



Secrets of the Ethical Bar Association

**A Practical Approach To Professionalism and Ethics
In Bar Association Management**

Developed by Jack Marshall and ProEthics, Ltd.
For the National Association of Bar Executives
2006 Annual Meeting
Honolulu, Hawaii ✦ August 3-8, 2006

Secrets Of the Ethical Bar Association

A Practical Approach to Professionalism and Ethics In Bar Association Management

An Ethics Seminar Developed By ProEthics, Ltd.
For the National Association of Bar Executives
2006 Annual Meeting
August 3-8, 2006

© 2006 Jack Marshall and ProEthics, Ltd.
All Rights Reserved

For information about ProEthics and its
various ethics seminars, materials
and consulting services,
please contact:



ProEthics, Ltd.

2707 Westminster Place

Alexandria, Virginia 22305

703-548-5229 ~703-548-3754

jacko@cs.net - or - gbm@cs.net

www.proethics.com

www.ethicsscoreboard.com



Your Facilitator Jack Marshall, Esq.

Jack Marshall is the president and founder of ProEthics, Ltd., and the primary writer and editor of The Ethics Scoreboard (www.ethicsscoreboard.com). He has taken the experience gleaned from a diverse career in law, public policy, academia and theater and applied it to the field of legal, business and organizational ethics. He has developed more than 90 programs for bar associations, law firms, Fortune 500 companies, and non-profit organizations, and recently has worked to develop rules of professional responsibility for attorneys in emerging African democracies through the International Bar Association, and for the new judiciary of the Republic of Mongolia through USAID.

A member of the Massachusetts and D.C. Bar Associations, Mr. Marshall is also an adjunct professor of legal ethics at the American University School of Law in Washington, DC. He has recently co-authored, with a Pulitzer Prize-winning historian, a new book on Clarence Darrow that is scheduled for publication in Fall 2006.

Marshall is a graduate of Harvard College and Georgetown University Law Center. His articles and essays on topics ranging from leadership and ethics to popular culture have appeared in *The Federal Lawyer*, *Ethics Today*, *Everyday Law*, *Trial*, *The Settlement Strategist*, *The Weekly Standard* and numerous state bar publications. He has appeared on a variety of talk shows to discuss ethics and public policy, from the Montel Williams Show to Neil Cavuto's News Hour to PBS's "Religion and Ethics" program.

He is also an award-winning stage director, and is the artistic director of The American Century Theater, a professional non-profit theater company dedicated to producing classic American plays. He lives in Alexandria, Virginia with his wife and business partner, Grace Marshall, their son Grant, and their Jack Russell Terrier, Rugby. Like many who are interested in the nature of good, evil, justice, and chaos, Marshall is a lifetime fan of the Boston Red Sox.

Secret #1:
Adopt and Embody
The Values Of The
Legal Profession.

It is a mistake to view any association as merely a trade guild, an organization for increasing business, strengthening ties in the profession, and providing needed services to the membership. An association must also embody and display the values of the profession it represents. This places a special burden on professional associations, and bar associations particularly. Though staffed with lawyers and non-lawyers alike, it must thoroughly demonstrate within and without its complete commitment to the ethics of the legal profession --among the most demanding ethical standards of any profession.

Although the ethical values and standards of the legal profession are wide-ranging, complex, subtle and often controversial, a bar association receives ample guidance from two readily available sources: the Preamble to the ABA's Model Rules of Professional Conduct, and Model Rule 8.4 (b), (c), and (d).

ABA Model Rules Preamble

[1] A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice...

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[7] ...a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and exemplify the legal profession's ideal of professional service

[11] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the

Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest it serves.

ABA Model Rule 8.4: Misconduct

It is professional misconduct for a lawyer to...

[b] commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

[c] engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

[d] engage in conduct that is prejudicial to the administration of justice;

Secret #2:
Recognize the Power
Of Non-Ethical Considerations
To Suppress Ethical Values!

As 34-year-old mountaineer David Sharp lay near death on Mount Everest, over 40 other climbers trudged past him on their march to the peak. All had oxygen with them, and a few even stopped briefly to give Sharp a few breaths. But still they climbed on, and Sharp perished. His demise on May 15, 2006 may well go into ethics lore alongside the infamous death of Kitty Genovese on March 13, 1964. Genovese was murdered outside her apartment building in Queens while thirty-eight neighbors watched and did nothing.

The two incidents stem from very different causes, however. While Genovese's death was fueled by urban fear and apathy, a mass failure of courage and the willingness to assume responsibility in a crisis, Sharp was the victim of that universal ethics-suppressant: the powerful non-ethical consideration.

Non-ethical considerations include all the goals, motivations and objectives that human beings care about. Some are good, some are not so good, and all are 100% human. Safety, health, love, lust,

sex, food, shelter, ambition, fun, revenge, greed, fear; the desire to get that promotion, satisfy that client, impress your date, conquer a lingering self-doubt... The list is long, and any of the non-ethical considerations on it can act as a magnet pulling mind, heart and conscience away from the clear perception of right and wrong.

The climbers who left Sharp to die were not bad people --- what would be the odds that among forty-plus mountain climbers there would not be one ethical one? --- but they were each so focused on an all-consuming non-ethical objective that none were capable of perceiving that saving a human life had to take precedence over conquering Everest. It would have been difficult to design a sociological experiment that demonstrated more effectively why good people do bad things. Mountain-climbers, by definition, have to be unusually dedicated and focused on the challenge of reaching the peak; anything less, and they will fail, and quite possibly die. They have already decided that their goal is worth both personal risk and sacrifice, so it is bound to be difficult to shock them out of a mindset that ranks *nothing* more important than completing the climb to the top. In effect, such individuals become immune to ethical reasoning until their goal is achieved.

David Sharp's death is eerily reminiscent of a Princeton experiment recounted in Malcolm Gladwell's excellent book, The Tipping Point. Seminary students were told to choose a theological topic for a lecture that would determine their

grade, and then asked to walk across campus to deliver it to a filled amphitheatre. On the way to give their critical speech, each seminarian encountered a prone and bleeding man, crying for help. Only a small percentage stopped to help him, because they didn't want to be late for their lectures. *Even most of the seminarians whose prepared topic was the Bible story of the Good Samaritan failed to stop.* Why? Because they were focused on their task and the grade to follow. Ethics had literally been blasted out of their minds by a powerful non-ethical consideration.

As usual when non-ethical considerations take command, rationalizations came easy for the Everest climbers who left Sharp to die. Typical was Australian climber Bob Killip, who told interviewers, "David was not left to die ... he was as good as dead. Max [a Lebanese climber] and Sherpas had spent an hour trying to help him. But it was a hopeless situation. Some might judge it as being callous, but at another level, it was just reality."

Only the steady pull of a desperately desired non-ethical goal like conquering Everest could produce such logic. Do rescue workers just decide that an accident victim is "as good as dead" and go to a matinee of "The Da Vinci Code?" Do bathers who see a child turning blue after being pulled from a pool decide that he's "as good as dead," and start a game of "Marco Polo?" If Sharp was 99.9 per cent dead, making the effort to salvage that one-thousandth of a life was obviously worth aborting an Everest expedition. But Killip couldn't see that, and neither could any of his colleagues

Sir Edmund Hillary, the famous mountaineer who in 1953 became the first to scale the world's highest mountain, was critical of those who abandoned Sharp. He told the New Zealand Press Association that his expedition "would never for a moment have let one of the members of a group just lie there and die while they plugged on towards the summit."

Maybe that is true; certainly Hillary believes it, and he is an extraordinary man. But it is deceptively easy for Hillary to say this now, when his quest is safely completed. Would he really have stopped his attempt to become the first man on Everest's peak to help a man who seemed "as good as dead?" We will never know, and Sir Edmund should count himself as fortunate that he never faced that choice.

The significance of the David Sharp tragedy is not that the mountaineers did the wrong thing. Of course they did the wrong thing. Nor is it that they are callous or unethical people, for they are probably no more so than you or I.

The importance of the story is that it vividly shows how difficult it can be to make even obvious ethical choices when powerful non-ethical considerations are in our sights. Every one of us has a goal or a dream or a desire that could make us walk by a dying man. It is our responsibility to recognize what those goals, dreams and desires are, and to force ourselves not to forget about right and wrong as we approach them.

**Secret #3:
Learn to Play
Ethics Chess.**

An **ethical dilemma** is when non-ethical considerations and ethical values dictate different results. By the time an ethical dilemma occurs, it may be too late to take the most ethical course. **Ethics Chess** is the technique of thinking ahead and anticipating how you and your organization will respond when predictable or likely ethical dilemmas occur.

**Hypothetical:
“Its All in How
You Look at It”**

Dee Lay, Executive Director of the Sunnydale Bar Association, is dreading the meeting in the coming week of her Budget Committee. She has a terrific staff, and she thinks the Bar is doing an excellent job. Her members are notoriously perfunctory in reviewing the budget numbers, but she is worried. Some areas, like CLE and publications, are showing a deficit. The redesign of the web site has

taken longer than expected, and is over budget; long-time Publications Director Boo Radley has been overseeing the project, and it has taken him a long time to become technologically savvy; worst of all, she has just received news that her last two predecessors had inflated both the membership and the circulation of the magazine through various devices. Dee has been in her job for over two years: it is far too late to blame anyone else.

She arrives at the following strategy:

- 1 Her Financial Director says that he can legitimately re-distribute income and expenses to eliminate the deficits in CLE and publications, and defer enough expenses to make the over-all picture look much better; after all, nobody on the committee pays much attention anyway. She will have to deal with the deficits later.
2. She will get rid of Boo. The members are clamoring for the new web site, and she needs to show that she is responding. He never should have been given the assignment, it's true. But he's nearing

retirement; she'll make it as painless as possible. And the staff needs new blood anyway.

3. This is no time to spring the phony membership and publication numbers on the board. Now that she knows about them, she'll work to bring them back into line.

She also asks her Assistant Director, a lawyer named Vince Elkins, what he thinks about her plan.

"Number 1 is absolutely valid," he replies. "Number 2 is a completely justifiable response to the problem. Many, if not most, execs would do the same thing. As for Number #3, you're still trying to get all the information; it's certainly reasonable not to bring this to the board now."

Secret #4:
Prioritize Core Values!

Every member on a staff needs to understand how the organization prioritizes its values.

Ethical conflicts are those that pit value against value: conflict of interest avoidance or loyalty; honesty or fairness; accountability or promise-keeping; reporting misconduct or following the Golden Rule. These can be difficult decisions, but they are far more manageable when an organization has established and communicated its own values.

Hypothetical:
“Staff Wars: The Review”

“So we come to another annual review, Sidney,” said the Executive Director. “I have to say, the timing of this isn't so good for you. That incident with the fruit basket...”

“As I told you,” Sidney said, wounded, “the company I hired to network our computers last March sent a fruit basket to my home as a Christmas present while I was on travel, and by the time I arrived, my wife and kids had polished it off.”

“Tut-tut... you're still responsible, and you know it violates our code. And it doesn't look good for raises this year...we have to tighten our belts. But there is good news!”

“Really? What?” asked Sid.

“I just saved a bundle on my car insurance!”

“Excuse me, sir,” interrupted the Exec’s secretary, Biff. “Those tickets to the football game were just sent over by messenger.”

“Oh, good, Biff...I've been expecting them!” he said. “Remind me to call our office furniture suppliers personally...no need to create a paper trail! Now, where were we, Sidney? Oh, yes, your review. Now, I could look the other way on this, given the special circumstances. I'd really like to give you a bonus, for that terrific department reorganization plan we implemented.”

“You told the President that you came up with that plan. She recognized you it in front of the whole membership!”

The Exec smiled. “Yes, that was nice, wasn't it? But I still think your contribution is worth a bonus; we'll just make the reason a little more general.”

“I'm sorry to interrupt again,” said Biff. “But we got word that our mailing consultant just sent a \$1000 contribution to Faber University....your old alma mater! Not in your name, of course, because *that would be a strict violation of our Code of Ethics*. No, this is an entirely voluntary gift to your college

alma mater, done anonymously and without *quid pro quo*. We're using them again this year, right?"

"Why not?" the Exec replied. I'm sorry for all these interruptions. Oh, yes...here's how you can help me out. I want you to send a \$100 personal campaign contribution to Bert Sleazy, last year's bar president. He's running for the U.S. Senate, you know. Now don't worry, we'll reimburse you... let's see, how about \$150 worth of long distance charges on us? Your parents retired to Hawaii, right? Let's make it an even \$200. It will also compensate for all the extra hours you worked last month."

"But...but..." Sidney stuttered.

"Look, this comes from the top. We're fighting some proposed anti-lawyer legislation that will make it very hard for our members. Sleazy is crucial, and these lousy new campaign contribution laws are making it tough for us. So our current president has promised him that the Bar will raise a minimum of \$100 per staff member. He passed it on to me. What choice do we have?"

It was Biff again. "Did you miss me?" he said, playfully. "Remember when you mentioned to our new printers all the trouble your sister has had since her husband lost his job as a designer? Well...and it's the most amazing coincidence...he sent his resume to that very same firm, and they hired him!!"

“What a co-inkee-dink!!” said the Exec. “I’m glad you told me, because I need to disclose this incredibly random occurrence, so nobody sees the appearance of impropriety.”

Question: Which of the following can be ethically justified, assuming none is specifically forbidden by the precise terms of the Code of Conduct?

1. The contribution to the college.
2. Soliciting the staff for a contribution.
3. Using long-distance charges to reimburse the staff member.
4. Having the brother-in-law send his resume to the printing firm.
5. None of the above.

Secret #5:
**Know How to Analyze,
Solve and Survive the
Unexpected Problem.**

An Ethical Decision-Making Model

[Source: Josephson Institute of Ethics. "Five Steps of Principled Reasoning." 1999.]

1. Clarify.

- a. Determine precisely what must be decided.
- a. Formulate and devise the full range of alternatives.
- b. Eliminate patently impractical, illegal and improper alternatives.
- c. Force yourself to develop at least three ethically justifiable options.
- d. Examine each option to determine which ethical principles and values are involved.

2. Evaluate.

- a. If any of the options requires the sacrifice of any ethical principle, evaluate the facts and assumptions carefully.
- b. Distinguish solid facts from beliefs, desires, theories, suppositions, unsupported conclusions, opinions, and rationalizations.

- c. Consider the credibility of sources, especially when they are self-interested, ideological or biased.
- d. With regard to each alternative, carefully consider the benefits, burdens and risks to each stakeholder.

3. Decide.

- a. Make a judgment about what is not true and what consequences are most likely to occur.
- b. Evaluate the viable alternatives according to personal conscience.
- c. Prioritize the values so that you can choose which values to advance and which to subordinate.
- d. Determine who will be helped the most and harmed the least.
- e. Consider the worst case scenario.
- f. Consider whether ethically questionable conduct can be avoided by changing goals or methods, or by getting consent.
- g. Apply three "ethics guides."
 - o Are you treating others as you would want to be treated?
 - o Would you be comfortable if your reasoning and decision were to be publicized?
 - o Would you be comfortable if your children were observing you?

-
-

4. Implement.

- a. Develop a plan of how to implement the decision.
- b. Maximize the benefits and minimize the costs and risks.

5. Monitor and modify.

- a. Monitor the effects of decisions.
- b. Be prepared and willing to revise a plan, or take a different course of action.
- c. Adjust to new information.

Summary Hypothetical:

“Don’t Panic: The Reception Guest”

Ed Leshorseman, the executive director of a large bar association, is the guest at the wedding reception thrown by Lambsie Doats, his bar president, for her youngest daughter. While Ed is chatting with Lambsie, a strange man horns in, introducing himself as Bo Constrictor, an old roommate of the groom, Bjorn Yesterday. Bo also notes that he is, coincidentally, VP of one of the companies bidding for the construction of the Bar’s new learning center. Ed, though not Lambsie, is deeply involved in the process, which is in its final stages...and he recalls that Bo’s company,

Mezzo-Soprano Construction, is the low bidder and likely winner of the job.

Suddenly Lambsie's daughter, Maresie Doats, runs up and plants a big kiss on Bo's cheek.

"Do you know what this man did?" she squeals. "He gave Bjorn and me an all expenses paid trip to Hawaii!!!"

Question: What should Ed do?

1. Nothing.
2. Tell Lambsie that she has to tell her daughter to give back the trip.
3. Ascertain Bo's motives.
4. Tell Bo in private that the gift can have no impact on your decision.
5. Recuse himself from the process.
6. Something else.

**Concluding
Remarks
And
Discussion**