Fordham Law Review

Volume 66 | Issue 4 Article 22

1998

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LAWYER DISCIPLINE: CONSCIENTIOUS NONCOMPLIANCE, CONSCIOUS AVOIDANCE, AND PROSECUTORIAL DISCRETION

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A lawyer is retained on a contingency-fee basis to represent a young man who was struck by a car. Because of the seriousness of the injury, the client's left leg is amputated, he is hospitalized for almost four weeks, and his hospital and medical expenses soar. The client lacks funds to pay for a prosthesis and other medical expenses. Nor can he afford a wheelchair-accessible house, rather than the trailer that he has been renting. It is clear that the client will eventually receive a substantial recovery. Until then, however, he is financially distressed. The lawyer knows that he is forbidden from advancing funds to the client by a disciplinary rule which provides that "[a] lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation."[1] Nevertheless, driven by religious conviction, the lawyer provides funds to pay for the client's medical and living expenses.[2]

How should disciplinary authorities respond? Professor Leslie Griffin identifies two alternative models: exemption and civil disobedience/conscientious objection.[3] She favors the latter—the model in which the lawyer would openly defy the rule, publicly state his reasons

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1. Model Rules of Professional Conduct Rule 1.8(e) (1995) [hereinafter "ABA Model Rules"]. To like effect is Model Code of Professional Responsibility DR 5-103(B) (1980) [hereinafter "ABA Model Code"]. *See generally* Deborah L. Rhode, *Institutionalizing Ethics*, 44 Case W. Res. L. Rev. 665, 722-24 (1994) (arguing for lesser restrictions on lawyer-financed litigation); Note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants*, 101 Harv. L. Rev. 1231 (1988) (advocating a system where the losing litigant's attorney pays the winning litigant's attorneys' fees).

A proposal was made to include a provision in the Restatement permitting lawyers to advance funds to clients in cases of financial hardship. That proposal, however, was rejected. *See* Restatement (Third) of the Law Governing Lawyers § 48(2) (Proposed Final Draft No. 1, 1996).

2. This scenario is loosely based on *Mississippi Bar v. Attorney HH*, 671 So. 2d 1293 (Miss. 1995), where a lawyer's advance of funds to a client in a personal injury case resulted in a private reprimand, over the objection of several dissenting judges who believed that the conduct should have been deemed permissible.

3. She explains:

> In an exemption model, . . . the profession would exempt religious believers from disciplinary proceedings, fines, suspension, or disbarment, when lawyers in good faith disagree with the profession's standards. In a civil disobedience model, the penalty is not suspended. The individual attorney breaks the law and can state publicly the reasons for her (mis)conduct or

for doing so, and accept the penalty—because of the problems posed by exempting religious lawyers from otherwise applicable rules of conduct.[4] These problems include the difficulty of defining "religion" and determining the legitimacy of a claim that the lawyer's conduct was religiously compelled, as well as the concern that recognizing religious exemptions would discourage compliance by those to whom the rule would still apply.[5]

Several years ago, a disciplinary counsel suggested an alternative model. As a principal speaker in a program for lawyers on how to avoid disciplinary problems and malpractice claims, he gave practical advice based on his experience investigating complaints about local lawyers, deciding which cases deserved to be prosecuted, and bringing formal disciplinary prosecutions. After his speech, a lawyer in the audience described a very sympathetic situation in which he felt driven to provide assistance to a financially distressed client, despite the rule forbidding him from doing so. The disciplinary counsel's response was, in substance, "Give him the money. Just don't tell us about it."[6]

The recommended conduct seems somewhat different from "conscientious objection" or "civil disobedience," as exemplified by Monroe Freedman's public defiance of the disciplinary rules on advertising and solicitation, to which Professor Griffin refers.[7] It is not intended to call attention to a misguided rule in an effort to change or overturn it. It is not conscientious objection so much as conscientious noncompliance—an act of conscience, but not of open defiance.[8]

The disciplinary counsel's effort to discourage the lawyer from calling attention to his conduct might be characterized as "conscious

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explain why the norms are wrong or inconsistent with her religious beliefs, then accepts whatever penalty the disciplinary committee assesses.

Leslie Griffin, *The Relevance of Religion to a Lawyer's Work: Legal Ethics*, 66 Fordham L. Rev. 1253, 1259–60 (1998) (footnote omitted).

4. *Id.* at 1260.

5. *Id.* at 1260–61.

6. I suspect that noncompliance with this particular disciplinary rule, privately and as a matter of conscience, is common. A former poverty lawyer recently described to me how he arranged to reimburse a friend in another city who would in turn provide needed funds to an impoverished client, all in an effort to avoid discovery of what the lawyer believed to be morally compelled, but unlawful conduct. I understand that a professor in a clinical law program teaches his students that, in this situation, the lawyer should find a way to get away with doing what conscience requires. Some time ago, while staffing an ethics hotline, I fielded a call involving another variation on this theme and found it hard to resist giving similar advice.

7. *Id.* at 1260 n.17 (citing Monroe H. Freedman, *Legal Ethics from a Jewish Perspective*, 27 Tex. Tech L. Rev. 1131, 1137 (1996)).

8. Maura Strassberg refers to such conduct as "secret ethical disobedience." Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 Iowa L. Rev. 901, 951 (1995). Her article addresses the constraints that a positivist view of the legal ethics rules imposes on lawyers seeking to engage in moral conduct, *id.* at 926, and argues that lawyers and courts should adopt a "Dworkonian interpretive approach," *id.* at 951, that would generally accommodate morally justified conduct. *Id.* at 937-49.

avoidance."[9] Ordinarily, the disciplinary counsel's job is to ferret out evidence of lawyer wrongdoing. He is assisted in doing so by a disciplinary rule that requires lawyers in some circumstances to report other lawyers' misconduct.[10] On this occasion, however, the strategy was to avoid learning of a possible disciplinary violation in order to avoid having to decide whether to initiate disciplinary proceedings.

If this disciplinary counsel were to learn (despite his best efforts to avoid doing so) that a lawyer had privately provided financial assistance to a needy client out of religious conviction, he might decline to institute a disciplinary proceeding. That the act had occurred privately would make it somewhat easier to do so. This would be different from "exempting" the conscientious lawyer because there would be no official, public determination that the lawyer was excused from complying with the rule and had acted lawfully by virtue of his religious and/or moral convictions. This would simply be an act of "prosecutorial discretion."

Would it be an abuse of discretion? It might be argued that, regardless of the lawyer's motive for violating the rule, the rule should not apply in this situation. The rule was designed to prevent a conflict of interest that might result when the lawyer expects to be repaid out of the proceeds of the litigation,[11] as well as to prevent lawyers from soliciting clients by offering them money.[12] These concerns are not strongly implicated, however, when, midway through the representation, a lawyer who already has a financial stake, because he represents the client for a contingent fee, advances funds to meet the financially strapped client's emergency needs. Yet, the courts do not necessarily see it that way. Perhaps out of a desire to preserve a clear line between what is and is not permissible, some courts have sanctioned lawyers for providing such financial assistance,[13] notwithstanding the

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9. In criminal cases, "conscious avoidance" refers to ignoring one's suspicions and consciously avoiding the truth about wrongdoing. Conscious avoidance is equivalent to knowledge of such wrongdoing for purposes of criminal statutes requiring proof of guilty "knowledge." *See, e.g.*, United States v. Wilson, Nos. 96-1989,96-1990, 96-2024, 1998 U.S. App. LEXIS 734, at *35 (7th Cir. Jan. 20, 1998).

10. *See* ABA Model Code, *supra* note 1, DR 1-103(A); ABA Model Rules, *supra* note 1, Rule 8.3(a).

11. Charles W. Wolfram, Modern Legal Ethics 507 (1986).

> The basic concern [of the rule] is with the conflict of interest created when a lawyer, who is supposed to take direction solely from the client on important decisions in the representation[ ], has a personal interest in the outcome that is created by the hope of repayment of advances for the client's benefit.

Id.

12. *Id.* (noting that, additionally, the rule is "concerned with the risk that the promise of money advances would be employed by some lawyers to solicit clients").

13. *See* Mississippi Bar v. Attorney HH, 671 So. 2d 1293, 1295 (Miss. 1995) (citing cases holding that a lawyer's advancement of personal living expenses to his client violates the Rules of Professional Conduct); *see also* Annotated Model Rules of Professional Conduct 130-31 (3d ed. 1996) (citing cases holding it improper for a lawyer to advance money to a client while litigation is pending); Wolfram, *supra* note 11, at

objection that this "puts an attorney in the untenable position of having to choose between doing what is morally proper and what is 'ethically' correct pursuant to [the disciplinary rule]."[14]

In states in which courts view it as sanctionable misconduct for a lawyer to advance funds to a needy client during litigation, one might expect a disciplinary counsel to bring charges against lawyers who are discovered to have done so, at least when the lawyers acted merely out of indifference to, or ignorance of, the rule.[15] If so, may the disciplinary counsel refrain from bringing charges against the lawyer who acts out of conscience or religious conviction?

In the criminal context, there is no evidence that prosecutors favor religious or conscientious lawbreakers over others.[16] It is easy to understand why. Compliance with the law, even by those who object for reasons of religious or moral conviction, is considered important to a civilized society. Should the principles governing prosecutorial discretion in the disciplinary context be different?[17]

Reasons why a disciplinary prosecutor might be more disposed than a criminal prosecutor to overlook lawbreaking that can be ascribed to the lawyer's conscience are not necessarily persuasive. One possibility is that, as Professor Griffin observes, "the law of lawyering . . . is different from other areas of the law,"[18] including criminal law, in that "its standards are determined by the self-interest of the lawyers who

507-09 & nn.88, 89 (same). *But see* Florida Bar v. Taylor, 648 So. 2d 1190 (Fla. 1994) (finding that it was not unethical to give a client used clothing for her child and $200 for basic necessities without an expectation of repayment); Louisiana State Bar Ass'n v. Edwins, 329 So. 2d 437, 445 (La. 1976) (noting that a lawyer who advances minor sums of money to a client to meet minimal living and medical expenses does not violate the spirit of the disciplinary rules).

14. *Mississippi Bar v. Attorney HH*, 671 So. 2d at 1299 (MacRae, J., concurring in part and dissenting in part).

15. In states where the scope of the applicable rule is unclear, disciplinary authorities might reasonably decline to bring charges on either of two grounds. First, they may conclude that an interpretation of the rule to allow this conduct is the preferable one or the one most likely to be adopted by the courts. Alternatively, they may conclude that this is a plausible interpretation and that a lawyer should not be sanctioned for acting in accordance with a plausible, albeit erroneous, interpretation of the disciplinary rule.

16. *See, e.g.*, United States v. Lynch, 952 F. Supp. 167, 169 (S.D.N.Y. 1997) (finding defendants not guilty of criminal contempt for violating an order enjoining them from obstructing access to an abortion clinic where it is undisputed that they "acted out of a sense of conscience and sincere religious conviction").

17. For discussions of prosecutorial discretion in the disciplinary context, see Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 St. Thomas L. Rev. 69, 88-91 (1995); Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 Geo. Wash. L. Rev. 460, 521-22 (1996); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L. Rev. 799, 805-06 (1992); and ABA Commission on Evaluation of Disciplinary Enforcement, Report to the House of Delegates (1991).

18. Griffin, *supra* note 3, at 1273–74.

write and enforce the rules."[19] But it does not follow, from the disciplinary authorities' perspective, that lawyers may therefore violate the law of lawyering as an alternative to working to improve it.[20] Another possible reason to treat lawyers differently is that, as David Luban and Michael Millemann recently argued, lawyers should be encouraged to exercise moral judgment.[21] But it does not follow that lawyers should be encouraged to exercise moral judgment not only about how to act within the confines of the disciplinary rules, but also about whether to comply with the rules in the first place. Given lawyers' particular duty "to encourage respect for the law,"[22] it might seem anomalous to allow lawyers to opt out of the particular rules of professional conduct that they find offensive on religious or moral grounds.[23]

Furthermore, the extent of disciplinary prosecutors' discretion may be especially limited because they lack the independence of criminal prosecutors. Disciplinary prosecutors are an arm of the court and might therefore be expected to exercise prosecutorial discretion in accordance with the court's expectations. And, perhaps for the reasons identified by Professor Griffin, courts notably have not been inclined to exempt lawyers from disciplinary rules on religious or moral grounds. As one state supreme court observed several years ago when it sanctioned a lawyer for deliberately defying a court order: The lawyer "is certainly free to disagree and maintain . . . his personal view of what some higher law provides. It is, however, the decision of the mortal judges . . . which [he] must obey."[24]

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19. *Id.* at 1274.

20. *See generally* ABA Model Code, *supra* note 1, Canon 8 ("A Lawyer Should Assist in Improving the Legal System"); *id.* EC 8-1, EC 8-7 (asserting that lawyers should help establish standards of conduct and should abide by those standards).

21. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 Geo. J. Legal Ethics 31 (1995).

22. ABA Model Code, *supra* note 1, EC 9-6; ABA Model Rules, *supra* note 1, Preamble; *see also* ABA Model Code, *supra* note 1, Preamble (recognizing that "[t]he continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law").

23. *See In re* Krogh, 536 P.2d 578, 590 (Wash. 1975) (disbarring a member of President Nixon's staff who authorized the break-in to Daniel Ellsberg's office). The court stated:

> A person may be of the highest character and yet not be a proper person to practice in the profession of law. The reason for this, of course, is that the lawyer dedicates himself to a system of values which imposes upon him the duty of knowing, understanding and supporting the constitution and laws of the land. Those laws may contain many provisions which are offensive to him, but he accepts the premise that change must come through the orderly processes provided in the constitution and the statutes.
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> If he does not accept and dedicate himself to this commitment and rather places . . . his convictions above the law and flaunts it in the excess of his zeal, he does a great disservice to that which he has sworn to serve—the constitution and the rule of law.

Id. at 588.

24. Florida Bar v. Rubin, 549 So. 2d 1000, 1002-03 (Fla. 1989) (quoting Rubin v. State, 490 So. 2d 1001, 1003 (Fla. 1986)).

Even if it would be an "abuse of discretion" for this disciplinary counsel to decline to prosecute the lawyer who provided financial assistance to a client as an act of conscience, it might be morally proper for him to do so. Like other lawyers, a prosecutor may feel compelled to act out of conscience. The disciplinary counsel might say to himself, "If I had been in the same position, I would have provided assistance to this client, because my own conscience would have dictated doing so." Or he might say, "Whether or not I would have done the same, I can understand how the lawyer may have felt morally compelled to act in violation of the rule." In either case, the prosecutor may reason, "This lawyer does not deserve to be punished. Regardless of how the judges who oversee my office expect me to act, I will not institute proceedings against him." Of course, the judges might well be of the view, "Ignore the violation. Just don't tell us about it."