do with the presumption of innocence, the right to counsel or the obligation of the state to prove his/her guilt beyond a reasonable doubt. Like high-iron workers on a skyscraper who learn to not look at the ground below, defense lawyers learn to approach criminal cases without giving much thought to the victim, whom we prefer to think of as "the complaining witness." We don't consider the shock, fear, injuries or suffering of the victim. We don't think about what must have been going through the victim's mind, although the defendant's frame of mind may hold the key to a valuable defense. Our fidelity to our client and our protection of the Constitution demand no less.

Still, this case of gay-bashing troubled me. My respect for Matt's efforts tempted me to decline that representation, although my moral compass told me to accept it. My RPCs gave me an out, allowing me to refuse or withdraw from a case wherein I had a fundamental disagreement with the client, but I knew that wasn't the case, here. Nevertheless, I declined to take the case. That act haunted me for years, because it represented my betrayal of my professional ethics, as I wanted them to be. As I saw it, my personal desire to not offend my friend made me unfaithful to my oath to protect the Constitution, protection that can only happen one case at a time, one lawyer at a time. There was nothing about the gay-bashing that made it more distasteful than other crimes whose perpetrators I had defended. There was only an extraneous situation that forced my hand.

Last year, sitting in a San Francisco gin mill with Matt, reminiscing our youth and discussing his recent retirement from the ACLU, I told him about my quandary. I thought he, the great civil libertarian, would say that I should have taken the case, defended him ably and let the proofs decide the defendant's fate. Instead, Matt looked across his drink at me, raised the glass a bit and said, "You did right." I felt better, but I was not convinced.

3. Another such conflict came to pass, when my practice included civil rights litigation. My choice here was easy. I was contacted by a Mississippi lawyer who was given my name by a federal judge. He was president and founder of a small, but vocal national group of white supremacists who had recently conducted a rally and march in Morristown. His group was sued for the costs of security and cleanup, and he defended in federal court under the Civil Rights Act, where he prevailed and was entitled to statutory attorney fees. To pursue payment of his fee, he was required to submit an affidavit from a local practitioner in the field, setting forth the usual range of attorney fees for such work in the jurisdiction. I was that practitioner. He explained how much trouble he'd had in finding an attorney to provide that affidavit. Many of the prominent civil rights lawyers were Jewish or black, and none would consent to his request. Some told him outright that his values and theirs were so disparate as to require that they not perform this simple, inoffensive favor. One attorney quoted him an exorbitant fee. Most assured him that he would find "someone," the implication being that this was below their moral station.

Although this man came from a different political planet from mine, and despite the fact that he would probably never have socialized with me or most of my friends, I offered to help. I did, and he was paid.

Since that time, I have maintained occasional contact with this purveyor of offensive notions, and we can openly discuss our differences, but I was then, as I am now, more disappointed in my colleagues than offended by his agenda. How could they not understand that freedom of expression exists even for the ideas we detest? Their efforts would not affect the merits of the case, but would only secure payment for a colleague who had prepared and argued a winning case. I suppose that they, comfortable within their own ethical frameworks, would have wondered how I, as a white liberal Jew, could offer to assist someone who would do me harm. Sometimes I wonder that, too.

There are times when our personal values and our professional mandate seem to be in irreconcilable conflict. When this happens, we can only hope to recognize the issues and to understand our professional obligations. This done, we should be able to lie comfortably in whatever bed we make. Act as you think you should, counsel, and you will always do the right thing.•

Next Week...

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