

A Critical Thinking Approach to Legal Ethics

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Introducing Herb Rubenstein

- Author, *Leadership for Lawyers* – 1st ed. NITA, 2005; 2nd ed. ABA, 2008
- Litigator DC, MD, VA
- Georgetown Law, JD 1982
- CLE and CPE (Accountants) Presenter – Leadership, Ethics. Professionalism, The Future of the Legal Profession
- Founding Board Member Association of Professional Futurists
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- Working on new book on the future of the legal profession and the courts
- Former Professor, Strategic Management, Graduate School of Business of the University of Colorado Denver
- Co-Founder, The Web3 Company, LLC – A Virginia educational company

Topics

- Model Rules of Professional Conduct and Some Virginia Rules which follow the Model Rules
- How to Think Critically About Ethics Rules and in some areas create your own ethical rules
- Definition of Ethics
- Definition of Corruption
- How to Be a Thought Leader in the field of Legal Ethics
- How to Expand and Improve Your Legal Practice Through Legal Ethics

Operational Definition of Ethics and Corruption

- **Ethics:** A system of moral principles turned into a code of conduct or behavioral norms which represent the minimum standard of acceptable behavior for the times. (*Equal Pay 1950's vs Equal Pay 2020's*) – *More than simply following written "obligations" and "prohibitions"*
- **Corruption:** "the exploitation of an official position [and all features, benefits, power, decision rights, deference afforded to in that position] for personal gain"

<https://www.theguardian.com/commentisfree/2021/aug/19/action-against-corruption-russian-sanctions-oligarchs-alexei-navalny>

Rule 1.1 Model Rules and Virginia

- Competence
- Critical thinking approach –
 - Substantive areas
 - Technological – not mentioned in some states
 - Virginia – Negotiation
 - What about: Cryptocurrency, BlockChain
 - What about: Bias, Discrimination
 - What about: Competent in Ethics?
 - Distinction: Can/Should – Can you lie during negotiation, mediation?
 - Lesson: Write your own Ethics Rules and Code of Conduct

Rule 1.6 Model Rules and Virginia

- Client confidences – collision course with duty to report, Rule 8.3, other lawyers for violating ethics rules
- What if reporting other or another lawyer would cause a confidential fact to be revealed – today – In Virginia must ask client permission to report other lawyer – tremendous barrier to reporting other lawyers
- Note: most disciplinary cases are not public, but some are

Rule 1.7 Model Rules and Virginia

- Conflict of interest – know of conflict opposing counsel has – what do you do?
- May file motion to disqualify if it does not harm your client – Virginia rule
- But should we have a duty to file motion to disqualify if there is known conflict of interest – Do we need client consent?
- Note here: Duty to profession and duty to client conflict – Lies to tribunal, duty to profession and courts win; Clearly in accounting duty to profession wins out over duty to client – law not there yet

Rule 3.3 and 4.4 Model Rules

- Cannot knowingly present false evidence
- Contradicts implicit due diligence requirements inherent in preparing pleadings and making arguments
- Simple new rule: Lawyers have a duty to know what they are talking about and be accurate
- **Accuracy** is a high standard, and should be the minimum standard when you write your own and your law firm/legal organization's own Code of Conduct

Rule 5.4 – Prohibited Non-Lawyer Ownership of Law Firm

- Changing in DC, (1991); Utah and Arizona (recently) CA and FL soon to change then tidal wave to change this flawed rule
- Terrible consequences
- Anti-free market, anti-capitalist, clearly has racist and sexist (promoting whites, harming minorities and females) implications
- ABA is a trade association – of course, it supports this
- This is the “lawyers keep all the money rule” plain and simple

Rule 8.3 Model Rules

- This is the duty to report attorney violation, but actually, it is the duty not to report violations
- Virginia and Louisiana – Never do this during litigation unless absolutely necessary –
- Everywhere language like: *reliable information* (is this an evidentiary test – no, how about “the preponderance of the evidence test”)
- Raises “substantial question” about “honesty, trustworthiness or fitness to practice law” – All words are *constraints to reporting violations*
- What about: personal knowledge of, or receipt of evidence, that suggests another lawyer violated a rule, must report
- No reporting – no ethics – no disciplinary proceedings – public trust falls even lower – lawyer’s right to self regulate will be challenged
- Increasing number of federal agencies have disciplinary proceedings SEC, USPTO, and someday there may federal agency to handle complaints against all lawyers as States simply do not do their job in a timely manner

Gender, Race and Other Forms of Bias and Ethics

- Now, many forms of bias are against the law and this is an ethical issue
- Not well “codified” in the ethical code
- Here, you must create your own code of ethics – your own standards
- How do you deal with a client that exhibits gender and/or racial or other bias?
- Notify client in writing of the issue and ask them to correct the situation in a timely manner and if they do not, resign (fire the client)
- Example: “Worker bias” 1992 – treating employees as “independent contractors” - illegal – notified client, gave them 30 days to correct, they did not, resigned – my biggest client
- Old adage – You are not a lawyer until you have fired a client, you are just a hired gun. And, you are not a great lawyer until you have fired a very good (well paying) client

Resigning/Firing Clients/Withdrawing from Matters

- All beginnings (retention agreements) should be in writing though some state bars do not require it
- All “terminations” or declining representation should be in writing, and where necessary, in litigation, approved by the court – Model Rule 1.16
- Can be done in court based on an emergency motion, notice to other counsel, notice to client
- Be aggressive in firing clients
- Be careful about any disclosures regarding fired clients
- Do not respond to negative “social media ratings” unless they are false, defamatory, and legally actionable.
- Do keep up with the social media comments about you and your firm and take them seriously

Technological and Substantive Competence

- To Meet Model Rule 1.1 business and other lawyers must know something about:
 - Artificial intelligence (which will be used to help deciding cases in the future and is currently used to help decipher and learn from e-discovery)
 - Cryptocurrency – what will be the future rules on law firms accepting this currency and whether your clients should accept this currency
 - Blockchain technology – will use of this be required of your client – already is by Walmart of its entire supply chain
 - Cybersecurity – Every law firm must have a cybersecurity consulting expert today. Data stolen from your law firm, not just a bad business situation, also an ethics situation, especially if law firm was negligent, failed to meet the standard of care of protecting client confidences.
 - Also, Ransomware, Privacy and Cybersecurity Insurance – Does your law firm need it and is it malpractice for you not to recommend it to your clients?
 - Electronic courtrooms – here to stay; become a master at video presentations, video communications with clients and beware of cybersecurity issues here

Settlement Agreements

- Certain non-disclosure agreements are now viewed as unenforceable and demanding them in settlement agreements would be unethical or even allowing your client to sign them if the other side put them in and demanded your client sign it
- Great future question – Is it unethical to draft settlement agreement for which there is no practical or legal means to enforce? (Clearly malpractice)
- When it comes time to do the first draft the settlement agreement, you do it yourself or have someone in your firm do it, if at all possible
- The case is not settled until the settlement agreement is signed must be your stance in negotiation
- Waivers of rights - beware of the blanket “release” and sign only when appropriate as to “all claims known and unknown prior to the date of this agreement” – Just refused to sign with such a clause and prevailed

Whistleblowers

- Who do you represent? Who do you not represent?
- What ethical duties to you have toward the client and the person you do not represent? Notify not representing potentially adverse party and suggest they get own counsel
- If you represent the entity or any officer who is not the whistleblower, you do not represent the whistleblower and you must make that clear in writing, but you may owe that whistleblower a duty of confidentiality if at any point the whistleblower sought legal advice from you or your firm and then you have a conflict of interest.
- Big minefield here and it is growing every day

Whistleblowers (Con't)

- Recent developments regarding whistleblowers
- SEC pays \$114,000,000 in October, 2020 to one whistleblower and over \$200,000,000 total in year
- Unlimited budget (5-30%) of amount collected
- Attorneys' fees are starting to be awarded
- Here comes tons of work for lawyers on both sides
- Whistleblowers are starting to get the "home field advantage" – can get their message out faster, are viewed as being more honest than defending organization, and getting better press coverage as part of the "*speaking up culture*" which is getting more and more traction and "sponsors as part of the *transparency* fight against *secrecy*"

Helping Clients and Other Lawyers Be More Ethical

- Help create office of Chief Ethics Officer or VP for Ethics or Corporate Director for Ethics
- Help create Ethics as a specific duty of a committee of a board of directors
- Help create and write contracts for clients for *Ethics Hotlines run by independent third parties* including reporting, analysis, and action requirements when data reveal problem (Could also include sexual harassment hotlines, workplace safety violation hotlines, racial or gender bias hotlines, regulatory noncompliance hotlines by phone, email, text, and protecting, where appropriate, the anonymity of information provider
- Do a conflicts of interest check of board members

Helping Clients and Other Lawyers Be More Ethical (Con't)

- Conduct regulatory, ethics *compliance legal audits*
- Help client write a code of conduct (so you better have one for your own firm before you try to do this)
- Help client create “an adjudicatory system” for when a person associated with client is alleged to have committed an ethics violation
- Help conduct an ethics related risk assessment via surveys, interviews, etc.
- Help develop regulatory risk profile in terms of potential future liabilities, social media response, negative potential outcomes to the client

Helping Clients and Other Lawyers Be More Ethical (Con't)

- Help your clients have good internal controls to assure the accuracy of their Environment, Social and Governance reporting
- Conduct a human capital and workplace compliance legal audit to assure equal pay across genders, no systematic racial bias in pay, promotion or workplace treatment
- Conduct a study of the future regulatory changes and future social changes in terms of ethics that will impact your client - Burberry story: *burning clothing*

Trends in Ethics

- Model Rule 3.1 Meritorious Claims and Contention - More judges sanctioning lawyers for filing lawsuits that are not supported by law or fact
- Judges need to be even better at being the gatekeepers to the courts and lawyers must use self-discipline not to file lawsuits that are not supported by law or fact in violation of Rule 3.1 which states: *A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. Oklahoma State Ethics Rule*

Trends in Ethics (Con't)

- More whistleblowers and accusers having “courage to come forward”
- Whistleblowers and accusers/complainants are getting “lawyered up”
- New non-hourly charges and fees and innovations in billing for all types of legal clients especially complainants with stories that will be compelling in social and traditional media
- “Nonlawyers” being allowed to invest in law firms, provide legal services

Trends in Ethics (Con't)

- More remote legal advice and adaptations to rules about practicing in one state while “residing” in another
- Greater use in disciplinary proceedings of immediate suspension “from the practice of law ... pending final disposition of this proceeding” for lawyers and judges...
- More clarity regarding ethics violations for unduly expansive e-discovery
- More people willing and able to speak up against ethics violations

Disciplinary Matters

- One of the greatest sources of failure in the legal profession
- Often too slow, too deferential to lawyers, too secret
- Staffed in large part by lawyer volunteers
- Too few court rulings requiring lawyers to pay for legal fees on the other side for non-meritorious law suits or dragging out litigation
- DC takes 8 years until final “discipline”
- Hurts the profession and the client
- Fix: Disciplinary authority should hire legal staff to investigate a client or third-party complaint – Can be seen as huge cost or reasonable investment
- Use “clear and present danger rule” which some states have to issue preliminary suspension of lawyer pending final hearing

How To Expand Your Legal Business Through Ethics Related Services

- These are many good business ideas for lawyers if you know trends and increasing focus on ethics is an important trend that will give many lawyers excellent business development opportunities
- Some new business development opportunities can be done in concert with work done by the accounting firm for current or future clients
- Some can even be done for your smaller clients on a per project cost rather than hourly basis and these projects will become more efficient and pay dividends when done for many clients

How To Expand Your Legal Business Through Ethics Related Services (Con't)

- Excellent business strategy to use “ethics” as an intentional springboard to new business
- If “advertised” or “shared” via websites, social media, speeches, etc. this increased “social presence” should promote getting more and better clients
- Don’t take a case unless you want three like it because when you do a brilliant job for Client A, others will hear about it and you will get more work in this area

How To Expand Your Legal Business Through Ethics Related Services (Con't)

- Join nonprofit boards or do *pro bono* work for a nonprofit – beware of politically divisive work and how your *pro bono* work can cause conflicts of interest
- Hire a social media or website expert to help you present your “ethics brand” and expertise as clearly as possible

Conclusion

- Model rules have some gaping holes
- Fill in these holes with your own law firm code of conduct – can find examples on the web, including videos by two firms about how they developed their own code of conduct
- Use the rules to help promote your business

Conclusion (Con't)

- Provide ethics training in-house at your law firm
- Give a guest lecture on ethics at a law school
- Put “ethics” on the agenda in writing in meetings
- Speak and write about ethics
- Recommend new ethics rules
- Expand your reputation (social capital) in the ethics arena
- Enforce ethics rules in your own firm and practice

Conclusion (Con't)

- Ethics takes time and an investment (a cost of doing business as a lawyer)
- Report lawyers and judges when they commit ethical violations
- Push hard for quicker, better disciplinary enforcement in your State
- Be an “ethics leader” and apply your critical thinking skills to ethics situations and opportunities to expand the ethics related work that you and your law firm do

Thank you and Contact Information

- Feel free to share these slides with anyone
- Keep me posted on your efforts in the area of ethics by reaching out to me at:
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