UB Law Forum

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Questions of Ethics: Convocation Explores Developments in Legal Practice

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Convocation explores developments in legal practice

Professional ethics – a subject that touches every lawyer's practice every day – was the topic of the 29th annual Alumni Convocation of UB Law School.

"Emerging Developments, Changes and Updates in Professional Ethics" addressed issues relating to business transactions, matrimonial law, surrogate court practice and litigation. At a luncheon that followed, Hon. Ann T. Mikoll was awarded the 2004 Jaeckle Award, UB Law's highest honor.

The Convocation was held in the University Inn and Conference Center. It offered CLE credit and drew a packed house.

After welcoming statements by UB Law Dean Nils Olsen; UB Law Alumni Association President Terrance P. Flynn '88; and the Convocation co-chairs, Hon. Erin M. Peradotto '84 and Dennis R. McCoy '78, attorney **Ralph L. Halpern '53** began the discussion of professional ethics in business transactions.

Citing the state's ethics code for lawyers, Halpern, a partner with Jaeckle, Fleischmann & Mugel, stressed that "your client is the corporation. Your client is not the officers who hired you, not the employees whom you may work with on a day-to-day basis. If you can keep those two things straight, the rest of the things fall into line."

A sticky ethical situation, he said, results when an employee or officer of a corporation refuses to correct a wrongdoing. The lawyer's duty then, Halpern said, is "reporting up" – going to the highest authority within the corporation that can rectify the wrong, the board of directors. "You do not jump over everybody," he said. "You go higher up the line and remonstrate as you go, to see if you can get it corrected. If you cannot get it corrected, the board of directors is your last step."

And if the board will not correct the situation, he said, "your sole obligation is to withdraw." That, he noted, can be easier said than done, particularly for someone acting as in-house counsel – because withdrawing means the loss of one's job.

Citing the precedence of confidentiality requirements over the lawyer's obligation to reveal a fraud, Halpern said, "Lawyers are lawyers because of their special calling. They are not policemen. They are not whistle-blowers. Their hallmark is confidentiality. They are trusted advisers, not informers. We do not represent the public interest when we represent a client."

Thomas F. Disare, a clinical professor at UB Law School, discussed the federal Sarbanes-Oxley Act, which went into effect in July 2002. Provisions of that act direct the Securities and Exchange Commission to "list standards of conduct for attorneys appearing before the commission." This, he said, set in motion a battle between the SEC and those groups traditionally charged with overseeing attorney ethics, such as the American Bar Association and state bar associations.

"The SEC saw this as a chance to perhaps enlist lawyers in their battle against corporate corruption," Disare said. The commission, he said, wants to require "noisy withdrawal" from a case in which an attorney discovers unmitigated fraud – i.e. the attorney would be required to report the wrongdoing.

Such "reporting out" is controversial, he said, describing it as "a situation where you have a corporate problem, a material violation of securities laws, and you are still not satisfied with the response of anyone including the board of directors. The SEC gives you a permissive – not mandatory – option to reveal a client's confidential information."

But because the provision does not mandate that a lawyer report such wrongdoing, "it is pretty hard for me to imagine when or why the average attorney would use the permissive reporting provision," Disare said.

Two Buffalo attorneys addressed issues of professional ethics relating to matrimonial law.

Patrick C. O'Reilly '80 first made an impassioned plea for more civility in legal practice. "All too often we practice uncivil litigation," said Reilly, a managing partner with Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria. "The canons of ethics say that we must represent our clients zealously. In matrimonial law, often a line is crossed between zealous representation and misguided empathy or misdirected frustration. In 90 to 95 percent of matrimonial cases, everyone remains relatively calm and everything gets settled. But in high-conflict cases where love has turned to hate, one party is despicable and does despicable things. And when someone does a despicable thing, lawyers get angry, and they start to personalize the process, and the enemy becomes the other lawyer. It ends up in sharp practice and sometimes it ends up in unethical practice, and it is not the way it should be. Remember who you are. You are supposed to be the voice of reason."

That said, Reilly launched into a discussion of the ethical dilemma of the dishonest client – one who lies to his or her lawyer. "Many people going through a divorce wish to hide their income or assets from their spouse," Reilly said. "Sometimes your client in a matrimonial

Ralph L. Halpern '53

Paul A. Vance

Susan J. Egloff

Catherine T. Wettlaufer '85

Hon. Erin M. Peradotto '84

Patrick C. O'Reilly '80

matter will lie to you.

"What I try to do early on with the client is explain: We have a problem here. You have three choices: 1. Lie to me and continue to lie to me, and you will get caught and I will not be able to help you because I will not know what the truth is. 2. Tell me everything and I will tell you how I will attempt to disclose it and settle your case using the true facts without getting you in trouble with the IRS or the district attorney. 3. Go somewhere else. My license is not worth the fees you can pay me in this case even if you pay me triple."

Paul A. Vance, a partner with Stiller & Vance, spoke of his work as a law guardian representing children in divorce actions.

"I feel very strongly about this, personally, that part of my ethical responsibility to the children I represent is to be a catalyst in effectuating a settlement," he said. "In the 20 years that I have been representing kids, they all say the same thing: 'Mr. Vance, I want this over.'"

The same confidentiality provisions that pertain to adults also apply to children, Vance said. "I tell these children, assuming they are old enough for me to tell them, that everything they tell me is confidential. I am not going to run and tell Mommy that you want to live with Daddy, and I am not going to run and tell Daddy that you want to live with Mommy. But tell me what is going on."

Citing 4th Department rules, he said: "If your client is old enough, you must advocate their position unless that position is somehow harmful or imminently dangerous to them. So if you have got a child who is 7 or 8 years old and they say for good and sufficient reason, I want to live with Mom or Dad, that is your position. You do not get to substitute your judgment."

An entertaining tag team of **Susan J. Egloff,** court attorney-referee at Erie County Surrogate's Court, and **Catherine T. Wettlaufer '85,** a partner with Hiscock & Barclay, presented jointly on issues in surrogate court practice.

They discussed those issues using case studies that are composites drawn from their varied experience in Surrogate's Court, such as the case of a Western New York couple who asked their neighbor – a freshly minted graduate of a California law school who had been doing securities work in Japan and was only in town for a visit – to draft a will for them. "Let me tell you, from all my years of experience in Surrogate's Court, there is no such thing as a simple will," Egloff said.

This case included previous marriages, assets including real estate and an IRA, tax issues, grandchildren and step-grandchildren. Not surprisingly, it ended up in a drawn-out and expensive mess.

The final topic, ethics in the field of litigation, was addressed by **Diane F. Bosse '76,** a partner in Volgenau & Bosse, and **Richard T. Sullivan,** a partner at Sullivan, Oliverio & Gioia.

Bosse discussed a number of scenarios involving individual attorneys at a firm and what happens when they leave. If a firm has represented a particular respondent, and the lawyer in question has never worked on the case, can she then represent the plaintiff? Can a lawyer who has represented a client leave the firm, take all the files and turn around to represent a new client against the former client?

The ethical issues, Bosse said, revolve around whether the lawyer had access to confidences or secrets of the client. The size of the law firm, and even its physical layout relating to files, can come into play in deciding whether such an attorney should be disqualified from handling a case.

Said Sullivan: "Most lawyers will say they know what the canons of ethics provide. Most lawyers do not. … The important thing to understand is that these rules are very specific and apply to all areas of practice, with one being very specific, that is, trial conduct.

"You should really look at the disciplinary rules relating to Canon 7 (of the state legal ethics code), because they relate to your conduct in the courtroom, they relate to your ability to contact witnesses, they relate to your ability to pay a witness, what contacts can you have with jurors, and even more important – in this day and age of cable TV, with all the talking heads who are commenting on what goes on in the courtroom but could not find the courthouse if given a map, but yet are willing to comment on trial strategy, and almost on a daily basis – the disciplinary rules relating to trial publicity.

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