

Walking in the Dark Shadows of the Ethics Line¹
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This paper's title is a misnomer. There is no bright line for difficult ethics issues. Sure, there are bright lines for easy issues (and sometimes people miss those, too, even though they're there.) But the hard part of practicing law is that, often, no easy answers exist. This paper is designed to highlight some, but not all, of the areas in which good lawyers might find themselves tripping over the fuzzy ethics line.

Advising clients generally. You know all of the basic rules: confidentiality (see Model Rule of Professional Conduct 1.6), competence (MRPC 1.1), diligence (MRPC 1.3), reasonableness of fees (1.5), conflicts of interest (MRPC 1.7 & 1.9), imputation of conflicts (MRPC 1.10), organizations as clients (MRPC 1.13), and withdrawal (1.16). What the rules don't talk about, however, is how to advise clients in this increasingly competitive economy—and how much pressure a stubborn or wayward client can bring to bear. Lawyers need to know when to say “no” to clients, even when what a client may be suggesting is not illegal but is merely wrongheaded.

Check out one of my favorite cases, *In re Martinez*, 393 B.R. 27 (Bankr. D. Nev. 2008). In that case, the wrong property description was attached to a lift-stay stipulation, but after the order approving the stipulation was signed, the lawyers discovered the error. The lawyer from Cooper Castle refused to enter into a stipulation vacating the order on the grounds that the lawyer's client (Wells Fargo) wouldn't consent. In essence, then, the client was holding the lawyer hostage—or attempting to do so—by withholding consent to undo an error. As the Court explained,

Clients may not demand unethical or unlawful conduct from their lawyers and expect compliance. As established above, Cooper Castle and its lawyers knew, or should have known, that Wells Fargo had no reasonable or nonfrivolous basis to oppose setting aside the stipulation. At a minimum, they had a duty to tell this to Wells Fargo, NEV. RPC 1.4(a)(5), and to withdraw from the representation or take some other action if Wells Fargo insisted on opposing. . . . They neither withdrew nor did they offer any evidence of compliance with Rule 1.4.

The court understands that lawyers do not give away their services, and that good business and good lawyering each require that the lawyer serve the client's business needs. But law is a profession as well as a business. Because of this status, lawyers

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2009 Southwest Bankruptcy Conference

7/2/2009 1:39 PM

must not allow the interests or dictates of a client to control their professional judgment. . . . As the Fifth Circuit recently noted, “This is no matter of rules of fine etiquette. Rather, it is the matter of lawyers as officers of the court conducting themselves in ways that do not impede the work of the courts—the genuine and not false service to their clients.” *Newby v. Enron Corp.*, 302 F.3d 295, 303 (5th Cir.2002). . . .

This court is concerned that Cooper Castle and its lawyers sacrificed their professional independence to the demands of a large institutional client. They should have counseled Wells Fargo to agree to vacate the mistaken stipulation, and informed them that any other course of conduct was unreasonable and one in which they could not participate. Instead, they followed Wells Fargo’s instructions without apparent regard to their professional obligations. In short, rather than remain as independent professionals counseling Wells Fargo, Cooper Castle and its lawyers instead chose to become unthinking agents for Wells Fargo’s ends.

The smooth functioning of the courts and the interests of justice always trump a client’s unreasonable demands. . . . A lawyer representing a client whose business contributes to a lawyer’s income necessarily faces a difficult question every day: Will the lawyer remain an independent professional or instead become a fancy butler serving the needs of a more powerful principal? . . . This court cannot force a party to undertake such introspection; however, to the extent the questions posed by such introspection are answered by the law governing lawyers, the court can compel compliance. As a result, the court finds that Cooper Castle and the lawyer appearing from that firm each violated their duties under Rules 1, 2, 1.4 and 1.16.

. . . .

Just as Cooper Castle was duty bound to alert Wells Fargo that its proposed course of action was improper, so, too, was the lawyer from Cooper Castle duty bound to inform the attorneys in his firm that their proposed course of action was improper. This lawyer was not merely the inanimate instrument of Cooper Castle and Wells Fargo; he was and is an attorney admitted to practice before this court. As such he has duties independent of his employment contract. As set forth above, his actions in opposing the motion to vacate violated Rule 9011. As a result, the court

finds that this lawyer has failed to present evidence that he did not fail in his professional duty as a lawyer. He is thus subject to sanctions for his conduct, just as Cooper Castle, his employer, is subject to sanctions for its conduct.³

Lesson one, then, is that clients shouldn't call all of the shots, even about strategies, especially when a lawyer knows that what the client wants is flat-out wrong.

In a recent article, Colin Marks and I suggested one way of trying to parse out when your client is asking you to go too far:

[A] lawyer's advice could easily get lost in the shuffle of everyday corporate life. Reporting structures need to solidify a lawyer's ability to give advice. Without giving a lawyer the power structure to make sure her advice gets real consideration, the miscreant corporation (and the corporation focused only on short-term gains) will be able to marginalize the lawyer's advice. Even a good corporation with well-meaning officers and directors will push back on legal advice from time to time. The question is not whether officers and directors will push back. The question is what the lawyer can do about the anticipated push-back. How can the lawyer help the corporation stay on the right side of the law?

There are always line-drawing problems when it comes to giving legal advice. For one thing, a client may want to "test" the line or urge that the line be moved in some way. For another thing, the line may not be well-defined at all when the client wants to take a particular action. And, of course, some clients (and some lawyers) couldn't even locate the line between right and wrong with a map and a divining rod. For this last group (those who couldn't find the line if it were directly in front of them and labeled "LINE IS HERE"), we propose a bright-line test for legal advice: if the advice uses the word "technically" in order to be accurate, then that advice is far too close to the line for comfort. So, for example, if an opinion letter suggests that a transaction will comply with the relevant regulations only if the words are read out of context and counter to the purpose of the regulations, that opinion letter likely will have some variant of the word "technically" in it, and it is too close to the line.⁴

³ *Id.* at 36-37, 41 (citations and footnotes omitted).

⁴ Colin P. Marks & Nancy B. Rapoport, *The Corporate Lawyer's Role in a Contemporary Democracy*, 77 *FORDHAM L. REV.* 1269, 1290-91 (2009) (footnote omitted).

Conflicts of interest in bankruptcy cases. At least in the large commercial cases, conflicts of interest are a constant trap for the unwary. I'm attaching to this paper another paper of mine, Nancy B. Rapoport, *The Intractable Problem of Bankruptcy Ethics: Square Peg, Round Hole*, 30 HOFSTRA L. REV. 977 (2002), which details how incredibly complex conflicts issues can be in large cases. The main point about conflicts, of course, is that parties can shift allegiances several times during a bankruptcy case, depending on the issues involved. Therefore, "clearing conflicts" at the beginning of a case may well not be sufficient. Lawyers need to be aware that other conflicts issues might arise during a case.

A lot has been said about "conflicts counsel,"⁵ but from my perspective, the best use of conflicts counsel is when the conflicts will be dormant, temporary, and issue-specific types of conflicts.⁶ Issues that might fall into this category could include—*sometimes*, but not every time—representing a corporate client with a few, discrete claims against insiders. But a good lawyer will anticipate and recognize the difference between discrete claims that may or may not arise and constant conflicts that are inconvenient from a section 327(a) point of view.

Privilege issues. Obviously, for bankruptcy lawyers, the juicy privilege questions started with the Supreme Court's decision in *Commodity Futures Trading Commission v. Weintraub*.⁷ Weintraub answered the question of who succeeded to a chapter 7 corporation's attorney-client privilege by, logically, holding that the trustee became the successor to the privilege. Unfortunately, it didn't answer questions about all of the other permutations of privilege: permutations of chapter and type of entity.

Disclosure issues. Lawyers know that the rule is "disclose early and often," but sometimes, in the pace of practice, someone in the office forgets to dot the "i" and cross the "t."⁸ The practice point in almost all of these cases is that someone must follow through to make sure that the court and other parties in interest get timely notice of a conflict when the lawyer involved reasonably should know that there's a potential problem. Although the issue is one of law office management, the practical effect of failing to inform the court and parties in interest about potential problems can include serious sanctions, including disgorgement of fees.

Duty as an officer of the court; duty of some professionals to the "estate"; fee issues; misc. Very few⁹ lawyers agree with me¹⁰ that lawyers owe a larger duty to keep the bankruptcy

⁵ Sadly for me, no one cites to any of my articles when arguing in favor of appointing 327(a) counsel who need "conflicts counsel." But I still have hope.

⁶ See Nancy B. Rapoport, *Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy*, 26 CONN. L. REV. 913, 924-26 (1994) (defining dormant, temporary, actual conflicts of interest—DTACs).

⁷ 471 U.S. 343 (1985). For a comprehensive listing of the post-*Weintraub* law on attorney-client privilege, see, e.g., Michael A. Cook & Sheldon S. Toll, *Bankr. Litig. Manual* § 4.08 4-23 n. 81 (2008-09).

⁸ See, e.g., Michael P. Richman, Mark A. Salzberg & Benjamin A. Ellison, *Sonicblue: Disclose or Perish Revisited*, 28-JUN AM. BANKR. INST. J. 20 (2009).

⁹ Seven at last count, including one relative.

system honest than they do to their own clients. The ethics rules do a miserable job of balancing the lawyer's duty of competent representation with his duty as an officer of the court. But, just as in the *Martinez* case discussed above, there are times when a lawyer still has to say no. For example, when a client wants to wring out every last procedural or other advantage by using the litigation system as his own personal battering ram, that's a good time for saying no, even though "technically"¹¹ what the client wants to do is within the bounds of the law. Beating up other lawyers and their clients for procedural jollies is bad lawyering and bad business. As Sol Linowitz has explained,

[I]t is my deep conviction that lawyers can and should do more—that they can lead the way to a more ethical America. I believe Elihu Root once again had it exactly right when he told a client: "The law lets you do it but don't. . . . It's a rotten thing to do."¹²

With respect to fees in particular, I have a special sensitivity to the issue of "overlawyering" a matter because it's relatively easy to do but difficult to detect. I'm sympathetic to a good lawyer's desire to do a fully competent job in representing a client, and—when the client can afford it¹³—to spend the time necessary to do a spectacular job. I'm not talking about "careful" lawyering. I'm talking about multiple lawyers working on the same parts of the same matter, trooping in four abreast to a hearing in which only one will have a speaking role and only one will have a solid second-chair role. In my opinion, when a lawyer is paid from estate funds, there is a reason to step back, before doing the client's bidding, to think about what it really means to be paid from those funds. Every dime going to the professional is a dime coming from the unsecured creditors' pockets. Sometimes lawyers forget this fact, and forgetting is easy to do when the person(s) paying the bill aren't the ones giving the marching orders. I'm in the process of thinking about whether the duty to the estate is an actual "duty" (which has implications for who has standing to sue for breach of the duty) or whether the issue is more about how to balance the competing duties to the court and to the client. I'll likely do an article on that issue early next year.

Some thoughts about why smart people do dumb things. If you ever wonder why you read about incredibly bone-headed blunders by very smart people, including very smart lawyers, you might want to pick up Milton Regan's book, *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2005). It tells John Gellene's story in a very compelling way.¹⁴

¹⁰ See, e.g., C.R. Bowles & Nancy B. Rapoport, *Has the DIP's Attorney Become the Ultimate Creditors' Lawyer in Bankruptcy Reorganization Proceedings?*, 5 AM. BANKR. INST. L. REV. 47 (1997); Nancy B. Rapoport, *Seeing the Forest and The Trees: The Proper Role of the Bankruptcy Attorney*, 70 IND. L.J. 783 (1995).

¹¹ See? The "technically" test works!

¹² Sol M. Linowitz, *Moment of Truth for the Legal Profession*, 1997 WIS. L. REV. 1211, 1214-15.

¹³ Or, in doing pro bono work, even when the client can't afford it.

¹⁴ See also Nancy B. Rapoport, *The Curious Incident of the Law Firm That Did Nothing in the Night-Time* (reviewing MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (Univ. of Michigan Press 2004)), in 10 LEGAL ETHICS 98 (2007).



2009 Southwest Bankruptcy Conference

7/2/2009 1:39 PM

Smart people can do very stupid things in part because they're human, and humans can convince themselves either that they're not crossing an ethical line or that they're somehow justified in crossing that line.¹⁵ In fact, smart people are exceptionally good at rationalizing their actions. Every corporate scandal about which you've read has very smart people who convinced themselves that they weren't doing anything wrong.

Final lesson: sometimes an ethics issue is tough because *in fact* it is in a grey area; sometimes, however, the ethics issue just feels tough because admitting that you've made a mistake is simply too uncomfortable to do. Don't confuse the two.

¹⁵ See, e.g., NANCY B. RAPOPORT, JEFFREY D. VAN NIEL & BALA G. DHARAN, ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER (Foundation Press 2d ed. 2009) (passim, but especially the third chapter).