

There are Limits: Ethical Issues in Settlement Negotiations

– Edward M. Waller, Jr.

Can you say pretty much anything to strengthen your client’s case when you are attempting to negotiate a settlement? Can you withhold the weaknesses in your client’s case? What are your obligations when you represent more than one party in negotiating a settlement? As defense counsel, can you insist that plaintiff’s counsel agree to keep confidential damaging information she learned about your client? Can you include in a settlement agreement a provision whereby your client hires opposing counsel as a consultant so she will be conflicted out of suing your client again? These are just a few of the ethical issues that may arise in the context of settlement negotiations. There is danger in these situations if counsel relies on gut instinct or perceived wisdom or local practice rather than the applicable ethical rules.

Misrepresentations and Omissions

Your client is a local brewery which buys a filling machine which is supposed to fill 150 cans a minute; however, the machine proves to be defective. It regularly breaks down and, even when working, fills only about 30 cans per minute. You sue the filling machine manufacturer for lost profits resulting from lost sales. In settlement negotiations, you state, “we can prove lost sales and consequent lost profits of \$500,000” when you know that 50% of the lost sales and \$250,000 of the lost profits had nothing to do with the problem filler. What if you said “we lost eight major customers because of the defective filler” when you know that four of the customers left for other reasons? Additionally, what if you tell opposing counsel, “my client won’t take a penny less than \$500,000 to settle this case” when your client has just authorized you to settle for \$250,000?

Rule 4.1(a) of the ABA Model Rules of Professional Conduct provides:

In the course of representing a client, a lawyer

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From the Co-Chairs:

Becoming More Involved

Since our last report, we have continued to work with the Committee Leadership Team to improve the subcommittee structure, recruit new subcommittee chairs and get more members actively involved in Committee activities.

To that end, we held our first ever Ethics and Professionalism Committee conference call meeting on Friday, May 20. Close to 20 members participated in the meeting and we had a great discussion. Penny and I were very pleased that the conference call format proved to be a successful way to give members an opportunity to participate in Committee activities even though they may not be able to attend Committee meetings at the Section Annual Meeting or ABA Annual Meeting. Several of the callers volunteered to write articles for the Newsletter and we received good suggestions for Committee projects. Thank you to all of the attendees for participating. We’ll do this again!

We are still looking for member volunteers to work on our Website. We think this is an area that could be much improved and add value for our members. Please let us know if you, or a colleague, are interested in working on this project.

As you know by now, the 2005 ABA Annual Meeting will take place August 4-9, 2005 in Chicago. Although none of the program proposals that we co-sponsored made it to the program agenda, the programming for the Annual Meeting is first rate. Penny and I hope you will be able to attend. Our Committee will hold a Breakfast Meeting on Friday, August 5, in the International Ballroom at the Fairmont Hotel. Please try to join us, as we will be planning our activities for the coming year. With all of the excellent programming and outstanding social events, Chicago will be a meeting you won’t want to miss! If you have not yet registered, do so right away.

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From the Co-Chairs:

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Let me end by again thanking all of you who are actively involved in the Committee. We value your input and need your help. If you are interested in becoming more actively involved, please contact us.

See you in Chicago!

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Reaching Out to the Next Generation: The Committee's New Law Student Liaison

In its continuing effort to facilitate the interest of law students in the American Bar Association and its activities, the Section of Litigation has named Student Liaisons to its committees. The Ethics and Professionalism Committee is proud to introduce you to its student liaison, Louis Reinstein. Louis was appointed as a liaison to the E & P Committee as a result of his interest in ethics and professionalism issues.

Louis Reinstein is a third year law student at Nova Southeastern University Shepard Broad Law Center in Ft. Lauderdale, Florida. There, Louis serves as a member of the Moot Court Honor Society, was awarded the "Best Brief" award in the Lawyering Skills and Values program, received a public service fellowship for his summer work in 2004, and is a student member of the Stephen R. Booher Inn of Court of Broward County. Prior to law school he earned a B.A. in Religious Studies from the University of Florida, studying abroad in the Tel Aviv University Overseas Study Program, and an M.A. in Jewish Studies from Emory University, studying abroad at Hamline - Hebrew University Program, in Jerusalem, Israel. Before attending law school, Louis taught history and social studies at the David Posnanck Hebrew Day School in Plantation, Florida.

Louis attributes his interest in legal ethics and professionalism issues to his background in religious studies. He says that, like "too many people, he had often heard uncomplimentary stories about lawyers in the news." Through his work on the Committee, Louis says he hopes to "meet positive role models in order to be sure that any future stories about me will

only be positive." Already, he feels that the opportunity to work closely with ABA leadership has benefited him: "My involvement with the ABA has provided both legal resources and national contacts that I would have never uncovered otherwise."

Additionally, despite the rigors imposed by the study of law, Louis uses his experiences with the Committee to encourage other law students to get involved in the ABA with topics that interest them, arguing that: "Any law student or young lawyer would benefit by joining the ABA and a Section of their interest." Moreover, Louis found that stepping forward and getting involved was really easy. "I was pleasantly surprised how easy it was to get involved and how receptive the members of the Ethics and Professionalism Committee have been to my interest in being an active member." Louis became involved simply by making his interest known to Litigation Section leaders.

After law school, Louis hopes to be involved in litigation. This summer he will be working at Bunnell, Woulfe, Kirschbaum, Keller, McIntyre & Gregoire, P.A., a civil firm in Ft. Lauderdale, Florida, and will be participating in a Fall internship at the State Attorney's Office for the 17th Judicial Circuit offered through his school, giving him a good opportunity to explore his interest in civil and criminal litigation.

Law students who want to follow Louis' lead and become more actively involved in the ABA Sections or Committees may contact Louis at reinsteinl@nsu.law.nova.edu ☐

Ethical Issues in Settlement Negotiations

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shall not knowingly: (a) make a false statement of material fact or law to a third person.

Further, Model Rule 4.1, comment [2] states:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are

Are you knowingly making false statements of material fact if you honestly believe opposing counsel will consider the settlement context and not rely on the statements as factual?

not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category. . . Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

All three statements are false. Are they statements of fact or statements of opinion? Isn't the first more opinion than fact but the last two more fact than opinion? Are they statements of "material" fact? Are you knowingly making false statements of material fact if you honestly believe opposing counsel will consider the settlement context and not rely on the statements as factual? Wouldn't you expect opposing counsel to discount the first and third statements? What if you have no experience at all with opposing counsel but you believe him to be fairly unsophisticated? *See, The Restatement (Third) of the Law Governing Lawyers, § 98, comment c,* which discusses the factors to be considered in assessing whether such statements may be improper misrepresentations of material fact.

As opposed to restricting your affirmative representations, ethics rules may prevent you from withholding factual information or may require you to correct prior misinformation. What if you have said nothing in the negotiations about the number of major customers lost but you learn that your client previously told the defendant about losing eight major customers, and you are aware that opposing counsel and the defendant are relying on that factual information? Can you remain silent?

Model Rule 4.1(b) provides:

In the course of representing a client a lawyer shall not knowingly: (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

By withholding the information that four of the eight major customers left for other reasons are you "assisting a . . .

fraudulent act by a client"? Does your duty of confidentiality to your client under Model Rule 1.6 prevent disclosure or, if you reasonably believe disclosure is necessary to prevent your client from committing a fraud, does Model Rule 1.6(b)(2) permit disclosure? Does Model Rule 8.4, which precludes you from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation," mean you should counsel your client that the false information has to be corrected and then withdraw, under Model Rule 1.16, if your client refuses to allow you to make the correction? If you, instead of your client, have made the false statement about losing eight customers, is this engaging in fraudulent conduct within

What if you have no experience at all with opposing counsel but you believe him to be fairly unsophisticated?

the meaning of Model Rule 8.4?

Even if false statements or omissions may not amount to ethical violations, they may affect your credibility with opposing counsel and can result in a court setting aside the settlement.

Representation of Multiple Clients

Under what conditions can you represent five different purchasers of the defective fillers? What if three purchased the fillers before defendant limited its warranty and two purchased afterward? What if one is in her first year of brewing beer, one has a seven-year history of very profitable production, two have barely broken even the last three years, and one is also a distributor of the fillers? What if the defendant offers a lump sum settlement of \$500,000 to settle all five claims? What if

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the defendant offers \$140,000 each to the three clients who purchased before the warranty change and only \$40,000 each for the other two? What if defendant offers \$10,000 to your brewer/distributor client, \$40,000 to your first-year brewer, \$100,000 each to the two marginally profitable brewers, and \$250,000 to the brewer with the seven-year history of substantial profits, and the offers are each contingent on acceptance by all the others? What if all offers are independent of each other?

Model Rule 1.7(a) describes the circumstances when a lawyer's representation of one client precludes the representation of another and Model Rule 1.7(b) sets forth the conditions when representation of more than one client is permissible even if there exists a concurrent conflict of interest. These rules provide:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client . . . or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and

diligent representation to each affected client;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Also, Model Rule 1.8(g) provides:

There is danger in these situations if counsel relies on gut instinct or perceived wisdom or local practice rather than the applicable ethical rules

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or *nolo contendere* pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Applying these rules to possible representation of the five clients, you will find numerous ethical hurdles to overcome. First, there is a conflict of interest if there is a significant risk

that representation of the brewers with no history of substantial profits would materially limit your advocacy on behalf of the brewer with seven years of very profitable production. This conflict will preclude representation of both categories of brewers unless you reasonably believe that you will be able to provide competent and diligent representation to both and all clients give informed consent in writing. Similarly, there may be a problem in representing brewers who bought before the warranty change and also brewers who bought after the warranty change. If there is a likelihood that different interests will emerge and they will interfere with your exercise of independent professional judgment in considering alternatives or foreclose arguments that you reasonably should make, then perhaps you should not undertake to represent all the brewers. See Model Rule 1.7, comment [8].

If you decide that you can represent several of the brewers after obtaining their consent, it may be wise to make sure their consent is informed consent by advising them to consult with separate independent counsel. Even with informed consent, you may not be able to represent the brewer/distributor and the other brewers since some of them may have claims against him. You might be able to represent these divergent interests in a mediation but may not be able to represent both in asserting claims against each other in the "same litigation" or other proceeding before a tribunal." See Rule Model 1.7(b)(3) and Model Rule 1.7, comment [17].

In the situations where the defendant is offering the \$500,000 lump sum to settle all claims or is making specific offers but they are contingent on acceptance by others, you must also disclose the "existence and nature of all the claims" and "the participation of each person in the settlement." See

Model Rule 1.8(g). Thus, each brewer must be advised the circumstances of the claims of every other brewer and the amount to be received by each one. Even if there is no aggregate settlement proposed, you should be aware, and so advise all the brewers, that client-lawyer confidentiality and attorney-client privilege will not be applicable as between them. *See* Model Rule 1.7, comment [30].

Agreements to Keep Information Confidential and to Restrict Counsel's Future Representation

As counsel for the defendant manufacturer of the fillers, you and your client want to keep confidential the settlements you have made with the brewers, and you want to eliminate the possibility that plaintiffs' counsel will represent other brewers in suits against your client. What can you do?

With respect to confidentiality, there is no general ethical rule which would prevent you from insisting on secrecy with respect to the terms of the settlement and the facts learned in the litigation by opposing counsel about your client's fillers. After all, information "relating to the representation" of the plaintiffs is confidential anyway under Model Rule 1.6. (A lawyer's duty of confidentiality applies not only to attorney-client privileged information but also to other information learned in the course of the representation.) The situation could be different if counsel reasonably believed it necessary to disclose information about the fillers to prevent substantial bodily harm. *See* Model Rule 1.6(b)(1). Under these circumstances, counsel may be obligated to disclose the information, and the attempt to restrict that duty might itself be unethical. *See* Model Rule 8.4(a). Also, there may be statutes in certain jurisdictions that would require disclosure of information such as environmental hazards, or there may be specific rules that impose an ethical duty to report certain information. Further, even if there is no ethical problem with

confidentiality agreements, courts in some jurisdictions will not enforce such agreements.

Even where confidentiality agreements are enforceable, they should not purport to prevent counsel from using, as opposed to revealing, information learned in the litigation. Model Rule 5.6(b) provides that

A lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

A prohibition against use of information may be interpreted as an indirect restriction on counsel's right to practice.

Similarly, an arrangement for defendant to hire plaintiffs' counsel in the future as a consultant or attorney so as to conflict her out of suing the defendant should not be negotiated as part of the settlement. Such an arrangement may defeat the purposes behind Model Rule 5.6. The rule exists so that future potential clients will not be deprived of the opportunity to retain plaintiffs' counsel and so that there will not be a conflict between the interests of the existing plaintiffs and their counsel. Therefore, any subsequent arrangement between the defendant and plaintiffs' counsel must be completely independent from the prior settlement agreement and must in no respect form part of the consideration paid by the defendant in the settlement. Any such arrangement

should be considered very carefully to avoid even the appearance of impropriety.

Conclusion

Besides the ethical issues described above, there are other ethical concerns which may be implicated in settlement negotiations. These may vary from jurisdiction to jurisdiction. Counsel must become familiar with the rules that may be applicable. A more detailed discussion of ethical issues in settlement negotiations may be found in the ABA Litigation Section's "Ethical Guidelines for Settlement Negotiations" which was promulgated in 2002 (before certain amendments to the Model Rules). *See* www.abanet.org/litigation/ethics/settlement.html □

Ed Waller is a shareholder, Class Action/Complex Litigation Team Leader and Health Care Practice Group Leader at Fowler White Boggs Banker P.A. in Tampa, with a practice encompassing business litigation, class actions, health care litigation, lender liability, bankruptcy, and creditors' rights generally. He has served (among other things) on the Executive Committee of the Section of Litigation, as chair of its Commercial and Business Litigation Committee, and as former chair of the ABA Standing Committee on Professionalism.

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Young Lawyers:

The Litigation Section has a site dedicated to young lawyers that includes articles, networking opportunities, web resources and more!

See: <http://www.abanet.org/litigation/younglawyers/home.html>

Duty to Report Another Lawyer's Misconduct May Be Triggered Based By A Reasonable Belief of Misconduct

– Francis G. X. Pileggi & Scott Thomas Earle

The Supreme Court of Louisiana (the “Court”) in *In re Michael G. Riehlmann*, No. 04-B-0680 (La 1/19/05) recently reviewed a decision of the Louisiana Office of Disciplinary Counsel (“ODC”) involving a violation of Rule 8.3(a) of the Louisiana Rules of Professional Conduct, (the “Rules”), i.e., a lawyer’s duty to report another lawyer’s professional misconduct. The Court rejected the ODC’s finding and held that a lawyer must report another lawyer’s misconduct where there is a reasonable belief that a violation of the ethical rules has occurred and the report must be promptly made directly to the ODC. *Id.* at 12-13.

Michael Riehlmann, a criminal defense attorney and former district attorney, had met his close friend, Gerry Deegan, also a former district attorney and former law school classmate of Riehlmann’s, at a bar in April of 1994 where Deegan told Riehlmann that he was dying of colon cancer. During the same

conversation, Deegan informed Riehlmann that he had suppressed exculpatory blood evidence in a criminal case that he prosecuted while working for the District Attorney’s Office. Deegan died shortly afterward in July of 1994.

John Thompson had been prosecuted by Deegan for armed robbery in 1985 and was scheduled to be executed by lethal injection on May 20, 1999, roughly five years after Deegan’s death. In April of 1999, Thompson’s counsel learned of a crime lab report containing the results of a blood test conducted on the perpetrator’s blood, which was taken from the clothing of the victim. Deegan never disclosed the crime lab report, which revealed that Thompson was not the same blood type as the perpetrator, to Thompson’s counsel.

Realizing that this case was the case he discussed with Deegan in the bar, Riehlmann informed Thompson’s lawyers of the conversation and executed an affidavit stating that “the

late [Deegan] said to me that he had intentionally suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant.” *Id.* at 2. In May of 1999, Riehlmann reported the conversation to the ODC.

In June of 1999, Riehlmann testified in a hearing for a new trial in the Thompson case where he testified that Deegan admitted to him that he “suppressed exculpatory evidence that was blood evidence, that seemed to have excluded Mr. Thompson as the perpetrator of an armed robbery.” *Id.* Shortly afterward, in September of 1999, Riehlmann provided a sworn statement to the ODC in which he was asked why he did not report Deegan’s statements to the ODC at the time they were made. Riehlmann responded:

I think that under ordinary circumstances, I would have. I really honestly think I’m a very good person. And I think I do the right thing whenever I’m given the opportunity to choose. This was unquestionably the most difficult time of my life. [Deegan], who was like a brother to me, was dying. And that was, to say distracting would be quite an understatement. I’d also left my wife just a few months before, with three kids, and was under the care of a psychiatrist, taking antidepressants. My youngest son was about two and had just recently undergone open-heart surgery. I had a lot on my plate at the time. A great deal of it was my own making; there’s no question about it. But, nonetheless, I was very, very distracted, and I simply did not give it the important consideration there it deserved. But it was a very trying time for me. **And that’s the only explanation I have, because, otherwise, I would have reported it immediately had I been in a better frame of mind.** [emphasis added.]

Louisiana Rule of Professional Conduct 8.3:

Rule 8.3. Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Office of Disciplinary Counsel.

(b) A lawyer who knows that a judge has committed a violation of the applicable rules of judicial conduct that raises a question as to the judge’s honesty, trustworthiness or fitness for office shall inform the Judiciary Commission. Complaints concerning the conduct of federal judges shall be filed with the appropriate federal authorities in accordance with federal laws and rules governing federal judicial conduct and disability.

(c) This rule does not require the disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program or while serving as a member of the Ethics Advisory Service Committee.

On January 4, 2001, the ODC filed charges against Riehlmann on the grounds that his failure to report the conversation violated Rule 8.3(a) as well as other Rules. Based upon its factual findings, the ODC found that Riehlmann did not violate Rule 8.3 because he did not have “knowledge of a violation” and that the statement made by Deegan did not rise to the level of a “confession.” *Id.* at 5. The ODC explained that Riehlmann’s statements at most suggested a potential violation of the Rules and declined to construe Rule 8.3(a) to require a lawyer to report a potential violation of the Rules by another lawyer. *Id.* at 5.

The Court overruled the ODC’s findings and disagreed with the ODC’s interpretation of Rule 8.3(a). The Court noted that, “absolute certainty of ethical misconduct is not required before the reporting requirement is triggered” and held that a “lawyer will be found to have knowledge of reportable misconduct, and this reporting is required, where the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely occurred than not occurred.” *Id.* at 12. The Court further explained that reporting must be done promptly in order to serve the purpose of Rule 8.3(a). *Id.* at 12-13 □

Francis X. Pileggi is a partner and Scott Thomas Earle is an associate in the Wilmington, Delaware, office of Fox Rothschild LLP. Pileggi is a co-chair of the Ethics Subcommittee of the Commercial and Business Litigation Committee of the ABA Section of Litigation, and a member of the Ethics and Professionalism Committee’s Media Relations and response subcommittee. Their e-mail addresses are: fpileggi@foxrothschild.com and searle@foxrothschild.com.

In re Riehlmann, 891 So.2d 1239, 1248-49 (La. 2005):

Regardless of the actual words Mr. Deegan said that night, and whether they were or were not “equivocal,” respondent understood from the conversation that Mr. Deegan had done something wrong. Respondent admitted as much in his affidavit, during the hearing on the motion for new trial in the criminal case, during his sworn statement to the ODC, and during his testimony at the formal hearing. Indeed, during the sworn statement respondent conceded that he would have reported the matter “immediately” were it not for the personal problems he was then experiencing. Respondent also testified that he was surprised and shocked by his friend’s revelation, and that he told him to remedy the situation. There would have been no reason for respondent to react in the manner he did had he not formed a firm opinion that the conduct in question more likely than not occurred. The circumstances under which the conversation took place lend further support to this finding. On the same day that he learned he was dying of cancer, Mr. Deegan felt compelled to tell his best friend about something he had done in a trial that took place nine years earlier. It simply defies logic that respondent would now argue that he could not be sure that Mr. Deegan actually withheld *Brady* evidence because his statements were vague and non-specific.

We also find that respondent failed to promptly report Mr. Deegan’s misconduct to the disciplinary authorities. As respondent himself acknowledged, he should have reported Mr. Deegan’s statements sooner than he did. There was no reason for respondent to have waited five years to tell the ODC about what his friend had done.

* * *

[R]espondent’s failure to report Mr. Deegan’s bad acts necessitates that some sanction be imposed. Respondent’s knowledge of Mr. Deegan’s conduct was sufficient to impose on him an obligation to promptly report Mr. Deegan to the ODC. Having failed in that obligation, respondent is himself subject to punishment. Under all of the circumstances presented, we conclude that a public reprimand is the appropriate sanction.

Do The Right Thing - Easy to Say, Hard to Do:

***Absolute Honesty: Building a Corporate Culture that Values Straight Talk and Rewards Integrity* by Larry Johnson and Bob Phillips**

***Just Business: Business Ethics in Action* by Elaine Sternberg**

***Letters to a Young Lawyer* by Alan M. Dershowitz**

– Rolf Dobelli, Ph.D.

Homespun actor Wilford Brimley who has appeared in countless roles on TV and the big screen, is perhaps best known for a line he spoke while pitching heart-healthy oatmeal. In the oatmeal ads Brimley, dressed in denim and suspenders, looked earnestly into the camera, his visage as earnest as an old leather saddle, and gruffly advised viewers to eat oatmeal because “it’s the right thing to do.”

Somehow Brimley turned oatmeal consumption into something of a moral imperative. A rather stout fellow, Brimley looked like he had enjoyed more than a few portions of porridge himself in his day. Years later we learned from Dr. Atkins that oatmeal wasn’t necessarily the apotheosis of dietary morality, either. No matter - Brimley was utterly believable in his appeal, which assumed that we really did know in our hearts what “the right thing to do” was.

It’s interesting that a mythical Old West setting was used as the context for Brimley’s appeal. After all, how credible would it be to set an ethical plea in a society whose primary moral imperative would appear to be: Don’t get caught? Indeed, imagine how Brimley’s motto might have more accurately reflected the current moral temperament. The ad might have featured Brimley strolling down Wall Street in dungarees saying: “Eating lots of oatmeal is the right thing for others, but that doesn’t apply to me.”

Or perhaps, “Whether or not you’re eating enough oatmeal depends on what your definition of ‘is’ is.”

Absolute Honesty: Building a Corporate Culture that Values Straight Talk and Rewards Integrity

Larry Johnson and Bob Phillips have a different, if less fashionable, perspective on what it really means to do the right thing. As the authors of *Absolute Honesty*, they offer ways your firm can build a culture of complete honesty. [AMACOM, 292 Pages]. Among their words of wisdom: Tell the truth, even when it scares you to do so; allow those who work with you to express their disagreement; be willing to listen to criticism; reward, rather than punish, the bearers of bad news; and rather than dodge or hide problems, steel yourself to address them immediately.

Johnson and Phillips contend that any organization that seeks to be honest must first build a culture of honesty, one that permits open disagreement and even criticism. The authors attribute recent cases of corporate malfeasance to what they call the “Kumbaya Syndrome,” so named after the wistful ballad sung by generations of happy campers.

The Kumbaya Syndrome traces its roots to the 1980s, when corporate America began to emphasize a soft, team-oriented approach to management. In practice, this view led to a culture that emphasized

harmony and consensus over honesty and confrontation. No one wanted to cause a stir by suggesting that liberties taken with standard corporate accounting practices had crossed the line into the realm of outright fraud.

The authors contend that if you want to have an ethically healthy organization, you need to install a culture that encourages employees to speak openly and truthfully, and to confront dishonesty wherever you find it. Here are a few questions that may help you determine just how honest your own corporate culture is ... don’t be surprised if your firm doesn’t quite measure up to Wilford Brimley’s Old West standards:

- Do employees hesitate to express differences of opinion?
- If one of your managers asked an employee to violate the law, would that employee report it?
- If someone engages in unproductive behavior, do others confront them, or do they merely speak behind his or her back?
- If staff thinks the boss’s idea stinks, do they say so?
- Does the staff know what to do if they observe or suspect illegal or unethical behavior?

What should you do if honesty isn’t your firm’s best policy? The authors recommend a detailed program to

ensure that the consequences for speaking the truth are bearable for those who speak it. Address the root problems, rather than viewing individuals and their personalities as the problem. Let others know upfront when you disagree with them, but understand that once your group agrees on a legitimate course of action, you need to be a team player. As a leader, perhaps the most important thing you can do is put out a welcome mat for the truth. Tell others continually that you'd rather hear their honest opinion than listen to what they think you want to hear. Keep in mind Jack Nicholson's reply to Tom Cruise in the movie *A Few Good Men*: "You want the truth? You can't handle the truth!" By becoming a person who *can* handle the truth, you're likely to hear it more often. The same goes for your organization.

***Just Business:
Business Ethics in Action***

Another excellent book is *Just Business* [Oxford University Press, 2000], written by Elaine Sternberg. She argues that "ordinary decency" is the key standard that permeates every business activity. Just as common sense isn't all that common, however, ordinary decency involves extraordinary trust, honesty, fairness, absence of coercion, and legal compliance. This notion extends to the safety of a company's products and the accuracy of its advertising. Sternberg agrees with authors Johnson and Phillips that businesses often set up incentives that discourage honesty among employees.

One highlight of Sternberg's work is her "Ethical Decision Model," a general framework she proposes for approaching difficult business issues:

Step One – Clarify the issue. Usually there are several related issues involved in any difficult situation. Determine the one issue at the heart of the matter, and don't let other concerns beyond your company's control cloud your decision.

Step Two – Verify business relevance. It's very easy to get sucked into societal problems that really aren't the responsibility of your firm. Make sure any apparent ethical dilemma is really pertinent to your firm's business activity.

Step Three – Identify circumstances and limitations. Laws, regulations, contractual commitments, cultural issues, economic realities, and logistical considerations are all elements that define any problem you face. You also need to consider

***For your summer
reading list:
Books addressing
ethically healthy
organizations,
making ethical
business
decisions, and
advice to
beginning lawyers***

traditional business constraints such as cost and time factors.

Step Four – Assess your options. Compare each possible course of action to the yardstick of fairness and ordinary decency. Even if an action would increase your profits or income, it must be rejected if it violates the ordinary decency standard.

Letters to a Young Lawyer

Attorneys understand that ethics isn't as simple as 1-2-3, however. Many of the ethical dilemmas they face are unique to their profession, which is

why I recommend Alan Dershowitz's classic *Letters to a Young Lawyer* to all lawyers, both young and old alike. [Basic Books, 226 pages.] Dershowitz is one legal exemplar who probably never had to be reminded to speak his mind honestly. His first piece of advice is: choose your role models wisely.

Dershowitz confesses, for example, that he looked up to Clarence Darrow until he learned that Darrow bribed jurors and witnesses. He admired Oliver Wendell Holmes until he discovered Holmes advocated forced sterilization and killing "incompetents." He also stopped looking up to Hugo Black when he learned Black was a former member of the Ku Klux Klan. The point is, before you model yourself after anyone, give their clay feet a very close inspection. Dershowitz states upfront that the practice of law can put your ethical commitments at risk. Ask yourself what you'll regret on your deathbed, he says, and avoid doing it. If nothing else, reading his book will help you understand you're not alone in facing professional quandaries.

Reading a million books on ethics may not make an attorney more ethical. Ignorance of the law (or morality), we are told, is no excuse. This begs the question: So why bother reading books on the ethical behavior in the first place?

I'd have to rely on Wilford Brimley to answer that one. He'd no doubt tell you it's the right thing to do □

Rolf Dobelli, Ph.D., is Founder & Chairman of www.getAbstract.com, a leading provider of business book summaries.

Endnotes:

What books do you recommend to other litigators interested in legal ethics?

–Compiled by Amy Gardner

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The Betrayed Profession, by Sol M. Linowitz, with Martin Mayer (Scribners Press, 1994).

Sol Linowitz, who died in March 2005, believed that being an ethical lawyer means much more than following the Rules of the Road (avoiding discipline and indictment). It means adopting the values and responsibilities that come with membership in a learned profession – one that is entrusted with a special role to protect rights and ensure justice for all in our society, and that is *not* just a business like other businesses. I recommend *The Betrayed Profession*, because it is an excellent guide to “living the law” in a way that can help the profession regain its soul, integrity and respect. Written by a consummate lawyer, businessman and diplomat when he was 80 years old, *The Betrayed Profession* is Linowitz’s attempt to show what our profession should be, how it has gone so profoundly astray, and what we (who betrayed it) can do about it -- as individuals, as bar associations, and through our courts and schools. You can read the first chapter of the book, “Living the Law,” at <http://www.dcba.org/brief/junissue/1999/art30699.htm>.

The book closes with Linowitz “fantasizing” about a legal profession “that is once again independent, willing to sacrifice money for pride, eager to reassert its role as the guarantor of rights.” He concludes:

To make the contribution only lawyers can make to the future of our country and the world, we must accept rather than simply assert our responsibilities. When we look at our fellows and we decide whom we respect, civic leadership should count for more than hourly rate, the sense of justice for more than a record of victories at trial, service to those who need the law for more than representation of those who merely use the law. The fault is not in our stars but in ourselves.

I recommend two great summer page-turners that are chock full of ethics issues. First, Gary Delsohn’s *The Prosecutors: A Year in the Life of a District Attorney’s Office* (2003), which chronicles a year in the turbulent and demanding life of Sacramento homicide prosecutors. It’s lively, it’s thoughtful, it’s well written. Second, Kurt Eichenwald’s *The Informant: A True Story* (2001), which retells the Archer Daniels Midland price-fixing scandal. The motivation and behavior of the prosecutors and defense counsel are perfectly captured in a non-fiction yet Grisham-esque thriller.

If you want a more explicit discussion of ethics, try James L. Kelley’s *Lawyers Crossing Lines: Nine Stories of Greed, Disloyalty, and Betrayal of Trust* (2001), which captures several real-life ethical dilemmas from a variety of practice areas (and includes a technical discussion of each issue), and Georgetown Professor Milton Regan’s *Eat What You Kill: The Fall of a Wall Street Lawyer* (2004), which recounts the entanglements and downfall of a Wall Street bankruptcy lawyer.

Interested in Exploring History?

Past issues of *Litigation Ethics* are available through the
Committee’s Website:

<http://www.abanet.org/litigation/committee/ethics/home.html>

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I'll take a somewhat more theoretical approach and recommend some of the classics in legal ethics. These are books that seek to establish a foundation in what one might call "ethics beyond the rules" – that is, standards of right and wrong action that do not depend on being enacted as positive law.

A book called *The Good Lawyer* (1984) edited by David Luban, contains essays presented by members of the Working Group on Legal Ethics at the Center for Philosophy and Public Policy at the University of Maryland. Many of these papers are still cited today, although the book is out of print. My personal favorite is an essay by the late British philosopher Bernard Williams, entitled "Professional Morality and Its Dispositions," which remains provocative and insightful.

David Luban produced his own book a few years later, *Lawyers and Justice* (1988). It is rich and complex, and attempts to outline a justification for the adversary system and the role-differentiated obligations it imposes on lawyers. His conclusion is that the usual defenses of the adversary system do not permit as much as lawyers tend to think they do.

In a similar vein, political philosopher Arthur Applbaum attacks role-differentiated morality in *Ethics for Adversaries* (1999). His book is even more critical of the adversary system than Luban's, and a reader can come away thinking that legal practice as it is conventionally understood is systematically amoral.

William Simon's work is similarly critical, but it approaches legal practice from a different standpoint. Rather than taking external standards of morality as a starting point, *The Practice of Justice* (1998) takes legal merit as the touchstone, and argues that lawyers' practices are wrong to the extent they subvert legal justice.

Finally, Anthony Kronman looks to revive the classical tradition of virtue ethics in *The Lost Lawyer* (1993), arguing for a moral ideal of the lawyer-statesman, who mediates between the interests of clients and the public interest.

David E. Springer
Skadden, Arps,
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I recommend Aristotle's *Rhetoric*, which makes a powerful case for adherence to ethical norms by linking personal character to persuasion, the object of advocacy: "Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible. We believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided." Since "exact certainty" is impossible in legal matters, and the legal profession depends, after all, on opinions being "divided," the most ethical advocates are also the most effective. Like most of Aristotle's ideas, this one deserves considering □

Endnotes seeks short responses to a general ethical question. The question for our next issue is:

How do you keep up to date on developments in ethics rules and obligations?

We invite readers to submit short responses for possible publication, which (like any other submission) may be sent to Newsletter Editor John Martin via e-mail at jmartin@schiffhardin.com.



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