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## The Lawyer's Duties of Confidentiality and Avoidance of Harm to Others: Lessons from Sunday School

### Cover Page Footnote

Tom Bevill Chairholder of Law, The University of Alabama School of Law; formerly, Professor of Law, Washington and Lee University School of Law. The author wishes to thank Sam Calhoun, David Cox, Elaine Johnson James, Uncas McThenia, Eric Kessel, and Brent Moneleone for their thoughtful comments on an early draft. A debt of gratitude is also owed to the participants of the 1997 Western, Southwestern and Southeastern Law Professors of Color Conference who gave helpful insights and warm support for this work. Special recognition is given to Professor Thomas Shaffer, my professional elder whose influence is evident in this paper.

# THE LAWYER'S DUTIES OF CONFIDENTIALITY AND AVOIDANCE OF HARM TO OTHERS: LESSONS FROM SUNDAY SCHOOL

Steven H. Hobbs\*

## INTRODUCTION

THE task of this Conference is to consider the relevance of religion to a lawyer's work. This paper considers whether religion informs the lawyer's ethical duty of confidentiality and the duty not to harm others. To address these questions, I refer back to the lessons of Sunday School as a rich source of moral insight. Can Sunday School lessons provide the moral sinews for our ethical reflection?

Sunday School provided a way to learn about life, to take on the armor of the Lord that we need to run the race of life,<sup>1</sup> to understand intrinsic values,<sup>2</sup> and to study God's precepts and plans.<sup>3</sup> The lessons of Sunday School provided a way to hear and to feel the religious rhythms of life.<sup>4</sup> They helped bring ethical structures and moral order to the entirety of our lives. Such lessons helped us understand what it meant to be in this world and not of it. Further, they helped us recognize the tensions that are inherent in Christian doctrine. Through this recognition, we came to tolerate the ambiguities of the lessons, realizing that the lessons must be relearned and restudied as we meet new life situations. The lessons also helped us accept the fact that perfec-

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1. "Put on the whole armour of God, that ye may be able to stand against the wiles of the devil. For we wrestle not against flesh and blood, but against principalities, against powers, against the rulers of the darkness of this world, against spiritual wickedness in high places." *Ephesians* 6:11-12. All biblical citations are to the King James version of the Bible.

2. See *Matthew* 5, 6 & 7 (the Sermon on the Mount).

3. See *John* 14, 15, 16 & 17 (Jesus's discourse with his Disciples at the Last Supper): "Let not your heart be troubled: ye believe in God, believe also in me. In my Father's house are many mansions: if it were not so, I would have told you. I go to prepare a place for you." *John* 14:1-2.

4. The rhythms could be felt in singing songs like "Jesus Loves Me;" in taking up collections of quarters and dimes; in memorizing parts for Easter pageants; and in taking Sunday School picnics to places like the Coney Island Amusement Park.

tion is not possible, but that the pursuit of righteousness is a worthy endeavor.<sup>5</sup>

As a youngster, I attended Sunday School at Macedonia Missionary Baptist Church in Bridgewater, New Jersey. Amos Hobbs, my great-grandfather, was one of the principal founders of the church in 1922. The essence of the lesson each Sunday was drawn from Bible stories, packed with practical wisdom for living in contemporary society. We would receive a 3" X 4" picture card (similar to a baseball card) with a picture (usually by one of the Renaissance artists) from biblical times on one side, and an explanatory text with biblical references on the other side. Right and wrong, sin and righteousness, and good and evil were studiously explicated in each lesson. We learned of God's love as well as His chastisement; His grace as well as His damnation.

Again, practical wisdom was the underlying theme.<sup>6</sup> We were learning how to live in the world, but not to be of the world.<sup>7</sup> The church was a spiritual refueling station that enabled us to take on the trials, tribulations, and triumphs of the week. This was no cloistered religious experience, but a place to learn respect for ourselves and for others. Sunday School was a place to learn the value of community, both within the Church and outside of those sanctified walls. The two communities are inextricably linked.<sup>8</sup> We are bound together in this journey of life, whether we are Samaritans or centurions; Gentiles, Greeks, Jews, or Ethiopians; tax collectors or prostitutes.

Accordingly, this article will explore these lessons for insights on the lawyer's duty of confidentiality and the duty not to harm others. The duty of confidentiality requires lawyers to maintain confidences and secrets, except under circumstances in which they should be disclosed. Can one search the scriptures for examples of confidentiality or confidential relationships? How does the Bible treat secrets? When are and under what circumstances are secrets kept or disclosed? Who controls decisions about if and when secrets are to be revealed? A key issue is, does our faith require us, as lawyers, to disclose certain secrets and confidences?

This article first considers some secrets in the Bible and whether Jesus had any confidential relationships. The story of Nicodemus and his secret relationship with Jesus will serve as a case study of one such

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5. We all sin and come short of the Glory of God, but we nevertheless "press toward the mark for the prize of the high calling of God in Christ Jesus." *Philippians* 3:14.

6. Parables often taught wonderful lessons about life, such as prodigal sons who waste their life on riotous living; bridesmaids who are unprepared; or sowers who sow seeds on rocky or weed-choked ground.

7. See *Romans* 12:2.

8. Those "outside" the church may love the church more than those within, since all of us sin and come short of the Glory of God. It is these outsiders with whom Jesus spent much of his time. Those in the church may have an inflated sense of their own piety. See *infra* Part II.B.

confidential relationship. Next, we will explore Jesus's teachings on avoiding harm to others. Clearly this will require some exploration of the duty to love one another. Then we will consider the Sanhedrin Council—the equivalent to lawyers in biblical times—whom Jesus called a brood of vipers.<sup>9</sup> The Council's administration of the law brought great harm to the people and was justly condemned by Jesus.<sup>10</sup> We will complete this reflection on Sunday School lessons with a study of Cornelius, the centurion who held a public law enforcement position and was able to live in a way which honored God. A modern-day example of this lifestyle is presented in a discussion about my father, also named Cornelius. The article concludes that Cornelius provides a model for modern lawyers serving justice in this world, without becoming a part of this world.

## I. THE DUTY OF CONFIDENTIALITY

This section will focus on how the duty of confidentiality might be informed by lessons from Sunday School. First, we will study secrets and confidential relationships in the Bible, reflecting on the importance of the need for confidentiality. Second, we will consider the dilemma of revealing secrets.

### A. *Secrets of the Heart*

At the outset, one can argue that our relationship with God is fundamentally one of confidentiality. Jesus teaches us to give alms, to pray, and to fast in secret.<sup>11</sup> We should not make a public display of our righteousness in an attempt to impress others. This is a one-on-one relationship. God knows our secret sins<sup>12</sup> and we confess these sins<sup>13</sup> to God, asking for his forgiveness,<sup>14</sup> and accessing the Grace that is available to all.<sup>15</sup> The Lord both hears and answers our prayers

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9. "Ye serpents, ye generation of vipers, how can ye escape the damnation of hell?" *Matthew* 23:33.

10. The New Testament is extremely critical of the Sanhedrin Council, especially the Pharisees. See *Luke* 11:37-54; *Matthew* 23:13-36. The texts focus on the hypocritical, strained application of the law. See Robert Jamieson et al., *Commentary, Practical and Explanatory, on the Whole Bible* 939-41 (rev. ed. 1961). For a discussion of the relationship of Jesus and the Pharisees as depicted in the New Testament, see Günter Stemberger, *Jewish Contemporaries of Jesus: Pharisees, Sadducees, Essenes* 21-38 (Allan W. Mahnke trans., 1995). Judaic literature sets the Pharisees in the broader context of Jewish history. Scholars agree that the religious traditions of the Pharisees "contributed significantly to the formation of rabbinic Judaism." Steve Mason, *Flavius Josephus on the Pharisees* 3 (1991). Much of the discussion on the Pharisees in this article is drawn from the New Testament texts and the historically limited lessons of Sunday School.

11. *Matthew* 6:2, 5, 16.

12. *Psalms* 90:8.

13. *Id.* at 51.

14. *Id.* at 19:12.

15. *Romans* 5:14-21.

in His own time. In fact, He promises to open the windows of Heaven and pour out a blessing.<sup>16</sup> Each believer is individually responsible for our walk with God and His eventual judgment of us.<sup>17</sup> We have the freedom to choose this relationship—and some choose darkness rather than light.

In the secular world, we lawyers are the ones to whom our clients confess. We try to know our clients' hearts and encourage them to tell us everything, so that we can offer them our legal skills and services to the fullest. The lawyer-client relationship is based on trust, faith, and confidence. Our clients are free to follow our advice or to ignore it.

Second, some tasks must be accomplished secretly. After Jesus was crucified, "Joseph of Arimathea, being a disciple of Jesus, but secretly for fear of the Jews, besought Pilate that he might take away the body of Jesus."<sup>18</sup> In his Gospel, Luke, who called Joseph a good and just man,<sup>19</sup> explained why Joseph could not do this deed publicly. While he was a member of the same Sanhedrin Council that condemned Jesus, Joseph had not agreed with the Council and had not consented to their deed.<sup>20</sup> Joseph assumed the obligation of burying the body of Jesus, an extreme act of courage given the times.

Some of Jesus's miracles or encounters with individuals were performed in secret. Jesus, resting at Jacob's well, asked a Samaritan woman to give him a drink of water.<sup>21</sup> Their dialogue evolved into one that revealed the secrets of spiritual water. In their discussion, Jesus exposed the secrets of the woman's tortured, personal relationships, much to her amazement. But when the Disciples returned, Jesus and the woman ceased their discussion. Their dialogue was private and confidential. Jesus revealed nothing of the discussion to the Disciples. The woman, on the other hand, quickly returned to her village, and revealed all she had heard to her kinsmen. The Samaritan woman put into action a chain of events that led many other Samaritans to believe in Christ.

One concludes that some secrets are not revealed because others will not understand and the revelation may cause harm. But it is within the individual's power to determine when and how to reveal these confidential contacts with God. This, again, is parallel to the confidentiality obligations of lawyers. The comment to Rule 1.6 of the American Bar Association's Model Rules of Professional Conduct is instructive: "A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate

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16. *Malachi* 3:10.

17. *See Revelation* 20:13.

18. *John* 19:38.

19. *Luke* 23:50.

20. *Id.* at 23:51.

21. *John* 4:7-26.

fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter."<sup>22</sup> This means that the "lawyer shall not use information relating to representation of a client to the disadvantage of the client."<sup>23</sup> The client must consent to any revelation of her secrets.<sup>24</sup> Moreover, the lawyer's duty of loyalty necessitates a fidelity to the client's clause such that "a lawyer may not exploit information relating to the representation to the client's disadvantage."<sup>25</sup> In addition, the lawyer cannot take on the representation of a second client that would be directly adverse to the first client, especially if knowledge or disclosure of confidential information of either would be harmful to both.<sup>26</sup>

As demonstrated by his encounter with the woman at the well, Jesus did some of his most inspiring work with individuals in confidential, one-on-one relationships. He performed other works as an advocate before crowds. An example is the story of the woman caught in adultery who was brought to Jesus, partly to test His knowledge and faithful application of the traditional law.<sup>27</sup> The crowd of accusers was intent on stoning the woman to death, as was the custom. Jesus encouraged those who were without sin to commence the stoning. However, everyone in the crowd had their own secret sins, disqualifying them from participating in the stoning. As they reflected on their own moral shortcomings, Jesus knelt in the dirt and wrote a message which was not revealed to anyone.<sup>28</sup> After the sinners/accusers beat a hasty retreat, Jesus had a private meeting with the woman, forgiving her sins and admonishing her to sin no more.<sup>29</sup> We are left to hope that she followed His counsel.

Similarly, we worry about our clients following our advice, even when we advocate for them in public arenas.<sup>30</sup> We can give them our best legal and moral advice, but ultimately, the decisionmaking authority rests with the client.<sup>31</sup> Part of the decisionmaking authority is the responsibility of deciding when secrets of the heart should be revealed. If the client chooses not to reveal his "sins," does the task of disclosure fall on his lawyer? While the next section explores this question in greater detail, a brief example of this dilemma can provide a reference point from which to reflect on confidentiality and confidential relationships.

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22. Model Rules of Professional Conduct [hereinafter Model Rules] Rule 1.6 cmt. 4 (1983).

23. *Id.* Rule 1.8(b).

24. *Id.* Rule 1.6 & 1.8(b).

25. *Id.* Rule 1.8 cmt. 1.

26. *Id.* Rule 1.7, 1.8 & 1.9.

27. *John* 8:3-11.

28. Some preachers have urged that he was listing the sins of the accusers.

29. *John* 8:9-11.

30. See Model Code of Professional Responsibility [hereinafter Model Code] EC 7-4 & 7-5 (1980).

31. See *id.* EC 7-8; Model Rules, *supra* note 22, Rule 1.2(a).

The classic articulation of this problem is found in the New York state case of *People v. Belge*,<sup>32</sup> in which two attorneys represented a client accused of murder. They decided to plead an insanity defense after the client revealed that he had committed three other murders. Attorney Francis Belge located one of the bodies using information provided by the client, but did not reveal this secret until the trial. The public was outraged that the parents of these victims were not informed of the location of their loved ones' bodies. Belge was indicted for violating public health laws requiring proper burial of a human body and reporting of the occurrence of a medically unattended death.

The indictment was subsequently dismissed in the Onondaga County Court. In his opinion, Judge Ormand N. Gale delivered an exegesis on the history and legal significance of confidentiality and the attorney-client privilege. While recognizing the attorney's obligation to the legal system and society, Judge Gale asserted that confidentiality was essential to effective assistance of counsel.<sup>33</sup> The defendant must be free to tell his attorney everything connected to his case if a fair defense is to be mounted. Judge Gale concluded:

Apparently, in the instant case, after analyzing all the evidence, and after hearing of the bizarre episodes in the life of their client, they decided that the only possibility of salvation was in a defense of insanity. For the client to disclose not only everything about this particular crime but also everything about other crimes which might have a bearing upon his defense, requires the strictest confidence in, and on the part of, the attorney.<sup>34</sup>

Ironically, the judge used the metaphor of salvation. Although the client was a murderer, he was still entitled to a defense and even to redeem himself to the extent permitted by law. Judge Gale found that "the constitution of the United States of America attempts to preserve the dignity of the individual."<sup>35</sup> He concluded that constitutional protections outweigh the interests of society: "Among those substantial constitutional rights is that a defendant does not have to incriminate himself. His attorneys were bound to uphold that concept and maintain what has been called a sacred trust of confidentiality."<sup>36</sup>

Judge Gale's dismissal of the indictment against Belge was upheld in the New York Supreme Court, Appellate Division.<sup>37</sup> That court recognized the need for balancing the client's interests against the general interests of society and the particular interests of the victims'

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32. 372 N.Y.S.2d 798 (Onondaga County Ct.), *aff'd*, 376 N.Y.S.2d 771 (App. Div. 1975).

33. *Id.* at 801.

34. *Id.*

35. *Id.* at 802.

36. *Id.*

37. 376 N.Y.S.2d at 772.



families. The court wrestled with implications of such a balance, however, observing that the attorney-client privilege was not always absolute: "We believe that an attorney must protect his client's interests, but also must observe basic human standards of decency, having due regard to the need that the legal system accord justice to the interests of society and its individual members."<sup>38</sup>

The question eternally left open is: When does the "basic human standard of decency" require disclosure of confidential information? From the Sunday School lessons discussed to this point, I think Jesus would advise us to keep the secret, as he did for Joseph, the woman at the well, and, as we shall discuss later, for Nicodemus. As suggested by my friend, Reverend David Cox, a confidential relationship permits confession—and possibly even conversion—to occur.<sup>39</sup> Or, as Judge Gale might say, confidentiality allows the client to seek at least earthly salvation, with the possibility of heavenly salvation.<sup>40</sup>

### B. *Shouting Secrets from the Housetops*

The lawyer's duty of confidentiality, while often viewed as sacred, can be an incomplete bar to disclosure of client secrets. Lawyers preparing tax forms or completing disclosure statements for a securities filing are required to reveal intimate details of the client's personal and business dealings.<sup>41</sup> While offering significant protection, the attorney-client privilege is not a complete bar to compelled disclosure of client information.<sup>42</sup> Further, some ethics codes require disclosure of clients' secrets when necessary to prevent death or serious bodily harm to others, or to stop fraud.<sup>43</sup> The lawyer has additional duties when he appears before a tribunal. Lawyers may not present false evidence<sup>44</sup> and must correct any evidence which is later determined to

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38. *Id.*

39. Reverend David Cox, of the R.E. Lee Episcopal Church, Lexington, Virginia, offered the observation in commenting on an earlier draft of this article.

40. Witness how the thief who was crucified with Christ was offered salvation after he confessed his sins. *Luke* 23:39-43.

41. For a discussion of some of the ethical issues in these areas, see Gwen T. Handelman, *Constraining Aggressive Return Advice*, 9 Va. Tax Rev. 77 (1989), and Richard W. Painter & Jennifer E. Duggan, *Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 50 SMU L. Rev. 225 (1996).

42. Hillary Rodham Clinton discovered how easily the attorney-client privilege could be lost when her personal attorneys met with White House lawyers to discuss the Whitewater investigation. The White House lawyers had to turn over notes taken during the meetings because the court held that no common interest existed between them and the First Lady acting in her personal capacity. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).

43. See, e.g., Florida Rules of Professional Conduct Rule 4-1.6(b)(1) (1994); Virginia Code of Professional Responsibility DR 4-101(D)(1) (1994).

44. Model Rules, *supra* note 22, Rule 3.3.

be false,<sup>45</sup> “even if compliance requires disclosure of information otherwise protected by rule 1.6.”<sup>46</sup>

Moreover, our clients may seek our help to pursue actions that may be viewed as immoral, illegal, or just ill-advised. Or more troubling, their actions may be personally objectionable or contrary to our moral beliefs and philosophies. We may discover, much too late, that our clients have used our services to achieve some heinous or reprehensible objective. If we consider ourselves to be independent, moral human beings and not merely amoral legal technicians, are there certain secrets that a high moral duty demands we expose? Can lessons from Sunday School help us reflect on when we should set aside the duty of confidentiality for a higher calling?

### 1. When the Truth Cries Out

The Twelve Disciples were Jesus’s confidants. He told them heavenly and spiritual things that the general populace was not prepared to hear. Even then, He revealed certain secrets only to certain disciples. For instance, only Peter, James, and John were with Him during the time when He was transfigured.<sup>47</sup> Moreover, some spiritual information would only be revealed by the Holy Spirit after the resurrection and ascension.<sup>48</sup> Nonetheless, when the time was right, He gave the Disciples permission to disclose these secrets. In His commission to them to go out “to the lost sheep of the house of Israel,”<sup>49</sup> He instructed them: “What I tell you in darkness, *that* speak ye in light: and what ye hear in the ear, *that* preach ye upon the housetops.”<sup>50</sup>

A similar, yet contextually different message was reported in *Luke*. After one encounter with the Pharisees, Jesus began a colloquy that separated spiritual truths from spiritual falsehoods and misstatements. He set out to demonstrate that blind allegiance to the Pharisees was harmful. He warned His disciples:

Beware ye of the leaven of the Pharisees, which is hypocrisy. For there is nothing covered, that shall not be revealed; neither hid, that shall not be known.

Therefore whatsoever ye have spoken in darkness shall be heard in the light; and that which ye have spoken in the ear in closets shall be proclaimed upon the housetops.<sup>51</sup>

Herein lies the biggest tension in confidentiality. Secret things shall be known—indeed, preached from the housetops. In John’s Gospel,

45. *Id.* Rule 3.3(a)(4).

46. *Id.* Rule 3.3(b).

47. *See Mark* 9:2. Jesus told them not to disclose what they had witnessed until after his resurrection. *Id.* at 9:9.

48. *John* 15:26-27.

49. *Matthew* 10:6.

50. *Id.* at 10:27.

51. *Luke* 12:1-3.

before they went out on their mission of healing and casting out demons, Jesus instructed His Disciples to speak boldly about the secrets of the Lord that Jesus had revealed to them. However, in Luke's Gospel, Jesus admonished His Disciples, before a multitude of people, that corruption will be exposed and shouted from the housetops; this takes on a slightly different meaning, which was ominous for those who heard it.<sup>52</sup> In *Luke*, He denigrated the Pharisees who said one thing in public, but said and did something clearly contrary in private. It was the Pharisees' secrets and confidences which would be revealed, known, held up to the light, taken from the closet, and proclaimed from the housetops.

Can we extrapolate from this that lawyers, in order not to be classed with the Pharisees, must aid our clients in revealing their secrets? Are we obligated, as counselors, to help them take the "beam" out of their eyes and to seek repentance?<sup>53</sup> Should our purpose be to restore those whom our clients have wronged, to promote reconciliation? Is Jesus's urging to proclaim it from the housetops informed by his instruction to not fear what can kill the body but what can kill the soul, and to lead a spiritual life? Are we then our clients' spiritual and moral keepers, whose principal function is to assist our clients in becoming clean?<sup>54</sup>

## 2. Whispers in the Wind or a Noisy Withdrawal?

We are not always helpless to shout our clients' misdeeds from the housetops. Certainly, as lawyers, we are not working in a civil system that guarantees suppression of the truth as an ultimate right.<sup>55</sup> In our adversary system, the truth, or some portion of it, may be revealed through discovery, interrogatories, and the testimonies of witnesses, including the relevant parties to the controversy.

The client facing criminal charges presents a significant challenge for the lawyer.<sup>56</sup> In criminal law, the defendant has the option of remaining silent, but once he speaks, his words can and will be used against him. In any event, the lawyer may hear words from the client about the gory details of the crime. The lawyer has a fundamental duty to keep these confidential. If the client perjures himself on the stand, however, the lawyer is obligated to take remedial measures to correct the falsehood.<sup>57</sup>

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52. This particular message was intended for the Pharisees, who were in the background taking notes and seeking ways to accuse Jesus of wrongdoing. *Id.* at 11:53-54.

53. Having a beam in one's eyes is emblematic of spiritual blindness. *See id.* at 6:42.

54. "Create in me a clean heart, O God; and renew a right spirit within me." *Psalms* 51:10.

55. *See Nix v. Whiteside*, 475 U.S. 157 (1986).

56. For a thorough review of these issues, see John Wesley Hall, Jr., *Professional Responsibility of the Criminal Lawyer* (2d ed. 1996).

57. *See Nix*, 475 U.S. at 175-76.

The Model Rules suggest—and some enacted versions require—that we disclose our client's intent to commit serious bodily harm or cause death.<sup>58</sup> Some states even require the lawyer to disclose financial misdeeds.<sup>59</sup> The American Bar Association has decreed that, while we cannot actively disclose most misdeeds, we can stomp our feet as we walk out the door, alerting the next lawyer. In ABA Formal Opinion 92-366, the ABA Standing Committee on Ethics and Professional Responsibility considered the classic case of a client using a lawyer's services to commit fraud on a third party.<sup>60</sup>

These fraud cases typically involve clients who borrow money to finance their business activities. The loans are secured by the underlying business contracts supporting the activity, through which the client would receive payments in the future and pay off the loan. The lawyer provides the lending institution a formal opinion letter vouching for the legitimacy of the business contracts and the client's financial statement of position. Unbeknownst to the lawyer, the business contracts and the financial statements are vastly overstated or fraudulently procured. The loan is extended to a client with no real ability to repay. The unfortunate lawyer soon discovers that her work product was used to commit fraud. What does the lawyer then do—shout it from the housetops?

ABA Formal Opinion 92-366 attempts to reconcile the confidentiality duty of Model Rule 1.6, the duty not to assist a client in committing fraud or a crime as proscribed by Model Rule 1.2, and the duty to withdraw if the client insists on committing a crime or fraud as required under Model Rule 1.16(a)(1). Without tracing the details of the complex ethics opinion, the best way to present the Committee's resolution of this dilemma is to quote the opinion's summary:

A lawyer who knows or with reason believes that her services or work product are being used or are intended to be used to perpetuate a fraud must withdraw from further representation of the client, and may disaffirm documents prepared in the course of the representation that are being, or will be, used in furtherance of the fraud, even though such a "noisy" withdrawal may have the collateral effect of inferentially revealing client confidences.

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58. See Model Rules, *supra* note 22, Rule 1.6(b)(1); Florida Rules of Professional Conduct Rule 4-1.6(b)(2) (1994); Virginia Code of Professional Responsibility Rule 4-101(D)(1) (1994); see also Thomas D. Morgan & Ronald D. Rotunda, *Selected Standards on Professional Responsibility* 132-41 (1997) (summarizing each state's ethics rules on client confidences).

59. See New Jersey Rules of Professional Conduct Rule 1.6(b)(1) (1997); Wisconsin Rules of Professional Conduct Rule 20:1.6(b) (1993); see also Morgan & Rotunda, *supra* note 58, at 132-41.

60. ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (1992); see also *O.P.M. Leasing Serv. Inc. v. Hassett*, 670 F.2d 383 (2d Cir. 1982); Stuart Taylor, Jr., *Ethics and the Law: A Case History*, N.Y. Times, Jan. 9, 1983, § 6 (magazine) at 31 (Magazine) (discussing the *O.P.M.* case).

When a lawyer's services have been used in the past by a client to perpetuate a fraud, but the fraud has ceased, the lawyer may but is not required to withdraw from further representation of the client; in these circumstances, a "noisy" withdrawal is not permitted.<sup>61</sup>

There has been significant criticism of this opinion.<sup>62</sup> The attempted reconciliation of conflicting duties is unpersuasive if the goal is both to preserve confidentiality and expose injustice or corruption, which is inimical to society's interests. The noisy withdrawal unsatisfactorily rides both horses and allows the cheating client to escape with his ill-gotten gains. Perhaps betraying the client's confidence is a burden the ethical lawyer should not have to bear. Yet, we "know" the client's misdeeds should be exposed before more harm is done to innocent parties at the bloodied hands of counsel.

One lesson from Sunday School portrays a similar dilemma. At the Last Supper, Jesus foretold His own death and that He would be betrayed by one of the Chosen.<sup>63</sup> The Disciples worried Him about which one would do the betraying. Jesus indicated that He and the betrayer would sop bread at the same time. In effect, the gesture was a "noisy withdrawal" of support for a disciple who had been entrusted with keeping the money. While Judas shared the sop with Jesus, no one comprehended the signal.<sup>64</sup> Later that evening, Judas led the Pharisees' henchmen to the Garden of Gethsemane and identified Jesus with a kiss.<sup>65</sup> Jesus wondered how an act of friendship and love could be used for betrayal.<sup>66</sup>

Here is a lesson of betrayed confidence. We must ask ourselves, can we betray our clients with the kiss of our own righteousness? A separate, but related question is: Should we help our clients when what they ask of us is potentially evil? How do we weigh these tensions and decide when to withdraw and reveal secrets?<sup>67</sup>

### 3. Summary

A literal interpretation of the housetops command and of Jesus's identification of Judas as his betrayer would be a misreading of Jesus's meaning. The message is much different. It is not our task to judge our clients or to shout their indiscretions from the rooftop. The es-

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61. Formal Op. 92-366, *supra* note 60.

62. See, e.g., H. Lowell Brown, *The Dilemma of Corporate Counsel Faced with Client Misconduct: Disclosure of Client Confidences or Constructive Discharge*, 44 *Buff. L. Rev.* 777, 821-24 (1996); Painter & Duggan, *supra* note 41, at 263; *Report on the Debate Over Whether There Should Be an Exception to Confidentiality for Rectifying a Crime or Fraud*, 20 *Fordham Urb. L.J.* 857, 864 (1993).

63. *John* 13:21-27.

64. *Id.* at 13:28-30.

65. *Luke* 22:47.

66. *Id.* at 22:48.

67. Notwithstanding Canon 7 of the Model Code, *supra* note 30, we too will be judged for what we do on behalf of our clients.

sence of the message is that the truth will come out in the fullness of God's time.<sup>68</sup> The Apostle Paul, in his first letter to the Corinthians, clearly makes this point: "Therefore judge nothing before the time, until the Lord come, who both will bring to light the hidden things of darkness, and will make manifest the counsels of the hearts: and then shall every man have praise of God."<sup>69</sup>

Our task is to deal with the earthly consequences of our clients' actions. We are their advocates, their intercessors, who plead their cases to a higher, earthly tribunal. We offer protection from the unjust application of man's laws. Our clients' good and evil deeds will come to light, not by our disclosure, but in the fullness of time as justice requires and prevails.

We do not have to take every case, represent every client, or press for every advantage. Justice, however, demands that even the most reprehensible person be treated fairly and given legal representation. Also, clients who are society's outsiders need our services because they may have worthy claims but no one to speak for them, or no one whom they can trust.<sup>70</sup>

Jesus's example is instructive. He sought fellowship with people that the Pharisees despised and viewed as sinners.<sup>71</sup> He ministered to those of low status and questionable backgrounds. In spite of their circumstances, Jesus individually offered each person an opportunity to have a personal, confidential relationship with Him. Jesus became their advocate before God, making a case for their salvation.<sup>72</sup>

### C. Nicodemus: A Case Study

Nicodemus was an important member of the Sanhedrin Council, the highest ruling tribunal in biblical Jerusalem. He was a member of the Pharisee sect, which provided authoritative interpretation of oral Jewish law and tradition. The Sanhedrin had the power not only to demand strict adherence to the law, but also to mete out punishment for violations, including the penalty of death. The Pharisees were as much feared as they were revered.<sup>73</sup>

As described in John's Gospel, Jesus, during the time Nicodemus served on the Sanhedrin, was just beginning His formal earthly ministry. He had performed many miracles, including turning water into

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68. Perhaps this was the essence of Simeon's message to Mary and Joseph when they presented the Baby Jesus at the Temple: "Behold, this *child* is set for the fall and rising again of many in Israel; and for a sign which shall be spoken against; . . . that the thoughts of many hearts may be revealed." *Luke* 2:34-35.

69. *1 Corinthians* 4:5.

70. See Model Code, *supra* note 30, EC 2-26, 2-27.

71. *Luke* 15:2, 5:25-32.

72. *1 John* 2:1-2; *Hebrews* 7:14-28.

73. When the Pharisees questioned the formerly blind man whom Jesus had healed, they interrogated his parents. *John* 9:17-21. The parents were afraid to answer detailed questions for fear that they would be expelled from the temple. *Id.* at 9:22.

wine at the marriage feast in Cana of Galilee. In Jerusalem, He had rid the temple of moneychangers and those who sold sacrificial doves, oxen, and sheep. Many had come to believe in Jesus after they saw the miracles performed. Jesus had established a formidable presence and was a growing threat to the rulers of the Jews. Accordingly, Nicodemus came to see Jesus in secret, at night, in order to see what this "Jesus-phenomenon" was about.<sup>74</sup>

The confidential discourse Nicodemus had with Jesus revealed the fundamentals of Jesus's mission, purpose, and personage. It was a one-on-one discussion that shook Nicodemus's core beliefs and changed his life forever. The discourse was also one that Jesus held in the strictest confidence. Moreover, Jesus did not demand that Nicodemus shout the message from the housetops.

Nicodemus addressed Jesus with reverence and awe, as if he were trying to curry favor with this great teacher before asking what was truly on his mind: "Rabbi, we know that thou art a teacher come from God: for no man can do these miracles that thou doest, except God be with him."<sup>75</sup> Perhaps Nicodemus did not know how to frame his real question properly, particularly since he considered Jesus to be a holy prophet and not the Son of God.

Jesus, however, cut to the heart of the issue, telling Nicodemus what he *needed* to hear. Jesus, knowing<sup>76</sup> what was on Nicodemus's mind (Are you really the Messiah?), identified the question presented (Why are you here?) and succinctly "stated the case" (What does this mean to me, Nicodemus?). He answered, "Verily, verily, I say unto thee, Except a man be born again, he cannot see the kingdom of God."<sup>77</sup> This discourse represented the essence of Jesus's Good News. He explained the spiritual nature of our relationship with God, stating: "Verily, verily, I say unto thee, Except a man be born of water and of the Spirit, he cannot enter into the kingdom of God. That which is born of the flesh is flesh; and that which is born of the Spirit is spirit."<sup>78</sup>

This was troubling to Nicodemus, who was still trying to comprehend how one could reenter one's Mother's womb to be born again. Jesus, however, explained that God is a Spirit who must be worshipped in Spirit.<sup>79</sup> He further stated that faith—believing in the unseen—is critical for understanding "heavenly things,"<sup>80</sup> which are beyond ordinary human comprehension. He told Nicodemus that He came into this world to be a true, pure, living sacrifice to save the

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74. *Id.* at 3:2.

75. *Id.*

76. *Id.* at 2:24-25.

77. *Id.* at 3:3.

78. *Id.* at 3:5-6.

79. "God is a Spirit: and they that worship him must worship *him* in spirit and in truth." *Id.* at 4:24.

80. *Id.* at 3:12.

world. Jesus entered at God's behest, because God loved the whole world.<sup>81</sup> Even Nicodemus, "a master of Israel," could be saved.<sup>82</sup>

Finally, Jesus confirmed to Nicodemus that these words were the truth, and that the truth would expose the evil deeds of humankind:

And this is the condemnation, that light is come into the world, and men loved darkness rather than light, because their deeds were evil. For every one that doeth evil hateth the light, neither cometh to the light, lest his deeds should be reproved. But he that doeth truth cometh to the light, that his deeds may be made manifest, that they are wrought in God.<sup>83</sup>

Jesus had in Nicodemus the ultimate client: a lawyer of the Sanhedrin coming in the darkness to receive illumination and counsel. Like our clients, he struggled to come to the point and disclose all that was troubling him. The matter that Nicodemus presented demonstrated the vital need for confidentiality. Jesus engaged in a Socratic dialogue—in which Jesus asked and answered most of the questions—challenging this master of the law to stop thinking like a lawyer and to see beyond present reality.<sup>84</sup> He opened Nicodemus's eyes to the truth of God moving in the world, on behalf of those who must continue living in the world. Within this confidential relationship, Nicodemus shared the secrets of his heart and was converted.<sup>85</sup>

Nicodemus continued to struggle with what he realized was the truth. As the Sanhedrin Council became more threatened by Jesus, they plotted to eliminate him, arguing that it was better for one man to die than for the nation to perish.<sup>85</sup> Nicodemus remained a voice of reason. He called for a hearing and due process as the Council conspired against Jesus, even though he did not rise to Jesus's defense.<sup>86</sup> After the crucifixion, however, Nicodemus cast caution aside and assisted Joseph of Arimethea with the burial of Jesus.<sup>87</sup>

Our clients, who often do their deeds in the dark, come to us in confidence for the truth. They do not expect us to judge or condemn them, but to save them from their misdeeds. After we present the truth to them, they freely choose what to do with that advice. They may not like the truth, and may not heed our advice, but their legal rights have been illuminated as Jesus illuminates our spiritual rights.

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81. *Id.* at 3:16.

82. *Id.* at 3:10.

83. *Id.* at 3:19-21.

84. *Id.* at 3:11-13.

85. *Id.* at 11:49-51.

86. The Council was growing impatient with its officers for not arresting Jesus, and questioned their failure to act: "Have any of the rulers or of the Pharisees believed on him? But this people who knoweth not the law are cursed. Nicodemus saith unto them . . . Doth our law judge *any* man, before it hear him, and know what he doeth?" *Id.* at 7:48-51.

87. *Id.* at 19:38-40.



## II. DUTY TO DO NO HARM

The avoidance of harm to others in our professional capacity may be a topic beyond the scope of this paper. One author, focusing on the legitimacy of criminal law, has studied the topic extensively.<sup>88</sup> Joel Feinberg's study, grounded in moral philosophy, examines the types of conduct a State may legitimately penalize.<sup>89</sup> Feinberg offers one useful formulation of the notion of harm to others:

To say that *A* has harmed *B* in this sense is to say much the same thing as that *A* has wronged *B*, or treated him unjustly. One person *wrongs* another when his indefensible (unjustifiable and inexcusable) conduct violates the other's right, and in all but certain very special cases such conduct will also invade the other's interest.<sup>90</sup>

We assume that a purpose of the project to enhance professional responsibility among lawyers is to ensure that we do not wrong others unjustifiably, or violate their rights. This part of the article explores how lawyers, placed in positions of public power and authority, can exercise our power in a manner which does not harm clients, other individuals, or society itself.

### A. *How to Love Thy Litigating Neighbor*

The duty to do no harm certainly begins with not harming our clients. Clients entrust us with their personal and business legal matters, and depend upon us to protect their legal rights, obtain justice for them when they are wronged, and protect any valuable property from loss. We must provide our services competently, diligently, and confidentially. We must be loyal to our clients, ever vigilant in promoting their interests, while not furthering our own or those of third persons in a manner that would harm our clients. While we are worthy of our hire, our fees must not be excessive and we cannot overreach in seeking out professional engagements.

Model Rule 4.4 of the ABA Model Rules of Professional Conduct admonishes us to respect the rights of third persons: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a per-

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88. See Joel Feinberg, *Harm to Others* (vol. 1 of *The Moral Limits of Criminal Law* 1984).

89. As Feinberg states:

Our question can be understood as one posed for an ideal legislature in a democratic country. It is not my purpose to try to specify what such a body *would* choose to include in its ideally wise and useful penal code, but rather what it *may* include, if it chooses within the limits that morality places on its legislative decisions.

*Id.* at 4.

90. *Id.* at 34.

son.”<sup>91</sup> As “[l]awyers [who] play a vital role in the preservation of society,”<sup>92</sup> our legal services should only be used “for legitimate purposes and not to harass or intimidate others.”<sup>93</sup> Moreover, our status as attorneys demands that we avoid personal and professional misconduct of any form. High character and personal integrity, evidencing a respect for others and our system of justice, are prerequisites for taking our oath of office.<sup>94</sup>

In Sunday School, we learned that the second “Great Commandment” was to love thy neighbor as thyself.<sup>95</sup> Moreover, we are to love our enemies,<sup>96</sup> and in so doing we heap coals of fire on their heads.<sup>97</sup> If we have something against a neighbor, we should go to him and restore our relationship.<sup>98</sup> After an impromptu dinner with Jesus, Zaccheus, the tree-climbing tax collector, restored four-fold those whom he had cheated.<sup>99</sup>

Many Gospel lessons provided non-adversarial methods for resolving disputes.<sup>100</sup> These teachings give honor to the Second Commandment.<sup>101</sup> In *Matthew* 18, Jesus prescribed a method for solving problems within the church: Disputes between neighbors can be settled by the wise elders of the church community.<sup>102</sup> Since God is a God of peace, none should need to resort to lawyers and litigation if the commandment to love others is followed.<sup>103</sup>

But litigate we do! Today, the United States is viewed as an over-litigious nation, with an over-abundance of willing and ready lawyers.<sup>104</sup> Lawsuits, frivolous and otherwise, burden our judicial system

91. Model Rules, *supra* note 22, Rule 4.4.

92. *Id.* Preamble § 12.

93. *Id.* Preamble § 4.

94. Our status affords us special privileges and responsibilities, as reflected in the comment following Model Rule 8.4:

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

*Id.* Rule 8.4 cmt.

95. *Matthew* 22:39.

96. *Luke* 6:27-28, 35.

97. *Romans* 12:19-20. This phrase suggests that the wicked and unrighteous will ultimately be punished by God. See Jamieson et al., *supra* note 10, at 1175.

98. See *Matthew* 5:23-24; *Galatians* 6:1.

99. *Luke* 19:1-10. This is another example of how a confidential relationship with a trusted counselor led to conversion and redemption.

100. See *Matthew* 5:25-26.

101. For example, if someone demands your coat, give her your cloak also. *Id.* at 5:40.

102. See *id.* at 18:17.

103. See *Romans* 12:17-18.

104. See Patrick M. Garry, *A Nation of Adversaries: How the Litigation Explosion is Reshaping America* (1997).

and cost society exceedingly huge sums in outrageous damage awards. The insurance industry, which must pay out great sums in malpractice, personal injury, and product liability suits, calls for tort reform with caps on punitive damages. Lawyers are cast as the villains, chasing after plane crashes and other disasters, and greedily looking for deep pockets to pick. Lawyers who are legislators craft complex and indeterminate rules and regulations, making our legal system incomprehensible to laypersons. The flood of lawyer jokes is a reflection of how low society's opinion of the legal profession has sunk. Some easily conclude that lawyers burden and harm our society.<sup>105</sup>

Whether or not such criticism of lawyers is entirely justified, it is clear that the legal profession is widely regarded as having lost sight of the basic rules of civility embodied in the commandment to "love thy neighbor." The criticism leveled by Jesus against the Pharisees—the lawyers of His day—are instructive on how we can practice our profession without burdening and harming others.

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105. For a critique of the recent literature on this topic, see Barry Sullivan, *Professions of Law*, 9 *Geo. J. Legal Ethics* 1235 (1996).

Sound arguments can be made, however, that lawyers and lawsuits are not driving our economy to destruction. Recent studies indicate that litigation has not increased over time, juries are awarding smaller damages and holding for defendants, and alternative forms of dispute resolution are solving problems economically and efficiently. A recent report on such studies found the following:

A GAO study that questioned the existence of a "litigation explosion" noted that only 10 percent of the 7 million cases filed in state courts across the country are tort cases of any kind. This is not surprising in light of a Rand Corporation study that found only 7 percent of all accident victims receive compensation through the court system. The tort reformers would have us believe the corridors of the nation's courts are clogged with greedy accident victims pressing dubious claims. This is not only dead wrong statistically, but the argument gets weaker every day.

Russell F. Moran, *System Self-Corrects Tort "Flaws,"* N.J. Law., Mar. 13, 1995, at 6. I am indebted to Gary Williams for presenting an alternative picture of the profession.

Further, notwithstanding the tarnished public image of lawyers, as a practical reality, lawyers are more often esteemed than vilified. Good lawyers—and their numbers are significant—are respected by their peers and the public. The *Washington and Lee Law Review* recently dedicated an issue to the memory of Edmond Douglas Campbell, a Washington and Lee graduate and District of Columbia lawyer. Of the ten tributes written in that issue, that of Dean Barry Sullivan summarizes best the high regard in which Attorney Campbell was held:

Most important, Ed Campbell lived a long and productive life that gave substance and particularity to the values that this University holds sacred. Ed Campbell's life was one of honor, civility, and dedication to community. It was marked by a deep concern for the public interest and the rights of others, a courageous dedication to what he deemed essential to the cause of justice, an abiding concern for the oppressed and the disadvantaged, and an unwavering commitment to the highest standards of personal integrity and professional responsibility. Throughout his life, Ed Campbell worked to build communities that were true, just, and inclusive. His successes advanced both the common good and the liberty and dignity of the individual.

Barry Sullivan, *A Tribute to Edmund Douglas Campbell*, 53 *Wash. & Lee L. Rev.*, 1211, 1212 (1996).

### B. *Gatekeepers or Masters of Confusion*

In Jesus's time, the principal guardians and interpreters of the law were the Pharisees. They were "the master interpreters of the oral traditions of the rabbis."<sup>106</sup> It was reported "that when the Jewish people faced an important decision, they relied on the opinion of the Pharisees rather than that of the king or high priest."<sup>107</sup> Accordingly, many were chosen to serve on the Sanhedrin Council, the highest government body in Judea.<sup>108</sup> The Pharisees combined forces with the Sadducees, another Jewish sect, which "accepted only the written Law of Moses."<sup>109</sup> The Pharisees made the law difficult and burdensome to follow. Moreover, those who should have respected and honored the law were arguably the biggest hypocrites when it came to obeying the law.<sup>110</sup> Jesus condemned them for the harm they did to others:

106. The Bible Almanac 506 (James I. Packer et al. eds., 1980).

107. *Id.*

108. The Sanhedrin Council was described as follows:

During most of the Roman period, the internal government of Judea was controlled by the Sanhedrin, the highest tribunal of the Jews. The Sanhedrin, a group of elders, presided over by the high priest, could mete out capital punishment until about 40 years before the destruction of Jerusalem. After that time, it could not execute the sentence of death without the confirmation of the Roman procurator, which is why Jesus had to be tried before Pilate.

*Id.* at 507 (citation omitted).

109. *Id.* The Sadducees were more scholarly, and were steeped in Greek philosophical traditions:

The Sadducees adopted the beliefs of the Greek philosopher Epicurus, who said that the soul dies with the body. They taught that each person is the master of his own fate.

The Sadducees loved to debate matters of theology and philosophy—another clue to their Greek interests. Their sophisticated ideas did not appeal to the masses, so in politics they had to join hands with the Pharisees.

*Id.* (citations omitted).

110. Luke reports that Jesus was invited to dine with a Pharisee, who wondered why Jesus did not wash his hands before the meal. *Luke* 11:37-38. Jesus then chided the Pharisees for their hypocrisy:

Now do ye Pharisees make clean the outside of the cup and the platter; but your inward part is full of ravening and wickedness.

.....

But woe unto you, Pharisees! for ye tithe mint and rue and all manner of herbs, and pass over judgment and the love of God: these ought ye to have done, and not to leave the other undone.

Woe unto you, Pharisees! for ye love the uppermost seats in the synagogues, and greetings in the markets.

Woe unto you, scribes and Pharisees, hypocrites! for ye are as graves which appear not, and the men that walk over *them* are not aware of *them*.

*Luke* 11:39-44. One commentary allowed that Verse 44 was a vicious condemnation of the Pharisees, stating: "As one might unconsciously walk over a grave concealed from view, and thus contract ceremonial defilement, so the plausible exterior of the Pharisees kept people from perceiving the pollution they contracted from coming in contact with such corrupt characters." Jamieson et al., *supra* note 10, at 1006 (citations omitted).

Woe unto you also, ye lawyers! for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers.

Woe unto you! For ye build the sepulchres of the prophets, and your fathers killed them.

Truly ye bear witness that ye allow the deed of your fathers: for they indeed killed them, and ye build their sepulchres.

....

Woe unto you, lawyers! for ye have taken away the key of knowledge: ye entered not in yourselves, and them that were entering in ye hindered.<sup>111</sup>

This indictment stung the lawyers' ears as Jesus accused them of three charges of malpractice. First, they were overzealous in the enforcement of the laws. One commentator suggests that Jesus was "referring not so much to the irksomeness of the legal rites . . . as to the heartless rigor with which they were enforced, and by men of shameless inconsistency."<sup>112</sup> While demanding compliance with legal minutia, the lawyers would wholly ignore more important underlying principles such as judgment, mercy, and faith.<sup>113</sup>

Second, the Pharisees were accused of being participants after the fact in the murderous crimes of their fathers. Jesus dismissed their hollow claims of greater piety, because they had reaped the benefits that their fathers stole through the murder of the prophets.<sup>114</sup> As they followed in their fathers' footsteps, they would pay the price for their inequities.<sup>115</sup>

Third, by their manipulation of the laws, the Pharisees had denied the people the true knowledge of God's love and salvation, miscreating their own version of God's principles.<sup>116</sup> They would soon have

111. *Luke* 11:46-48, 52.

112. Jamieson et al., *supra* note 10, at 1006.

113.

Woe unto you, scribes and Pharisees, hypocrites! for ye pay tithes of mint and anise and cummin, and have omitted the weightier *matters* of the law, judgment, mercy, and faith: these ought ye to have done, and not to leave the other undone.

Ye blind guides, which strain at a gnat, and swallow a camel.

*Matthew* 23:23-24.

114. *Id.* at 23:29-36.

115. Jesus recognized the folly of the Pharisees, as one commentary indicates: Out of pretended respect and honor, they repaired and beautified the sepulchres of the prophets, and with whining hypocrisy said, "If we had been in the days of our fathers, we should not have been partakers with them in the blood of the prophets," while all the time they "were witnesses to themselves that they were the children of them that killed the prophets."

Jamieson et al., *supra* note 10, at 1006 (citations omitted). Jesus understood that the same Pharisees would seek to kill Him, God's ultimate prophet. See *Matthew* 20, 21 (the parable of the vineyard owner's son).

116. In explaining *Luke* 11:52, one commentary observed: "In *Matthew* 23:13, they are accused of *shutting heaven*; here of *taking away the key*, which was worse. A right knowledge of God's Word is eternal life; but this they took away from the people,

this prophet die for—they claimed—the sake of the people,<sup>117</sup> without acknowledging or accepting Jesus's holy commission.<sup>118</sup>

The lessons that we learn from this discourse is that those in power, the keepers of the law, must not use their legal authority to burden and harm others. Unfortunately, modern day lawyers zealously twist the law into indeterminate muddles and demand—in the procedural sense—legal actions to which they themselves would be opposed.<sup>119</sup> Our fee structures and even our ethical rules, designed by our fore-runners, grant us status and special privileges within our society.<sup>120</sup> Yet we are ever reluctant to seek the high ground that our noble profession demands. Woe unto you, LAWYERS!

This is again emblematic of the tension between Sunday School lessons. The lessons of love, peace, and reconciliation counsel forbearance of legal warfare designed to burden and harm others. The legal profession, standing in the equivalent shoes of the Pharisees, is subject to a corresponding condemnation.<sup>121</sup> The challenge is to find a lesson that instructs us—leaning on Professor Shaffer's work—on how to be both a Christian, or a person of faith, and a lawyer.

### C. *A Lesson from Cornelius*

How we can respond to this challenge may be informed by the example of two Corneliuses. The first was a Roman centurion who became a believer. The second is my father, who served as Sunday School Superintendent during my early youth. Both serve as examples of individuals who, while holding important public positions, revealed to all the depth and strength of their faith, and how that faith provided an ethical basis for not harming others.

Cornelius the centurion was instrumental in the spread of the Gospel to non-Hebrews. His story of visits and visitations hold transcen-

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substituting for it their wretched traditions." Jamieson et al., *supra* note 10, at 1006 (citation omitted).

117. *John* 18:14.

118. *See id.* at 3:16.

119. Legal malpractice actions really give lawyers a dose of their own medicine.

120. For a discussion of fee abuses, see Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 Wash. & Lee L. Rev. 1339 (1996).

121. One author, in lamenting the tendency to use abusive tactics in discovery, commented on the dilemma of exercising high professional ideals in a world where abusive tactics are normative:

According to Judge Pepe, the lawyers who would like to practice according to the model of lawyering stated in the Model Code and see their role involve greater professionalism and public worth believe that it is an impossible task due to what Judge Pepe called the "Hobbesian Dilemma" of lawyering. Judge Pepe states that many who adhere to this conception of professional responsibility see the real world of lawyering as harsh and cut-throat.

Robert E. Sarazen, Note, *An Ethical Approach to Discovery Abuse*, 4 Geo. J. Legal Ethics 459, 473 n.121 (1990).

dent value in lessons on obedience and respect for others.<sup>122</sup> Once when praying and fasting, he had a vision of an angel who told him to send for the Apostle Peter, who was in Joppa.<sup>123</sup> Cornelius did as he was instructed, sending three of his men to find Peter.

Peter was having perplexing visions of his own. Three times he saw a vessel come down from Heaven with “all manner of four footed beasts of the earth, and wild beasts, and creeping things, and fowls of the air,” and he heard a voice instructing him to kill and eat these creatures.<sup>124</sup> What did this vision mean, since Peter followed the traditional Jewish rules which prohibited eating such foods? The Spirit told him that the answer would be found by going with the three men sent by Cornelius. In the improbable meeting of Disciple and centurion, Peter discovered that “God is no respecter of persons.”<sup>125</sup> His vision meant that he should preach the Gospel to all who would hear, including Gentiles upon whom the gift of the Holy Ghost was poured out in Peter’s presence.<sup>126</sup>

The story of Cornelius is intriguing because he was recognized as a devout man, and at the same time was the bodyguard of a Roman procurator in Caesarea. As the head of a Roman cohort, he had prestige, power, and significant authority. He was a professional soldier who tended his spiritual side and was guided by spiritual principles, even though he had the power and authority to cause serious harm to the lives of people. We do not know if duty ever required him to cause harm to others. Being a high-ranking soldier, one could assume that this was quite probable. It is said that he established a church later in his life. For lawyers, it is possible and not inconsistent to hold a position of power and authority while holding on to faith. Lawyers can practice law and faith at the same time without causing unnecessary harm to others.

The second Cornelius, my father, is a further example of this compatible duality. He too is a devout man who has practiced and shared his faith for seventy-plus years in private and public spheres. He currently serves as a deacon, as did his father, at the Macedonia Missionary Baptist Church. He had been, and continues to be, a leader in his community, serving in numerous capacities, including positions on the volunteer fire department and rescue squads.

Life for my father has not always been a “crystal stair,” to use Langston Hughes’s words.<sup>127</sup> As Hughes once said in his famous poem about motherly advice, life has had “tacks in it, and boards torn up,

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122. Cornelius is described as a “devout *man*, and one that feared God with all his house, which gave much alms to the people, and prayed to God alway.” *Acts* 10:2.

123. *Id.* at 10:4-5.

124. *Id.* at 10:11-16.

125. *Id.* at 10:34.

126. *Id.* at 10:34-48.

127. Langston Hughes, *Mother to Son*, in *The Collected Poems of Langston Hughes* 30 (Arnold Rampersad & David Roessel eds., Vintage 1994).

and places where there ain't been no carpet."<sup>128</sup> My father had a successful moving business which collapsed, significant periods of unemployment, critical illnesses, and several near-fatal car accidents. He wrestled with alcoholism, taming that demon over twenty years ago. While his faith was tested in the crucibles of life, he endured, and continues, like Paul, to press toward the high calling.<sup>129</sup>

In the summer of 1996, Cornelius Hobbs retired from his position as head custodian at the Van Holton Elementary School in Bridgewater, New Jersey. He had worked with the Bridgewater-Raritan Regional School District for eighteen years. I turn to this time of retirement for the last lessons from Sunday School.

At a retirement party organized by his co-workers, and attended by family, friends, and public officials, many testimonials were offered reflecting upon his successful career and the high esteem in which he is held. It seemed to me that the testimonials paralleled several legal ethical values, as indicated parenthetically. Cornelius's commitment to faithful service (loyalty) and high standards of job performance (competence) were duly noted. He supervised his professional staff, encouraging their growth and development and ability to exercise initiative (independent professional judgment). Many commented on the fact that he always had a cheery hello or good morning for both students and staff (civility). He went the extra mile to help the Parents Teachers Association succeed with its programs (zealousness). While not in his job description, some teachers shared personal matters with him and obtained pearls of wisdom (confidentiality).

My father's fundamental principle is the Golden Rule: to treat people the way you would wish to be treated. In so doing, one demonstrates how to "love your neighbor." This is what Shaffer and Cochran identify as an ethic of mercy or care.<sup>130</sup> In caring for neighbors—individuals as well as the community as a whole—one does good and, to the extent humanly possible, avoids causing harm to others.

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128. *Id.*

129. *Philippians* 3:14.

130. Shaffer and Cochran describe the ethic of mercy and care as follows:

An ethic of mercy is concerned with the full context of the other person as sister, brother, neighbor, or fellow human, not merely with his or her rights. Moral requirements consequent on an ethic of mercy emerge from the needs of others irrespective of what is fair, irrespective of what they may deserve. As a matter of social ethics, mercy seeks to avoid systematic harm to individuals—from any source—and to avoid political or legal programs that break down community. An ethic of mercy calls clients (and lawyers) to help others and may call on clients (and lawyers) to yield their rights; it may call on them to be "more than fair."

Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers, Clients, and Moral Responsibility* 71-72 (1994).



## CONCLUSION

In his thoughtful essay, *On Being a Professional Elder*, Shaffer challenges academics to give students the gift of our wisdom.<sup>131</sup> The knowledge and experience we possess can assist in the moral training of those who enter the profession. For Shaffer, moral training is based on his well-developed exposition on Gentleman Ethics grounded in faith.<sup>132</sup> This moral training, or as Shaffer says, the process of becoming “a *good* person, a person of integrity,”<sup>133</sup> is more art than science. Lessons on this process can be found in Sunday School,<sup>134</sup> in books on baseball,<sup>135</sup> or from middle-aged academics.<sup>136</sup> Ultimately, Shaffer is talking about character, integrity, and service: traits that allow a young lawyer to become a “trustworthy professional, adhering to the standards of her calling, and doing carefully and honestly what the community and her client trust her to be able to do.”<sup>137</sup> Upon such moral training and example, we can ground our duty not to harm others, or more to the point, not to exploit our position of power and authority.

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131. Thomas L. Shaffer, *On Being a Professional Elder*, 62 *Notre Dame L. Rev.* 624, 626 (1987).

132. *Id.* at 629.

133. *Id.* at 630.

134. *Id.* at 633.

135. *Id.* at 635.

136. *Id.* at 624.

137. *Id.* at 632.

*Notes & Observations*