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LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY IN A GLOBAL CONTEXT

PETER D. EHRENHAFT*

I am standing, or sitting, between you and a reception, which is a very difficult place to be. However, I do want to share a few thoughts with you.

First, I think that the term “legal ethics,” as it has been discussed here, is as much an oxymoron as “military justice.” I think that what we have been talking about has very little to do with ethics, and a lot to do with what we, at the Commission on Multijurisdictional Practice understood was the relevant term: “Unauthorized Practice of Law” (UPL).

Bear in mind that before this audience I am discussing practices on behalf of sophisticated clients who understand the implications of using lawyers. My remarks may not well extend to individuals who are unfamiliar with the needs for and limitations of legal advice. Also, I do not here focus on the control all courts and agencies may properly impose on the persons who appear before them. Our concentration here is on lawyers advising knowledgeable clients in transactions that cross borders—as more and more do daily.

Moreover, when I speak of “ethics” I am referring to a layperson’s concept of moral propriety. These ideas do not necessarily coincide with what are loosely referred to as “legal ethics” and which are more properly labeled as “rules of professional conduct.” But the facts are that many of the “rules” are discussed and labeled as “ethical imperatives,” and it is that notion that I will address.

When we are talking about “rules of professional conduct” or UPL, we refer to constraints on the practice of law regulators impose. The UPL rules are essentially guild rules, not ethics. What are their justifications? As far as ethics are concerned, I think there are only three ethical rules, and, indeed, I would say there is really only one that is the overriding principle, with which we all need to comply, and that is competence.

Without legal competence, a lawyer’s advice is mere conversation. Competence requires a lawyer’s full understanding of the factual bases on which his advice will be provided, the legal principles applied to those

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facts and an ability to articulate for the client how the facts and the law relate to one another.

It is not possible to measure competence in advance; it is determined after the fact. Only after a car crash do we determine whether the driver was incompetent, intoxicated, or negligent. Success in passing an examination may show the driver once knew how to operate a vehicle and understood the road rules at the time, but five or fifty years later, vehicle designs and even road rules change. Yet, we drive a lifetime, in many regions, on the basis of that first test qualifying us for a license.

This is an apt model for lawyers: graduation from law school and passage of a bar exam rest on and test knowledge at a particular time and often rely on memory, not the developed expertise of giving legal advice. The substance of law changes, and with increased specialization, the lawyer's competence narrows. Therefore bar admission, based on historic examination provides slim evidence of present competence. It allows, and ought to be limited to, initial entry.

The question of how we can protect clients and the public from incompetent lawyers in an international context can be compared with the way we deal with producers of defective goods. Injured consumers properly claim a right to act and the same rule can apply to legal advice. An injured party may seek recourse in the courts of his own country, obtain a judgment, and seek to collect compensation where possible. At the same time, regarding legal advice, that party may seek to limit or even revoke the offending lawyer's "driver's license." Our institutions and practices may not be in place to deal with "bad drivers" from elsewhere. But this is a matter of modernizing procedures, facilitating reciprocal enforcement of sanctions. The concept is desirable, feasible, and fully ethical. The mere fact that enforcing a judgment in another country may be difficult does not justify a blanket prohibition on allowing foreigners access to the local market, just as the importation of one rotten apple does not support an embargo on trade in all fruit from the exporting country. This is not an issue of ethics, but a challenge to develop better rules for the enforcement of foreign judgments.

The second ethical principle is "faithfulness." Faithfulness to the client requires, first, adherence to a number of ordinary principles that are properly regarded as the ethics of moral man: Don't lie; don't steal; don't cheat; don't destroy evidence; don't claim as fact what you don't know to be fact. In the case of a lawyer it also requires avoiding even the appearance of conflicts of interest and applying appropriate diligence on the client's behalf. As a prerequisite to providing full and effective representation, the ethics of the lawyer must protect the "attorney-client

privilege”; fealty is undermined by requirements that a lawyer “tattle.” It should be left to others to shoulder the responsibility of finding wrongdoing. The conflict of interest rules are appropriate corollaries to this idea. Moreover, as partners owe fealty to one another—as they should—they cannot violate that value for the sake of a client that is in conflict with a partner’s client. We try to squirm away from this logic. But ethical rules clearly say we cannot do so. We may, therefore, question whether “screens” to prevent lawyers in a single firm from seeing conflicting clients’ files are consistent with ethical principles or, instead, a practical accommodation to the requirements—demands—of larger and larger law firms in which such conflicts become more common. This ethical principle is more readily submerged in the rhetoric regarding the alleged need for preserving the lawyer’s monopoly on local legal services.

The third ethical principle relating to legal practice mandates fair service charges. Lawyers’ bills are not often discussed as an ethical question. But fees affect access to justice and, therefore, have an ethical dimension. A lawyer should charge an appropriate fee, which must be discussed with the client in advance of any work done for which a fee is sought. And a lawyer may properly refuse work if he will not be paid (other than at times when accepting pro bono assignments—that may be ethically required of those with a monopoly license). What is “fair” is driven by abilities to pay, non-coerced consent on an individual basis, and *not* a fee based on a schedule created by a cartel of bar members. Happily, in the United States, minimum—or maximum—mandatory fees are unlawful.

I would suggest those three are the only “ethical” rules. The rest relate to the “Unauthorized Practice of Law,” which is an effort by regulators and our guild to keep competition out of law practices. It has nothing to do with ethics.

The sea change that occurred with regard to the unauthorized practice of law did not arise, in my view, at the time of the 1998 discussion of multi-disciplinary practice. Multi-disciplinary practice was a concept that accounting firms attempted to foist on the organized bar and which the legal profession properly resisted. This attempt has fallen on its face because the accounting firms do not apply the same ethical principles as lawyers, particularly the conflict of interest rules that are so critical to ethical legal practice.

Another event in 1998 *was* a sea change: in the American profession’s view of the bases upon which cross-border legal practice—multi-

jurisdictional practice—can be pursued. I am referring to the opinion of the Supreme Court of California in a case called *Birbrower*.¹ This case involved New York lawyers representing a California client in an arbitration in California. These New York lawyers had the misfortune of losing the arbitration before rendering their bill. When they sent a bill for a million dollars, the client declined to pay. The law firm turned to the California courts to collect its fee. The client contended it need not pay because the New York lawyers' work in California in the arbitration constituted the "Unauthorized Practice of Law." Therefore, the client said, it had no legal obligation to pay. The Supreme Court of California affirmed the decision, declining the lawyers' claims. This sent a chill through the American legal profession. The ABA quickly organized a Commission on Multijurisdictional Practice. The focus of the court's decision, however, was on the trans-state border practice of law, or what New York lawyers could do in California; it had very little to do with international practice. But wisely, I believe, the International Section of the ABA determined it had a dog in this fight as well, and should be represented. Thus, I was belatedly added to the Commission to deal with the international practice of law issue in *Birbrower*.

Normally, when I talk about this to other lawyers, I start my conversation, by addressing "my fellow outlaws." Quite frankly, we are all violating these rules every day. In the United States, modest efforts are being made to try and overcome this, in part in response to the effort of the Commission on Multijurisdictional Practice. The ABA is trying to urge states to liberalize their UPL rules. In my view, however, these rules are not being liberalized in an effective way that comports with our ethical obligations. Rather, these efforts are constrained by significant nods to the investment we have made in bar regulators. Moreover, the state supreme court justices, who must generally adopt rules, also have an interest in maintaining their control over the profession. The institutional inertia against attempts to liberalize is enormous. I think it is going to take quite a while before it is changed.

The last thing that I would say is that the direction in which the European Union is going is commendable; it is gradually adopting the driver's license model for the practice of law within the European Union. The big problem for us, in the United States, is that this model is a closed system. It is not available to us because we are not nationals of the EU. We are not at all pleased with the idea that the liberalized direction of the

1. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 949 P.2d 1 (1998).

EU is closed to American lawyers. We were hopeful that the CCBE, which testified before our Commission on Multijurisdictional Practice, would follow its suggestion that we follow the London example. In London, anybody can practice, and the English legal market has thrived enormously because it is so welcoming and so open. According to Jonathan Goldsmith of the CCBE, there are a few constraints in England, other than the traditional requirements of competence and conflict of interest avoidance, that apply to persons offering legal services outside of court appearances. Jonathan was very persuasive to me. But his suggestions were not accepted by our Commission. The United States does not have the unity of the European Union. I'm sorry that now, in his role at the CCBE, Jonathan has defended an EU rule that is inhospitable to Americans competing with English lawyers in the European market.